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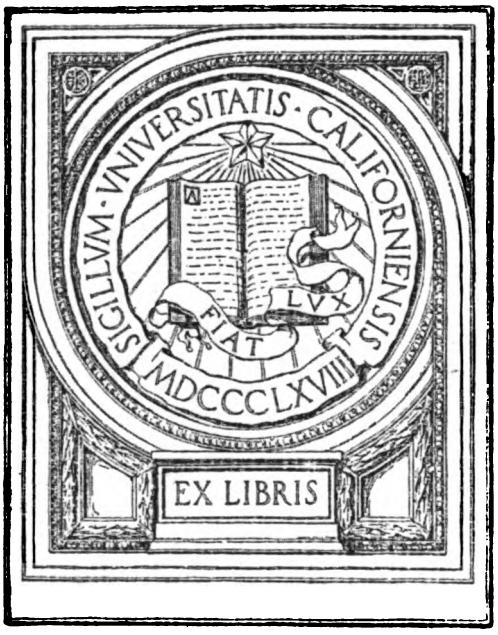

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IN THE

SUPREME COURT OF PENNSYLVANIA, THE COUNTY COURTS OF PHILADELPHIA, AND THE UNITED STATES DISTRICT AND CIRCUIT COURTS FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BY

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ERRATA.

Page 186, col. ii, line 6; *for* "HARDING, P. J.," *read* "HANDLEY, J."

Page 218, col. i, line 13 from bottom; *for* "Bickel" *read* "Filbert."

Page 228, col. ii, line 26; *for* "personality" *read* "personalty."

Page 235, col. i, line 24 from bottom; *for* "one" *read* "our."

Page 264, col. i, line 15 from bottom; *for* "1871" *read* "1877."

Page 275, col. ii, line 6, strike out "not."

Page 288, col. i, line 11; *for* "1867" *read* "1869."

Page 340, col. ii, line 25 from bottom; *for* "WILSON, P. J.," *read* "WATSON, P. J."

KERN *v.* SIMMONS, p. 359, col. ii; *for* "C. P. No. 2" *read* "C. P. No. 3."

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UNIV. OF

WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, MAY 1, 1879.* [NO. 1.

Supreme Court.

Jan. '79, 50. Jan. 30, 1879.

In re Sedgley Avenue.

Roads, highways, and bridges—Opening of streets on public plans—Award of damages by road jury—Jurisdiction of the Court of Quarter Sessions to issue a mandamus to the City Treasurer for payment of damages—Distinction between the right to issue the writ and the right of the Court to enforce its judgments.

The confirmation of an award of damages by a road jury for opening streets under the Act of April 1, 1864, is a final judgment, the liability of the city being absolutely fixed by the confirmation. The judgment is for the payment of money.

The Court of Quarter Sessions, which from the earliest period in this State has had exclusive jurisdiction in all matters relating to the opening of streets and the assessment of damages, although it has no power to issue the prerogative writ of mandamus, has the right to issue an order to enforce a judgment standing on its records. This right is inherent in every Court, and must be presumed to exist in the absence of legislative inhibition.

Legislation in regard to the opening of streets and assessment of damages in the city of Philadelphia reviewed by PAXSON, J.

Certiorari to the Quarter Sessions of Philadelphia County.

The petition of John Taylor to the use of William Slater set forth: that the jury appointed to assess the damages sustained by the property owners from the opening of Sedgley Avenue in the city of Philadelphia by their Report, which was confirmed by the Court March 13, 1875, awarded the sum of $800 to two lots of ground, marked on the plan annexed to the Report in the name of John Taylor; that the latter never was the owner of one of the lots, the title of which was vested in William Slater; that John Taylor did not receive the damages awarded to him for the above lot, but disclaimed any right to receive the sum of $400, which remained unpaid by the city, and which the petitioner, as owner of the lot, was willing to receive as damages. The petition prayed that the sum of $400, awarded by the jury to John Taylor, with interest from the confirmation of the Report, might be paid to William Slater as owner of the lot. On September 28, 1878, John Taylor filed a petition to the use of William Slater for a writ of mandamus execution. On October 24, 1878, the Court granted a rule upon the city to show cause why a mandamus execution should not issue, returnable November 2, 1878, when the rule was made absolute. Whereupon a writ of mandamus execution was issued to John Taylor to the use of William Slater for $400 and interest. The Court below filed no opinion, following the decision in *In re* Lex or Mica Street (35 Legal Int. 282.)

The city took this writ of certiorari, assigning for error the issuing of the writ.

J. Howard Gendell and *Wm. Nelson West*, City Solicitor, for the city.

Can the Court of Quarter Sessions issue the writ of mandamus based upon the award of a road jury? The Court of Quarter Sessions is a court of criminal jurisdiction. It has no general common law powers, and no jurisdiction beyond that derived from statute. It, therefore, has no power to issue the writ.

Assuming the Court has power to enforce its judgments, the award of a road jury is not a judgment, and the proceeding to assess the value of the land to be taken for a street is not a suit. An action at law is a proceeding to redress a wrong already suffered, and the cause of action is complete before suit is brought. The statutes forbid the opening of streets until after assessment of damages, and the cause of action follows the suit. The award is a mere preliminary appraisement of the value of the land.

Constitution, Art. XVI. sec. 8.

Therefore, until the land is taken, no cause of action accrues to the land-owner, whose remedy then is by action of debt.

City of Philadelphia *v.* Miskey, 18 Smith, 49.

The power of making an appropriation for road damages is lodged in the City Councils. By the Act of May 13, 1856, orders for payment of road damages are not to be countersigned or paid until an appropriation is made by Councils. The Consolidation Act of February 2, 1854, directs that "no money shall be drawn from the treasury of the city, except the same shall have been previously appropriated by Councils to the purpose for which it is drawn." The Act of 1856 is in the same spirit because it prohibits the payment of road damages until an appropriation by Councils. The Act of April 1, 1864, provides that "the said city shall pay to the respective owners of the property damaged or their legal representatives, the damages so assessed for said opening." How shall the city pay? The Act of 1856 requiring an appropriation by Councils was not repealed, and the implication is that by "the City" is meant City Councils, not the City Treasurer.

Where the payment is made by the mere au-

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thority of the award of the jury, the Act of June 13, 1836, requires the payment to be "out of the County Stock."

Stewart *v.* County of Philadelphia, 2 Barr, 340.

The writ in this case requires the Treasurer to pay money, and is therefore improper.

In re Kensington & Oxford Turnpike Co., 35 Leg. Int. 152.

David W. Sellers (with whom was *John J. Snare* and *Jacob Snare, Jr.*,) contra.

By payment of the award "out of the county stock," required by the Act of June 13, 1836, is meant payment out of the fund raised by taxation for county purposes, by school tax, poor tax, etc., taxes for county purposes *eo nomine*, and for county liabilities. In 1854 the school tax, health, and poor taxes were abolished, and it was provided that they should all be levied as one city and county tax. The entire fund, therefore, raised by taxation became an indiscriminate fund, liable for all the city's liabilities. Under the Act of April 21, 1858, the owner of land, through which a street has been laid out and the damages assessed, may, after one year, in case of non-payment, sue the city therefor, although the street has not been opened.

City of Philadelphia *v.* Dyer, 5 Wr. 463.

By the Act of 1864 the award became conclusive evidence of the city's liability to pay. The county of Philadelphia was put on a footing similar to that of other counties in the State, and the Court of Quarter Sessions could issue an order on the County Treasurer to pay out of any moneys unappropriated.

A *fi. fa.* cannot issue upon a judgment against the city. The writ must be a mandamus execution under the Act of April 15, 1834, and it must be directed to the City Treasurer.

Monaghan *v.* City of Philadelphia, 4 Casey, 207.

The word mandamus is not used in the statute, but the order of the Court is in the nature of a mandamus. It is not claimed that the Act of 1834 authorizes the Court of Quarter Sessions to issue a mandamus on a judgment of the Court, but that it has power to issue the writ to enforce the payment of an award of road damages.

In re Lex or Mica Street, 35 Leg. Int. 182.
Price *v.* County Commissioners, 1 Wharton, 1.
Commonwealth *v.* Commissioners of City of Philadelphia, 2 Wharton, 286.

March 3, 1879. THE COURT. This was a proceeding, in the Court below, under the Act of April 1, 1864 (P. L. 206) to compel the payment of the damages awarded by the jury for the opening of Sedgley Avenue. The report of the jury was filed May 2, 1874, and exceptions thereto were dismissed and the report confirmed March 13, 1875. On Oct. 24, 1878, the Court below, upon petition filed, granted a rule to show cause why a writ of mandamus execution should not issue in favor of John Taylor, to the use of Wm. Slater, the damages having been awarded to Taylor by the jury. This rule was made absolute Nov. 2, 1878, and the writ issued the same day in accordance with the prayer of the petition. The city sued out this writ of *certiorari*, and assigned for error the order awarding the mandatory execution.

I do not understand the objection to be to the form of the remedy. A mandatory writ is the only means known to the law by which a municipal corporation can be compelled to pay a debt or perform a duty. The writ of *fieri facias* will not lie against such corporations. (Monaghan *v.* The City, 4 Casey, 207.) If, then, the payment of road damages cannot be enforced against the city in this form of proceeding, it cannot be compelled at all. It is contended, however, that the Court of Quarter Sessions has not the power to issue such mandatory order, but that suit must be brought upon the award in the Common Pleas, and a judgment recovered thereon. If this be so, the result must be the same in the end, as the Common Pleas can only enforce its judgment when recovered against the city in the precise manner in which the Court of Quarter Sessions is now attempting to compel payment. The effect of such a mode of proceeding would be to entail upon the city a considerable amount of additional costs in each award of road damages, and to cause vexatious and unnecessary delay to every property holder whose property has been taken by the city.

It would serve no good purpose and unnecessarily protract this opinion to review all the legislation in regard to the opening of streets and the assessment of damages therefor in the city of Philadelphia. Prior to the Act of April 21, 1855 (P. L. 266), the payment of street damages was voluntary on the part of the city. The city might not open the streets under the old system in force for many years; it was prohibited from opening a street until actual payment of the damages, and, unless the damages were paid within one year, the whole proceedings fell. (Act of April 3, 1804, 4 S. L. 198.) The Act of 1855 authorized councils, whenever they shall deem the public exigency to demand it, to order by ordinance any street upon the public plans of said city to be opened, and if the damages assessed upon such opening shall not be paid within one year, the property owner may sue the city to recover the same. The said Act further provides "that security shall be given by the city to the owner for the payment of such damages before his ground shall be actually taken." This Act provides, as we have seen, a summary method by which streets upon the public plans of the city may be opened, but re-

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quires security to be given as a condition precedent to the actual taking of the land, and if the damages are not paid within a year the owner may sue therefor. There is no lapse by reason of the non-payment of the damages for a year, as there was under the Act of 1804, nor could there be a lapse where the city had actually taken the property. The Act of 1864, under which the proceedings were instituted, provides that "when said award is confirmed by the Court, the street shall forthwith be opened by the proper authorities of the city of Philadelphia, and said city shall pay to the respective owners of the property damaged, or their legal representatives, the damages so assessed for said opening." The 3d section of said Act further provides that "when the Court has confirmed the award of the jury, as aforesaid, the solicitor of the city of Philadelphia shall notify the property owners benefited of the amount assessed against the property of each, and have delivered to them bills for the sum so assessed; and if said assessments are not paid within thirty days after the delivery of the bill, said solicitor shall, without delay, file a claim in the proper Court for the amount thereof against such property, which claims shall be a lien against the premises assessed, and shall be collected in the same manner as municipal claims are now by law collected."

It is manifest this Act worked a radical change in the road law of the city of Philadelphia. For the first time authority is given to open streets without the payment of damages, or giving security therefor. The command of the Act is, that when the award of damages is confirmed by the Court, "the street shall forthwith be opened," and it imposes a corresponding duty upon the city; for the succeeding sentence in the same section declares "and said city shall pay to the respective owners of the property damaged, or their legal representatives, the damages so assessed for said opening." There is another peculiarity in the Act of 1864, viz., the finality of proceedings under it. This does not appear in any of the previous Acts; under them the assessment of damages was more in the nature of an appraisement of the value of the land provided it should be taken. It was optional with the city to take the land, and as a sequence optional with the city to pay. But in proceedings under the Act of 1864 there is a final adjudication of the whole matter. The damages are assessed against the city as the party primary liable to pay them. At the same time the jury are required to assess such sum against the properties benefited as to them shall seem just. These assessments, if not paid within thirty days, are to be filed by the City Solicitor in the proper Court, and are made a lien upon the respective properties. Just here it is important to consider the effect of the confirmation of the award under the Act of 1864; on the one hand it is contended that it amounts to a final judgment, on the other that it is at most a mere ascertainment of the amount of damages, and is not, in any sense, a judgment. It must be conceded that the award when confirmed is final. The rights of all parties then become fixed. The damages are assessed against the city, as the party primarily liable to pay them, at the same time the benefits are assessed upon adjacent properties. These assessments, if not paid within thirty days, are to be filed by the City Solicitor in the proper Court, and become liens against the respective properties. The award possesses every element of finality. It is binding upon all the parties, and cannot be questioned collaterally in any subsequent proceeding. It is true it is not a lien; a judgment, however, is not necessarily a lien; it is made so by statute. A judgment is the decision or sentence of the law given by a Court of justice or other competent tribunal as the result of proceedings instituted therein for the redress of an injury. (Bouvier L. Dic., *title* "Judgment.") "The judgment," says Blackstone, vol. 3, p. 396, "though pronounced or awarded by the judges, is not their determination or sentence, but the determination or sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law and fact, and depends not, therefore, on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. The judgment, in short, is the remedy prescribed by law for the redress of injuries; and the suit or action is the vehicle or means of administering it, and the language employed to express the determination of the law is 'it is considered,' *consideratum est per curiam*, that the plaintiff do recover his damages, his debt, his possession, and the like." If we apply these familiar principles we have here a suit or proceeding in Court, an injury to be redressed; a party complainant and a party defendant; a jury appointed according to law to hear the parties and decide the case upon the evidence, and a Court to revise the proceedings, correct all errors, and pronounce final judgment. It was contended, however, on the part of the city, that there was no party plaintiff in whose favor final judgment can be pronounced; that until the land is actually taken, there is no party injured within the meaning of the law. There would be more force in this suggestion were we considering a case arising under the general road law of the State or the earlier statutes in regard to the opening of streets in Philadelphia. But the system now in force there is altogether peculiar. The streets of the city of Philadelphia are laid out in the public plans in advance of being

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opened, and, when such plans are approved by the Board of Surveyors, became binding upon all parties through whose land such contemplated streets pass. (Act of 6th June, 1871, P. L. 1353.) The confirmation of the plan is notice to the property owner that at some future time his land will be taken. In the mean time he cannot sell it to advantage, and if he improve it he does so at his own risk, for he cannot recover compensation for the subsequent loss of his improvements. There is, therefore, an inchoate taking of his property; for many purposes he is deprived of the use of it. When the city commences proceedings for the actual taking of his property, and a jury has been appointed to assess his damages, it cannot be truly said that he is not a party to the proceeding and a party injured.

We are of opinion that the confirmation of the award under the Act of 1864 is a final judgment; moreover, it is a judgment for the payment of money. If drawn out in form, it would be that the party do recover from the city his damages, etc. This is by reason of the present duty of the city to pay contained in the Act of 1864, and which is not to be found in any prior acts, except those relating specially to Fairmount Park.

It is contended, however, that even if a confirmed award under the Act of 1864 is a judgment, there is no power in the Court of Quarter Sessions to issue the writ of mandamus. I concede that the Quarter Sessions cannot issue a mandamus. It never had such power. This writ is a high prerogative writ, and in England issued only out of the King's Bench. In this State it issued formerly only out of the Supreme Court, in which the powers of the King's Bench were lodged. The Act of the 14th June, 1836, (P. L. 626), conferred the power upon the Courts of Common Pleas. Under the present Constitution the power to issue it in this Court fell with most of our original jurisdiction, except in the single instance by a mandamus to Courts of inferior jurisdiction. (See Article V., Section 3.) But the right to issue a mandamus, and the right of a Court to enforce its own judgments are entirely different questions. The latter right is inherent in every Court, and must be presumed to exist in the absence of any legislative inhibition; the writ issued in this case, although called a mandamus for convenience, is not so in point of fact. It was simply an order issued by the Court to enforce a judgment standing upon its records. This is nothing new. The payments of road damages have been made upon orders issued in the Quarter Sessions from the foundation of the Government. No other Court ever had any jurisdiction. Such orders were issued in Price *v.* The County Commissioners, (1 Wharton, 1); Com. *v.* The Commissioners (2 Id. 286). In each of those cases the Quarter Sessions issued its order on the county treasurer to pay; the treasurer declined for want of funds, and an application was then made to this Court to enforce the order of the Court below by mandamus. The mandamus was refused for reasons which do not concern the present conclusion, but no one doubted the power of the Quarter Sessions to make the order. Such orders could undoubtedly have been enforced by the Court in which they were made, but for the reason that, as I have before stated, a confirmed award of a road jury at that time was not a judgment. Had there been a judgment upon which to base the proceeding, I see no reason why the orders in questions could not have been enforced by the Quarter Sessions under the Act of 15 April, 1834 (P. L. 538), which provides for the enforcing of judgments against counties and townships. The 6th section of the said Act is as follows: "If the judgment shall be obtained against a county in any action or proceeding, the party entitled to the benefit of such judgment may have execution thereof as follows, and not otherwise, viz.: "It shall be lawful for the court in which said judgment shall be obtained, or to which such judgment may be removed by a transcript from a justice of the peace or alderman, to issue thereon a writ commanding the commissioners of the county to cause the amount thereof, with the interests and costs to be paid to the party entitled to the benefits of such judgment, out of any moneys unappropriated by such county, or if there be no such moneys, out of the first moneys that shall be received for the use of such county, and to enforce obedience to such writ by attachment." In Monaghan *v.* The City, *supra*, it was held that although cities are not expressly named in this Act, yet they are clearly within its spirit, that a *fieri facias* could not be issued against the city, and that the only remedy was the mandatory writ prescribed by the Act of 1834, which must be directed to the city treasurer.

There being, as I have endeavored to show, a final judgment in the Court below, is there any sufficient reason why that Court may not enforce its judgment under the Act of 1834. It is said that to do so would change the nature of the payment, that by the 8th section of the general road law of 13 June, 1836 (P. L. 555), the damages awarded by the jury are required to be paid in county stock. It is very true that Stewart *v.* The County of Philadelphia (2 Barr, 340), recognized this section of the Act of 1836, as being in force in Philadelphia at that time. It is not in force there now, so far as payment in county stock is concerned. There is now no such stock out of which such payments can be made. It was swept away by consolidation. There is now no county board, as there was prior to 1854, to issue such stocks. The bonds of the old districts were all paid or taken up by new certificates of the loan of the city of

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Philadelphia. It is impossible, therefore, to pay road damages in county stock, and even if it were thought desirable to pay road damages in city loan, and the city were authorized to do so, it cannot be pretended that any Act of the Legislature could compel the property holder to accept such loan in payment. The city's own promises to pay could not be made a legal tender. Such methods of paying debts are better suited to the financial genius of a Micawber than to the consideration of courts of law. The Act of 1836 did no more than authorize the county to tender county stock in payment of road damages; the claimant had the right to accept or refuse; if he accepted, he took the stock as payment; if he refused, and the city did not within the year pay in money, the proceedings fell. All this is changed now; the liability of the city is absolutely fixed by the confirmation of the award, and she must pay in money.

It is further said, however, that the land-owner must either wait until an appropriation shall be made by councils, under the 4th section of the Act of 13th May, 1856 (P. L. 568; Purdon, 1288, p. 128), or bring his action of debt in the Common Pleas, under the Act of 21st April, 1855 (Purdon, 1287, p. 124; P. L. 266). The first objection seems entirely to overlook the plain reason why the Legislature, by the Act of 1864, required the city to pay the damages upon the confirmation of the award of the jury. It is a part of our fundamental law that compensation shall be paid or secured before the property of the citizen shall be taken for public use. In view of the unsatisfactory financial condition of some of the municipal corporations of the State, this Court has gone far enough, in my judgment, in holding that actual payment or security is not necessary on the part of such corporations to enable them to take private property for public use; that the taxing power in the hands of such bodies is a sufficient security, and that if the Legislature provides a remedy, by which the person whose property is taken may enforce his right, it is sufficient. (City of Pittsburgh *v.* Scott, 1 Barr, 309; Commissioners *v.* Wood, 10 Id. 93; Yost's Report, 5 Harris, 524; Keene *v.* Boro' of Bristol, 2 Casey, 46.) Where, as by the Act of 1864, authority is given to the city to take the property of the citizen for public use, forthwith upon the confirmation of the award, we can understand why the corresponding duty of payment was in the same Act imposed upon the city. Nor is there any reason why the citizen, whose property has been taken, should be compelled to knock at the doors of Councils and ask for an appropriation. They may, or may not make such appropriation, or they may unreasonably delay it. His property having been taken, and his right to compensation established by the judgment of a competent tribunal, he is in a position to demand satisfaction, and it does not rest with City Councils to deny it, or to delay it, at their pleasure. Nor is there any sufficient reason why he should be compelled to bring an action of debt in the Common Pleas. To do so under the Act of 1855, would necessarily involve the delay of a year. It may well be questioned, in view of the constitutional provisions above cited, whether the Legislature may lawfully restrain the property owner, whose land has been taken without payment or actual security, from proceeding at once to obtain satisfaction. Aside from this, I do not see any well-founded reason in public policy why suit should be commenced in the Common Pleas; such suit would be the merest formality. The award would be conclusive, however unjust it might happen to be. The city could not defend upon the ground that it was oppressive. The remedy for any wrong to her is in the Quarter Sessions, and not elsewhere. There are other reasons why the award can best be enforced in the Court in which it was rendered. An award of damages by a road jury is an award to the owner of the land, whoever he may be, yet such owner is not always entitled to the money. The land taken may be mortgaged or otherwise encumbered. It is the duty of the City Solicitor, before such award is paid, to examine the title of the alleged owners, and procure searches against the property. It may, and often does happen, that the sum awarded goes in whole or in part to the lien creditors. The writ in controversy is grantable in the discretion of the Court, and should always, as in the case in hand, go out only after a rule to show cause. This furnishes an opportunity for the Court, with the aid of the City Solicitor, to examine and dispose of all these delicate questions. It is no answer to this to say that the Quarter Sessions is an inferior tribunal, and that "it is a court for the trial of crimes, and has no general common law powers." While it is true that it has not general common law powers, it is equally true that it has had, from the earliest period in this State, the exclusive jurisdiction in all matters relating to the opening of roads and streets and the assessment of damages therefor. Every question connected with this matter has always been committed to its care. The road damages throughout the State have always been paid upon its order. It has always possessed the power to make such orders as may be necessary for the proper disposition of the sum awarded as damages. I notice in this case a petition to impound a portion of the damages awarded to one of the property owners. If the Quarter Sessions has not this power, in what Court is it lodged and by virtue of what Act of Assembly? I am un-

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able to see the wisdom or the policy of the rule which would require the Quarter Sessions to hand over a portion of its unfinished business to another Court for completion.

The case of the City of Philadelphia *v.* Miskey (18 P. F. Sm. 49) was cited as authority against the right of the Court below to issue the order in question; that was a suit upon an award by a jury appointed to assess damages under the Act of Assembly authorizing the land to be taken for Fairmount Park. The Act of 14th of April, 1868 (P. L. 1083), which is a supplement to the Fairmount Park Act, provides in the 10th section that "whenever any report of the said commissioners shall have been confirmed by the Court, the valuation made shall be forthwith payable by the city of Philadelphia." This is substantially the language of the Act of 1864 in regard to the opening of streets; but the question presented by this record was not before the Court in that case and was not considered. It cannot be regarded as authority for what it does not decide. In the case in hand there was no question of title. Damages were awarded to John Taylor. A portion of said damages was paid to him upon a prior mandatory writ issued out of the Quarter Sessions. The present proceeding was had upon the petition of Wm. Slater, setting forth that said damages were awarded for two lots of ground, as to one of which the said Taylor never had title, but the title to which was in the petitioner. As the title of the latter, as set out in his petition, is not denied by the city, and is expressly admitted by Taylor, it cannot be said there was any dispute about title, and we must assume the Court below was satisfied of the validity of Slater's claim to the balance of the sum awarded by the jury and not paid over to Taylor.

Since the passage of the Act of 1864 it has been the practice of the Court of Quarter Sessions to issue like mandatory writs to compel the payment of road damages in the city of Philadelphia. Until recently I never knew its power to do so denied or even doubted. This is not conclusive, yet it is not without weight as showing the uniform construction placed upon that Act by the learned and experienced Judges of that Court. The proceedings are affirmed.

Opinion by PAXSON, J.

SHARSWOOD, C. J., and WOODWARD and TRUNKEY, JJ., dissent.

Oct. & Nov. '78, 332. Nov. 29, 1878.

Commonwealth ex rel. Fertig et al. v. Patton et al.

Constitutional law—Art. III. sec. 7 of Constitution of Pennsylvania—Special legislation—Classification of cities—Limits to—Act of 18th April, 1878.

The Act of April 18th, 1878 (P. L. 29), entitled "An Act to provide for the holding of Courts in certain cities of this Commonwealth," is in conflict with Art. III. Sec. 7 of the State Constitution, and is, therefore, unconstitutional and void.

Per PAXSON, J. There can be no proper classification of cities or counties, except by population. Geographical distinctions cannot be resorted to, without entering the domain of special legislation.

Act of 23d of May, 1874, and Wheeler *v.* City, 22 Sm. 338, distinguished.

Error to the Common Pleas of Crawford County.

This was a proceeding by the Commonwealth at the relation of Samuel S. Fertig et al., for a mandamus to compel the Commissioners of Crawford County to provide suitable buildings for the holding of courts in the city of Titusville, in accordance with the Act of 18th April, 1878 (P. L. 29). This Act provides—

"That in all counties of this Commonwealth where there is a population of more than sixty thousand inhabitants, and in which there shall be any city incorporated at the time of the passage of this Act with a population exceeding eight thousand inhabitants, situated at a distance from the county seat of more than twenty-seven miles by the usually travelled public road, it shall be the duty of the President Judge, or of the Additional Law Judge, or of either, to make an order providing for the holding of one week of Court, or more if necessary, at the discretion of the Court, after each term of Court for said county, for the trial of civil and criminal cases in said city. And that it shall be the duty of the President Judge, or of the Additional Law Judge, or of either, to assign for trial at the Courts held in such cities, such civil and criminal cases as the convenience of the public, the proper administration of justice, the residence of the parties or of the witnesses shall require. It shall be the duty of the President Judge, or of the Additional Law Judge, or of either, and of Associate Judges in counties where the office of the latter exists, to hold said Courts in said cities, at the times in said order mentioned, and there to try such cases, civil or criminal, as shall have been previously assigned for trial. It shall also be the duty of the President Judge, or of the Additional Law Judge, or of either, to hold such adjourned Courts and Argument Courts in said cities for the transaction of business as shall not require the intervention of a jury, as shall in their judgment be required. It shall be the duty of the jury commissioners of all counties to which this Act shall apply, at the regular time for the drawing of the juries, to draw an additional panel or panels of jurors, for the trial of civil and criminal cases in said city, as the order of the Court may require, but nothing herein shall authorize the drawing of a grand jury to sit at said city.

"It shall be the duty of the Sheriff of the county, of the Register of Wills, and Clerk of the Orphans' Court, of the

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Prothonotary of the Court of Common Pleas, of the Clerk of the Court of Oyer and Terminer, General Jail Delivery, and Quarter Sessions of the Peace, or the Deputy of either, and of the District Attorney, to attend the sessions of the said Court in said city, and to bring with them such papers, dockets, documents, seals, and to perform such official duties as said Court, in the transaction of its business may require. It shall be the duty of the Commissioners of each county to which this Act shall apply, within thirty days after its passage, to procure and furnish at the expense of the county, suitable rooms for the accommodation of the Court and its officers and officials, and for the proper and convenient transaction of business in each of said cities, and the same from time to time to keep in proper order and repair.

"Whenever any application shall be made to the Court of any county to which this Act shall apply, by any inhabitant of any such city for license to sell any intoxicating liquors, or for license to keep a restaurant or a hotel, or tavern, it shall be the duty of the Court to hear and decide upon said application, when sitting in said city, and for the purpose of hearing and deciding said application, said Court is invested with full power to order all needful rules. Whenever all parties or their Attorneys of Record in any cause shall apply to any President Judge, or Additional Law Judge of any county to which this Act shall apply, to hear any cause now pending or hereafter commenced in any of the Courts of said county, assigned for trial by the Court when sitting in said city, it shall be the duty of said Judge forthwith to make said assignment. And whenever a like application shall be made by any of the parties of record in any cause now pending or hereafter commenced in said Court, to have said cause tried by the Court, when sitting in said city, it shall be the duty of the Judge to hear and consider said application, and if it shall appear that said cause can be tried at less expense, and with greater convenience to the parties and their witnesses, at the said city than at the county seat, he shall grant the application, and make such assignment.

"Every Court in any county to which this Act shall apply, shall have full power to make and adopt all rules or orders it may require, and to issue all writs of *venire* and other process, for the transaction of its business in said cities, and to make such orders as may be necessary to bring before it when sitting in said cities, all persons under imprisonment upon any criminal charge whom it may then design to try. All Acts or parts of Acts inconsistent herewith are hereby repealed."

The petition, after reciting the provisions of said Act, set forth, substantially, that the said Act applied to Crawford County, and that the city of Titusville came within its provisions, wherefore the petitioners prayed that a mandamus issue for the purpose above stated.

An alternative mandamus was allowed, and a rule granted on the respondents to show cause why a peremptory writ should not issue. A return was filed, denying certain of the facts alleged in the petition, and averring that the said Act was unconstitutional, under Art. III., sec. 7, of the Constitution. Trial by jury having been waived, the cause was duly submitted to the Hon. PEARSON CHURCH, P. J., who upon hearing, found, *inter alia*, the following facts, viz:—

(1) That the county of Crawford had a population exceeding 60,000 at the time of the passage of the Act.

(2) That the city of Titusville had, at that time, a population exceeding 8000; that it was then, and is now, incorporated, and is situate more than twenty-seven miles from the county seat, by the usually travelled road.

(3) That Crawford is the only county in the State to which the said Act would apply.

The Court then declared the said Act unconstitutional and void, and discharged the rule; whereupon the relators took this writ, assigning for error this action of the Court.

Roger Sherman (with him *Wm. S. Morris*, *Samuel Minor*, *D. D. Fassett*, *Guthrie & Byles*, *L. W. Wilcox*, *Geo. S. Chase*, *Samuel Grunsbine*, and *Neill & Heywang*), for the plaintiffs in error.

The Act referred to is not special legislation. It is a proper classification.

Wheeler *v.* Phila., 27 P. F. Smith, 348.
Kilgore *v.* Magee *et al.*, 5 WEEKLY NOTES, 61.
Walker *v.* Cincinnati, 21 Ohio St. Rep. 42.
Van Riper *v.* Parsons, 40 N. J., 123.

Wm. R. Boyle (with him *D. M. Farrelly*, *Thomas Roddy*, and *F. P. Ray*), contra.

The manifest intention of this Act is to affect Titusville only, there being no other city in the the State coming within its provisions. Hence it is special legislation, and, therefore, unconstitutional and void.

Art. III., Sect. 7, of the New Constitution.
Wheeler *v.* Phila., 27 P. F. Smith, 348.
City of Columbus *v.* Mitchell, 31 Ohio, 607.

January 6, 1879. THE COURT. The plaintiffs filed their petition in the Court below, praying for a writ of mandamus to compel the commissioners of Crawford County to provide suitable buildings for the courts of said county in the city of Titusville. The relators set forth in said petition, that they are citizens and taxpayers of Crawford County, resident inhabitants of the city of Titusville, and suitors in the Court of Common Pleas of said county; that by the Act of Assembly of 18th of April, 1878 (P. L. 29), it was provided, *inter alia*, "That in all counties of this Commonwealth, where there is a population of more than 60,000 inhabitants, and in which there shall be any city incorporated at the time of the passage of this Act with a population exceeding 8000 inhabitants, situate at a distance from the county seat of more than twenty-seven miles by the usually travelled public road, it shall be the duty of the President Judge, or of the additional Law Judge, or of either, to make an order providing for the holding of one week of court, or more if necessary, at the discretion of the Court, after each regular term of court for said county for the trial of civil or criminal cases in said city." The petition further avers that, at the time of the passage of said Act, the county of Crawford had a population exceeding 60,000; that the city of Titusville was at that time, and is

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now, an incorporated city, with a population exceeding 8000, and situate more than twenty-seven miles from the county seat of said county by the usually travelled public road; that by reason of the premises, the said Act applies to Crawford County, and that the city of Titusville is within the provisions thereof; that by the fifth section of said Act, it is made the duty of the commissioners of the county to provide and furnish suitable rooms for the accommodation of the Court and its officers; that the said commissioners had neglected and refused to perform this duty, etc. Upon the filing of this petition, the Court awarded an alternative mandamus, and, at the same time, granted a rule on the commissioners to show cause why a writ of peremptory mandamus should not issue, as prayed for.

The respondents appeared and filed a return to the alternative writ, denying some of the material allegations of fact in said petition, and averring, in the fifth paragraph of said answer, that the said Act of Assembly is unconstitutional and void, for the reason that it is repugnant to that portion of the Constitution (Article III., Section 7) which declares that the General Assembly shall not pass any local or special law regulating the affairs of counties, cities, townships, wards, boroughs, and school districts; changing the venue in civil and criminal cases; locating or changing county seats, etc. The relators filed a traverse to this return, and, upon the cause being placed at issue, the parties waived trial by jury, and the Court below proceeded to dispose of the case, both upon the law and the facts. The learned Judge, among other facts, found the following: (1) That the county of Crawford had a population exceeding 60,000 at the time of the passage of the Act. (2) That the city of Titusville had, at that time, a population exceeding 8000; that it was then, and is now, incorporated, and is situate more than twenty-seven miles from the county seat by the usually travelled road; and (3) That Crawford is the only county in the State to which the said Act would apply.

The Court, upon hearing, denied the writ.

The vital and controlling point in the case is, whether the said Act is obnoxious to the Constitution as being special legislation within the terms of the constitutional prohibition. It was contended for the relators that the case came within the ruling in Wheeler *v.* The City (27 P. F. Smith, 338), and that the Act was general, inasmuch as its applies to certain counties in the State as a class.

A comparison of the Act in question with the Act of May 23, 1874, under which the case of Wheeler *v.* The City arose, will show some marked features of dissimilarity. The Act of 1874 provided for the classification of the cities of the Commonwealth. For the exercise of certain corporate powers, and having respect to the numbers, characters, powers, and duties of certain officers thereof, the cities then in existence, or *thereafter to be created* in the Commonwealth, were divided into three classes. It is true, that in that classification, the city of Philadelphia was the only city of the first class. But, as was said in Wheeler *v.* The City, legislation is not intended for the present merely; it provides for and anticipates the wants of the future. The Act of 1874 classifies cities by their population. The Act of 18 April, 1878, can hardly be said to be a classification of counties. It is true, it speaks of all counties of more than 60,000 inhabitants. But it goes on to say "and in which there shall be any city incorporated at the time of the passage of this Act, with a population exceeding 8000 inhabitants, situate at a distance from the county seat of more than twenty-seven miles by the usually travelled public road." This is classification run mad. Why not say all counties named Crawford, with a population exceeding 60,000, that contain a city called Titusville, with a population of over 8000, and situate twenty-seven miles from the county seat? Or, all counties with a population of over 60,000, watered by a certain river, or bounded by a certain mountain? There can be no proper classification of cities or counties, except by population. The moment we resort to geographical distinctions, we enter the domain of special legislation, for the reason that such classification operates upon certain cities of counties to the perpetual exclusion of all others. The learned Judge finds the fact that Crawford County is the only county in the State to which the Act of 18 April, 1878, can apply at the present time. Said Act makes no provision for the future, in which respect it differs from the Act of 1874, which, in express terms provides for future cities, and the expanding growth of those now in existence. That is not classification which merely designates one county in the Commonwealth, and contains no provision by which any other county may, by reason of its increase of population in the future, come within the class.

We need not pursue the subject further. We are of opinion that the legislation referred to is special, and within the prohibition of the Constitution. This is decisive of the case, and renders a discussion of the other points involved unnecessary.

Judgment affirmed.

Opinion by PAXSON, J. WOODWARD and MERCUR, JJ., absent.

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Jan. '79, 68. March 13, 1879.

Mason's Appeal.
Dean's Estate.

Decedents' estates—Distribution of insolvent estates—Order of payment of debts—Lien creditors, rights of, to share of personalty—Personalty and realty funds—How distributed.

The personal estate of a decedent is the primary fund for the payment of all debts, and a judgment which was a lien on the real estate of the decedent in his lifetime, is entitled to share *pro rata* with the unsecured debts in its distribution.

In the distribution of a decedent's estate, where there are two funds, one arising from the personalty, and one from the sale of real estate, and there are both lien creditors and unsecured creditors, the personalty fund must be distributed first, *pro rata*, among both classes of creditors, and the realty afterwards among the judgment creditors alone, in the order of their liens.

Ramsay's Appeal, 4 Watts, 71, commented upon.

For purposes of distribution, there is no distinction between solvent and insolvent estates; the order of paying the debts is the same in both cases.

Appeal from the Orphans' Court of Luzerne County.

This was an appeal by William Mason, from a decree distributing the balance in the hands of the administrators of Davis Dean, deceased. The facts were these:—

Davis Dean died in 1876, intestate and insolvent, and a sale of his real estate, for the payment of debts, was ordered in the following year. This sale was accordingly had, and was subsequently duly confirmed.

The administrator's account was filed in April, 1878, and exhibited a fund arising from the personal property, which, after deducting costs of the audit and preferred claims, left a balance for distribution of $2237.86. It further showed a fund arising from the sale of the real estate of $4126.92, which consisted of $1141.70 in cash, and a balance of $2985.22 represented by mortgages, which did not become due until some seven months after the audit of the account. Unsecured claims were proved to the extent of $10,250.13, and liens on the real estate to the sum of $4281.75, the latter including judgments of Mary Dean for $573.50, and of William Mason for $171.

Upon the audit it was contended, on behalf of these parties, who were the last two lien creditors, that the personal property fund should be first distributed *pro rata* among all the creditors, lien and unsecured alike; that this method of distribution would have paid something over fifteen cents on the dollar to both the secured and unsecured creditors; and the lien debts would thus have been reduced some $600, and could have been paid in full out of the real estate fund, which lacked only about $150 of being able to pay all the lien debts in full as they were proved upon the audit.

The auditing Judge distributed the real estate fund, first, to the lien creditors, in the order of their priority, which paid part of Mary Dean's judgment, but none of Mason's, and the personalty afterwards, *pro rata*, among the general creditors, Mary Dean's unpaid balance, and Mason's judgment.

Exceptions were filed on behalf of both of these lien creditors, and upon a restatement of the adjudication, correcting some minor errors of calculation, Mary Dean's judgment was paid in full out of the real estate fund. The Court (RHONE, P. J.) dismissed the exceptions of Mason, viz: that the auditing Judge erred in not distributing first the personal fund, *pro rata*, to all the debts, secured and unsecured, and in first distributing the real estate fund to the lien creditors; holding that, where an estate is insolvent, judgment creditors *may*, but are not *obliged*, first to claim a dividend out of the personal estate, and then resort to the real estate for any deficiency; and that in the absence of any express demand on either fund, it is presumed that they elect to claim payment out of that fund which they have in their immediate grasp, and which will the most directly satisfy them. (Morris *v.* Olwine, 10 Harris, 442.) It is elementary law that no one will be forced upon a fund simply to accommodate another claimant, unless such fund is sufficient to satisfy his whole demand. No one will be compelled to split up his claim, and roll it around until he finds satisfaction, when he has under his immediate control a single fund, if the purpose is simply to accommodate a stranger to him. We cannot, for such a purpose, without his consent, substitute the real estate security of a judgment creditor of a decedent for the personal bond of an administrator and his sureties, given for personal estate only, and thus oblige him, in case of the default of the administrator, to pursue two sets of sureties—one for that part which is to be paid out of personal estate, and another for the balance awarded out of real estate. In this case the exceptant has no superior equity, for his present demand cannot be complied with without injuring the general creditors, and at least endangering the rights of the senior judgment creditors.

A decree was entered in accordance with this opinion, distributing, first, the real estate fund to the liens, in the order of their priority, which paid a small part of Mason's claim; and, as to the balance, awarded it a *pro rata* share with the unsecured debts, of the personal property fund.

From this decree Mason appealed, assigning as error this ruling of the Court.

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A. D. Dean, for the appellant.

It has been settled in this State, since Ramsay's Appeal (4 Watts, 71), that the personal estate of a decedent is the primary fund for the payment of *all* debts, and must be first distributed; this rule is now so thoroughly established as to have become text-book law.

Scott on Intestate Law, 187.

The principle is fully sustained in the analogous case of the distribution of a fund in the hands of an assignee for the benefit of creditors. And in Shunk & Freedley's Appeal (2 Barr, 304), where the Court was dealing, as here, with both a real and personal fund, the opinion of the lower Court, upon which the judgment was affirmed, says, upon this point, that personal property is the primary fund for the payment of debts, and must, in the first instance, be appropriated to their payment. . . . The Court, it would seem, must base its orders and decrees on the principle stated, and consequently distribute the fund arising from personal effects *pro rata* among all the creditors, and thus ease the land *pro tanto* of its burden, whether the claims be secured by liens on the realty or not, no execution having been issued against the personal property. And see also—

Morris *v.* Olwine, 10 Harris, 442.

The doctrine of election is inapplicable, there being no inconsistent or alternative rights between which Mason was to choose.

Trustees of Bank of U. S., 2 Parsons, 148.

Neither has the doctrine of the marshalling of assets any bearing upon this case.

Torr's Est., 2 Rawle, 250.

Kittera's Est., 5 Harris, 422.

(No counsel appeared for the appellees.)

March 24, 1879. THE COURT. In this case there were two funds for distribution; one the proceeds of the personal estate, the other the proceeds of the sale of the real estate. The Court below distributed the real estate fund first, and applied it to the payment of the judgments which were liens during the lifetime of the decedent, and then applied the personal fund *pro rata* to all the claims, including the judgments of Mary Dean and the appellant. The result was that all the judgments were paid in full, except the judgment of the appellant, which was thrown entirely upon the personal fund, and of course received only its *pro rata* dividend. From this decree of distribution an appeal was taken to this Court upon the ground that the Court below should first have applied the personal fund to the payment of all the debts *pro rata*. The effect of this would have been that the lien creditors would have received a dividend out of the personal estate, which would have so reduced the amount of the incumbrance as to let in the judgment of the appellant upon the real estate fund, and paid him in full. There would of course have been a corresponding reduction in the dividends to the unsecured creditors, who were confined to the personal fund.

By the laws of this State all of a man's debts become a lien upon his real estate when he dies; for the purposes of distribution, however, judgments recovered during the lifetime of a decedent are entitled to priority over general creditors out of the proceeds of the real estate. The personal estate is the primary fund for the payment of debts, including such as were liens upon the real estate. I know of no rule of law better settled than this. It hardly needs the citation of authorities, and I refer to only a few that are conveniently at hand. (4 Kent's Com. 429; Walker's Est., 3 Rawle, 229; Ramsey's Appeal, 4 Watts, 71; Hoover *v.* Hoover, 5 Barr, 351.) If, therefore, the administrators had filed a partial account containing only the proceeds of the personal estate, it is clear that such proceeds must have been applied *pro rata* to all the creditors, including the judgment creditors who are secured upon the real estate. This would have produced the precise result claimed by the appellant. So much was admitted by the learned Judge of the Orphans' Court, but inasmuch as there were two funds for distribution at the same time, and the estate was insolvent, he held that the creditors may, but are not obliged to claim a dividend out of the personal estate, and then resort to the real estate fund for any deficiency; and further, that in this case the appellant has no superior equity which entitled him to throw the judgment creditors upon the personal fund, in the first instance, to the manifest injury of the general creditors. I concede there is no equity in the appellant's claim, but this is not a question of equities, or of the marshalling of assets, nor is it a question of election by creditors between funds; on the contrary, it is a matter of the payment of debts in the order prescribed by the Act of Assembly. As before said, the personal estate is the primary fund for the payment of all debts. Until that is exhausted, or shown to be insufficient, the law will not permit the administrators to sell the real estate, and then only so much thereof as may be necessary to make up the deficiency of the personal estate. The Act of 24th of February, 1834 (P. L. 77; Purdon, 421), provides that "all debts owing by any person within this State at the time of his decease shall be paid by his executors or administrators, so far as they have assets, in the manner following, viz.: 1. Funeral expenses, medicine furnished and medical attendance given during the last illness of the decedent, and servants' wages not exceeding one year. 2. Rents not exceeding one year. 3. All other debts, without regard to the quality of the same, except

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debts due to the commonwealth, which shall be last paid. There is no distinction here between solvent and insolvent estates; the order of paying debts is the same in either case. Nor is there any question of equities, or of marshalling assets; it is an order of the payment of debts which must be observed in all cases. The executor or administrator has no discretion; he shall pay, is the imperative command of the statute, in the order therein prescribed. Hence, when personal estate comes to his hands, he must apply it first to the preferred debts specified in the Act, and then to "all other debts, without regard to the quality of the same," and for this he is responsible upon his official bond. Nor can this order of the payment of debts be changed by any arrangement between a class of creditors and the administrator. In the case in hand, had the personal estate been sufficient for the payment of all the debts, including general and lien creditors, it is too plain for argument it would have been the duty of the administrators so to have applied it, and thus to have relieved the real estate for the benefit of the heirs. The same principle must be applied though the estate be insolvent. No authority can be found in this State to sustain the position of the appellees. Ramsey's Appeal (4 Watts, 71) is the only case in point that I have found, or that has been called to our attention, and that is with the appellant. It is not well reported, but enough is clear to show that there were two funds as here, the one real and the other personal, and one of the main questions was whether the personal fund should be first applied *pro rata* among all the creditors. This appears from the following exception: "There was error in not decreeing the personal fund to be first applied to the payment of the debts of the deceased according to the statute of distribution, and then applying the fund raised by the sale of the real estate to the payments of the liens upon it." It was said by Mr. Justice ROGERS, in delivering the opinion of the Court: "The personal fund, including of course the money arising from the sale of the land not bound by judgments obtained in the lifetime of the deceased, must be distributed in the first place among the creditors in the order prescribed by the Act. It is made the duty of an executor or administrator to pay all the debts of the intestate in the manner therein prescribed. . . . . The personal property of a decedent is the primary fund for the payment of all debts, and this is as true of a judgment which is a lien on the real estate in the life-time of the decedent as of any other debt. It is only in case there is an insufficiency of personal estate, that an Orphans' Court will order a sale of real estate to pay debts." Ramsey's Appeal was decided nearly half a century ago. Its principle was recognized and followed in the somewhat analogous case of Shunk and Freedley's Appeal (2 Barr, 304), where there was a fund for distribution in the hands of an assignee for creditors. Shunk and Freedley's Appeal was cited and approved in Morris *v.* Olwine (10 Harris, 422). I know of no case in conflict with Ramsey's Appeal; certainly no such case was cited upon the argument. That it has not been questioned, is persuasive evidence of the general approval of the profession of the principles it established.

The decree is reversed at the cost of the appellees, and it is ordered that the record be remitted to the Orphans' Court with directions to make distribution in accordance with the principles indicated in this opinion.

Opinion by PAXSON, J. MERCUR, J., dissents.

Jan. '79, 125. Feb. 26, 1879.

Hayes's Appeal.
Graham's Estate.

Decedents' estates—Intestacy—Descent—Heirs and next of kin—First cousins to take per stirpes, and without distinction of blood—Acts of April 8, 1833, and April 27, 1855.

Under the Act of April 27, 1855 (P. L. 368), the children of deceased uncles and aunts of an intestate take *per stirpes* the share to which their parents, if living, would have been entitled, and not *per capita.*

The Act of April 27, 1855 (P. L. 368), constituted the grandchildren of brothers and sisters, and the children of uncles and aunts, additional classes of collateral heirs as distinguished from next of kin. The provisions, therefore, of section 14 of the Act of April 8, 1833 (P. L. 315), have no application.

Brenneman's Appeal, 4 Wr. 115, followed.

Appeal from the Orphans' Court of Philadelphia County.

The facts were as follows: Rosetta M. Graham died November 10, 1877, intestate, unmarried, and without issue. Her nearest relatives were ten first cousins, the children of the decedent's deceased paternal uncles and maternal aunts, viz.: *ex parte paterna*, (1) three children of Alexander Graham, (2) one child of Thomas Graham, and (3) three children of John Graham. *Ex parte materna*, (4) one child of Mrs. Barnum, maternal aunt, and (5) two children of Mrs. Vanhorn, maternal aunt of the half-blood.

Upon the audit of the account of the administrator, the auditing Judge (PENROSE, J.) awarded the fund among the cousins *per stirpes*, saying, *inter alia:* "Whether the parties shall take *per stirpes* or *per capita* is a question which if it were *res integra* would now be decided without hesitation in favor of the latter view. . . . . But so long as Brenneman's Appeal (4 Wright, p.

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115) stands unreversed, it is binding upon the Orphans' Court."

To this adjudication exceptions were filed by the children of Alexander Graham, which, after argument, were dismissed by the Court. (See opinion of PENROSE, J., reported 6 WEEKLY NOTES, 402). Whereupon the exceptants took this appeal, assigning for error the action of the Court.

Henry J. McCarthy and *Wm. A. Marr*, for appellants.

Distribution when all stand in an equal degree to the decedent is *per capita* and not *per stirpes*.

Act of April 14, 1833, P. L. 315.
Parke & Johnson's Dig. 781.
Miller's Appeal, 4 Wr. 387.
Scott on the Intestate Law, 483-487.

In Brenneman's Appeal (4 Wr. 115) the attention of the Court was not called to section 14 of the Act of 1833, and besides it has been overruled by Miller's Appeal (*supra*).

John T. Spencer, for appellees.

Any other construction of the Act of 1855 (P. L. 368) than that adopted by the Court below would be a plain violation of its terms.

Brenneman's Appeal, *supra*.
Lane's Appeal, 4 Casey, 487.
Krout's Appeal, 10 Sm. 380.
Person's Appeal, 28 Id. 123.

Miller's Appeal (*supra*) cannot be regarded as a construction of the Act of 1855, for the distributees were nephews of the decedent, and therefore one degree too near for the Act to apply.

March 24, 1879. THE COURT. The Act of April 8, 1833 (Pamph. L. 315), after providing in the fourth section for brothers and sisters and nephews and nieces, declares in the seventh and eighth sections that, "in default of all persons hereinbefore described, the real and personal estate of the intestate shall descend to and be distributed among the next of kin to such intestate; provided, that there shall be no representation admitted amongst collaterals after brother's and sister's children." The effect of these provisions was to exclude the grandchildren of brothers and sisters wherever there were brothers or sisters living, and also the children of uncles and aunts wherever there were uncles or aunts living. It was to remedy this supposed injustice that the Act of April 27, 1855, section 2 (Pamph. L. 368) was passed. It constituted the grandchildren of brothers and sisters and the children of uncles and aunts additional classes of collateral heirs as contradistinguished from next of kin. It would have been very easy, if it had been intended to have framed the Act so that the 14th section of the Act of 1833 would have applied, to say, that when they should all be in equal degree they should continue to take as they had done, as next of kin *per capita*, and *per stirpes* only when there were living nephews and nieces or uncles and aunts. But the legislature—whether by design or inadvertence—did not do so, but directed in the plainest and most explicit terms that "the real and personal estate shall descend and be distributed among the grandchildren of brothers and sisters and the children of uncles and aunts by representation, such descendants taking equally among them such share as their parent would have taken if living." No one can question that by these words, as to these new classes of collaterals, the rule of representation was established whether they stood in unequal or equal degrees of relationship to the intestate. As to them the rule of the 14th section of the Act of 1833 was changed. How then could this Court have decided otherwise than it did in Brenneman's Appeal (4 Wright, 115), unless it had assumed to change the language of the Act of 1855 in order to make the whole system uniform and harmonious? Is it at all probable that the Judges who decided that case without a dissent could have overlooked the 14th section of the Act of 1833, as is now supposed? We think the Act of 1855 was rightly construed in Brenneman's Appeal, and on the authority of that case affirm the decree of the Court below.

Decree affirmed and appeal dismissed at the costs of the appellant.

Opinion by SHARSWOOD, C. J.

Quarter Sessions.

Q. S. of Lycoming Co. April, 1879.

Overseers of Poor of Davidson Township v. Overseers of Poor of Moreland Township.

Paupers—Poor laws of Pennsylvania—Removals of pauper—Settlement of pauper, when derived from parent—Emancipation of a child at 21 years of age—Able-bodied children arriving at 21 become ipso facto emancipated—Effect of a change of residence by parent and emancipated child, followed by service in the parent's family without a contract of hiring.

Appeal from order of removal. The following were the facts:—

Many years ago, Ann Sperry, at the age of 25, removed with her father from Huntingdon Township, Luzerne County, to Davidson Township, Lycoming County. She was sound in

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mind and body, and for some years remained with her father, doing housework, without a contract of hiring, hope of reward, or actual compensation beyond her board and clothing. On this a claim of settlement in Davidson was subsequently founded. From 1844 to 1868 Ann lived in Benton and various other districts, without gaining a settlement in any. In 1868, after a few months' residence in Moreland Township, Lycoming County, Ann was disabled by a fall on the ice, and became a township charge. In 1869 two justices of Lycoming County made an order directing the overseers of Moreland to care for her "until she could be removed to her last legal settlement." Soon afterwards the Moreland overseers took her and left her in Davidson Township, Sullivan County, at the residence of her half-brother, alleging that Davidson was her "last legal settlement." Her half-brother being unable to support her, the Davidson overseers, alleging that if she ever had a settlement in Davidson she had afterwards lost it by going to Benton Township, Columbia County, obtained an order for her removal back to Moreland, which was effected. This order of return was affirmed, both on appeal to the Quarter Sessions of Sullivan County, and on writ of error, the Supreme Court holding that it was incumbent on Moreland to ascertain her "last legal settlement." (Moreland *v.* Davidson, 21 Sm. 371.)

The Moreland overseers then obtained an order for Ann's removal to Benton Township, Columbia County, but on appeal to the Quarter Sessions of Lycoming County, the Benton overseers proved that Ann had no settlement there, and the order was reversed. The Supreme Court, on writ of error, affirmed this decree, and decided that "Moreland must resort to the last place of legal settlement of the pauper, wherever that shall be found." (Moreland *v.* Benton, 3 WEEKLY NOTES, 20.)

The Moreland overseers then, in 1877, again obtained an order of removal to Davidson Township, and Ann was sent there, whereupon the Davidson overseers took this appeal to the Quarter Sessions of Lycoming County. All the testimony taken in the former proceedings was read in evidence, and new testimony was taken, which tended to show that Ann had never acquired a legal settlement after leaving Davidson.

O. H. Reighard and *F. F. Drake*, for the appellant.

Moreland is concluded by the decree in 21 Sm. 373, from again calling upon Davidson to take charge of this pauper.

It is not proved that Davidson was her last legal settlement.

Linn, Bently, and *Bently & Parker*, contra.

April 15, 1879. THE COURT. Two questions are raised in the proceedings before us in this case: (1) Whether or not Moreland Township is concluded by a former decree from again calling upon Davidson Township to take charge of this pauper. (2) Whether or not Davidson Township is the last place of settlement of the pauper Ann Sperry.

(1) As to the first question it is to be noticed that the proceeding reported in 21 P. F. S., *supra*, was between the same parties, and related to the same subject matter as the one before us, viz., the ascertainment of the last place of settlement of the pauper Ann Sperry. And it is also to be noticed that in that proceeding Moreland Township was the appellant. Chief Justice GIBSON in West Buffalo *v.* Walker Township (8 Barr, 180), said: "It appears that an order of the Sessions confirming an order of removal is conclusive against the appealing parish against all the world." In the view we take of this branch of the case it becomes necessary to inquire into the effect to be given to the fact appearing in the record of the former decree (21 P. F. S., *supra*), viz., that that decree was made against Moreland, not because the pauper did not have a settlement in Davidson Township, but because in the investigation of the question then presented it appeared that the pauper had acquired a settlement elsewhere after she left Davidson.

We think the Supreme Court in their wisdom foresaw the very question now before us, and expressly provided against their decree being construed to be final and conclusive between these parties. Chief Justice THOMPSON, in delivering the opinion of the Court, says: "I will not speculate on what might be the condition of affairs if it should turn out eventually that she had no residence in Benton or in any other township, excepting at her derivative settlement, which it *seems* was Davidson Township; we leave this until it occurs."

(2) Did Ann Sperry have a settlement in Davidson Township? In both the former investigations of this question it was taken for granted in the Courts below that this pauper had a derivative settlement in Davidson Township. Chief Justice THOMPSON says it *seems* her derivative settlement was Davidson Township. In the discussion of the case now before us it is claimed by Moreland Township that the pauper had a settlement in Davidson Township derivatively from the father, who had a settlement there while she remained in his family. It was not claimed nor indeed could it have been maintained that Ann Sperry had any other kind of settlement. It is evident there was no contract of hiring either expressed or implied. Her services were rendered to her father and his family, after she be-

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came of age, no doubt on account of her love and affection for her father, or for her younger brothers and sisters, or both. No contract of hiring was shown. Many cases might be cited, that no contract can be presumed to exist between father and child for services rendered to the former by the latter after she comes of age.

Did Ann Sperry then have a settlement in Davidson Township derivatively, by reason of her father having a settlement there while she was a member of his family? She undoubtedly did if she was not emancipated in law or in fact before she came to live in Davidson Township.

We have already seen that this pauper arrived at the age of 21 years while she was a member of her father's family in Huntingdon Township, Luzerne County, several years before she removed with the family to Davidson Township. That she never married, and that she was always of sound mind and body and able to take care of herself until the accident happened in 1868, which rendered her chargeable. After she was of age she could have left her father's house at any time; he could not compel her to serve him any longer, nor restrain her from going and doing as she pleased. She was no longer under any legal restraint whatever. She was then freed or emancipated by the law, and had power to do anything that might be lawfully done by anybody, and of course was competent by her own acts to acquire a settlement for herself in any of the modes prescribed in such cases by the statute.

Although we do not find any case in this State squarely deciding it, we think the rule of law is, that children arriving at the age of 21 years are *ipso facto* to be considered emancipated, unless they are compelled to remain longer with their parents on account of some infirmity of mind or body, which renders them incapable of taking care of themselves.

That arriving at the age of 21 years is equivalent to emancipation, is plainly indicated in Lewis *v.* Turbut (3 Harris, 147). Judge ANTHONY, in the Court below, then said: "The settlement of a pauper is the place of his birth, the father's settlement is the settlement of the children, etc. Until the son acquires a new settlement his father's settlement is his. He must contract a relation inconsistent with the idea of being part of his father's family, as marriage *or arriving at the age of 21 years, etc., before he becomes emancipated, etc.*" In affirming this judgment of the Court below, the Supreme Court say in their per curiam opinion, "The law of the case was stated by the President Judge with entire accuracy in every particular."

That children are not to be considered emancipated at the age of 21 years who are compelled to remain longer with their parents on account of some infirmity of mind or body which renders them incapable of taking care of themselves, has been repeatedly decided in this and other States. In Washington *v.* Beaver (3 W. & S. 548) the pauper was a lunatic. In Shippen *v.* Gaines (5 Harris, 38) the pauper was an idiot. In Toby *v.* Madison (8 Wr. 60) the pauper was a lunatic. In Wayne *v.* Jersey Shore (1 W. N. C. 340) the pauper was insane.

In support of the rule as to children of sound mind and body, as we have above stated it, may be cited the following authorities: Monroe *v.* Jackson (55 Maine, 55); Lowell *v.* Newport (66 Maine, 78); Oxford *v.* Rumney (3 New Hampshire, 331); Springfield *v.* Wilbraham (4 Mass. 493); Upton *v.* Northbridge (15 Mass. 237); Buckland *v.* Charlemont (3 Pick. (Mass.) 172). The only case we have been able to find tending to sustain a different rule, is the case of Alexandria *v.* Bethlehem (16 New Jersey, 119), but an examination shows that the pauper in that case was an idiot, and hence the case is not necessarily in conflict with the rule. That a child who has been emancipated from her father's family, does not, except by her own acts, acquire a settlement where her father subsequently goes to reside, scarcely needs authority for its support. The following cases, however, will be found in point: Washington *v.* Beaver (3 W. & S. 548); Lewis *v.* Turbut (3 Harris, 145); Lowell *v.* Newport (66 Maine, 78); Springfield *v.* Wilbraham, (4 Mass. 493); and Buckland *v.* Charlemont, (3 Pick. 172).

Having found that Ann Sperry, the pauper in this case, was of sound mind and body, and well able to take care of herself when she arrived at the age of 21 years; and that at that time the settlement of her father was Huntingdon Township, Luzerne County; we hold that Ann was then emancipated, and that she could not have a settlement derivatively from her father in Davidson Township, Sullivan County, the district to which she removed with him after arriving of age, and in which he subsequently acquired a settlement.

The order of removal, therefore, is vacated and discharged at the costs of the appellees. And it is further ordered that the pauper be returned to the appellees, and that they pay to the appellants the reasonable costs of her keeping and of her removal. If the pauper is dead—as we have heard since the argument of this case—it is ordered that the appellees pay to the appellants the reasonable cost of keeping until the time of her death, together with the reasonable expense of her burial.

Opinion by CUMMIN, P. J.

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Common Pleas—Law.

C. P. No. 1. March 1, 1879.

Gilmer v. Philadelphia and Reading R. R. Company.

Affidavit of defence—Character of instrument which entitles holder to judgment for want of an affidavit of defence—Interest warrant—The holder of an interest warrant detached from a bond is entitled to judgment for want of an affidavit upon filing a copy of such warrant.

Rule for judgment for want of an affidavit of defence.

Debt, for the amount of certain coupons detached from the bonds of the defendant company's "Convertible Loan 1873–1893."

The plaintiff filed copies of the coupons, which were in the following form:—

The Philadelphia and Reading Railroad Company.
Interest Warrant on Bond No. —.
Thirty-five dollars
Payable without deduction for taxes at the office of the company in the city of Philadelphia July 1, 1877.
$35 J. W. JONES, Secretary.

The company, by its president, filed a suggestion that the copies filed were not such as to entitle the plaintiff to judgment for want of an affidavit of defence.

Gormley, for the rule.

These coupons are such instruments in writing as entitle the plaintiff to recover. There is a distinct liability to pay on each coupon when it becomes due.

Thomas Hart, Jr., contra.

It is necessary to go to the bond itself to ascertain the terms of the agreement. It is not a coupon but a mere interest warrant. The only way to recover is to bring covenant on the bond itself. There is no payee designated in the instrument, nor is it payable to bearer; therefore, it is not a promissory note, nor was it negotiable. It is a mere acknowledgment of an amount due.

Crossly *v.* R. R., 26 Conn. 121.
Wright *v.* O. & M. R. R. Co., Disney's Rep. 465. [Sup. Ct. of Cincinnati.]
Jackson *v.* R. R. Co., 48 Me. 147.
Evertson *v.* Nat'l Bank, 69 N. Y. 14.

The cases sustaining suits upon coupons are those where the coupons were negotiable instruments, and when detached formed express promises to pay. In Megargee *v.* R. R. Co. (2 WEEKLY NOTES, 535), the coupons were express promises to pay. See also—

City *v.* Lamson, 9 Wallace, 477.
Thomson *v.* Lee County, 3 Id. 327.
Beaver *v.* Armstrong, 8 Wright, 63.

A writing merely acknowledging a debt is not within the Act relating to affidavits of defence.

Hennesey *v.* Muller, 1 WEEKLY NOTES, 106.
Dickson *v.* Buchanan, 5 Id. 192.
Fidelity Co. *v.* Miller, Id. 191.

C. A. V.

March 15, 1879. THE COURT. The object of issuing coupon bonds is to give the holders thereof an opportunity to obtain the interest thereon without presenting the bond itself. With this view the coupon gives the number of the bond from which it is detached, and all the other information which the bond itself would give if produced. Whether it is in the commercial sense a negotiable instrument, it is not necessary to decide. As far as appears in this case, it is the holder of bonds Nos. 12,141, etc., claiming the interest due on them in the mode prescribed by the company, and bringing suit upon their failure to conform to it. The coupons filed in R. R. Co. *v.* Adams (4 Sm. 94) were identical in form with these, and the right to sue on them detached from the bond was not questioned.

Rule absolute.

Oral opinion by BIDDLE, J.

C. P. No. 1. March 1, 1879.

Copeland v. Philadelphia and Reading Coal and Iron Company.

Affidavit of defence—Coupons—Form of action—Debt or covenant is the proper action on a coupon detached from a bond—Case will not lie on such coupons—The coupons partake of the nature of the instrument to which they are attached.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit, for the amount of 38 coupons, on bonds issued by the defendant. The plaintiff filed copies of the coupons, which were in the following form:—

The Philadelphia and Reading Coal and Iron Company will pay to bearer, at the office of the company, in the City of Philadelphia, on September 1, 1877, thirty-five dollars, being six months' interest on bond No. 51.
$35. J. W. JONES, Treasurer.

The affidavit of defence by the president of the company set forth that the coupons had been issued with and were a part of the bonds to which they appertained; that the seal of the corporation had been affixed thereto, and that no copy of the bonds had been filed.

Moore, for the rule.

The coupon is a simple contract to pay interest, and partakes of the nature of a promissory note. It is payable to bearer, and is a negotiable instrument. Assumpsit or case is, therefore, proper.

Megargee *v.* R. R. Co., 2 WEEKLY NOTES, 535.

Thos. Hart, Jr., contra.

There is no averment that the coupons have been detached, nor is it customary to detach

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over-due coupons; if not detached suit must be brought on the bonds, and they should be filed; if detached, suit on them must be debt or covenant, and not an action on the case. The coupons so far partake of the nature of the bonds, that as the latter are specialties, so are the coupons also, and not mere simple contracts.

Thomson *v.* Lee County, 3 Wallace, 327.
City *v.* Lamson, 9 Id. 477, 483-4.
Lexington *v.* Butler, 14 Id. 282, 296-7.
Clark *v.* Iowa City, 20 Id. 583, 587.
Jackson *v.* R. R. Co., 48 Me. 147.
Clark *v.* Zanesville, 1 Bissell, 98.
County *v.* Armstrong, 8 Wright, 63.
P. & B. C. R. R. Co. *v.* Johnson, 4 Sm. 127.

C. A. V.

March 15, 1879. THE COURT. The only question raised in this case, is as to the form of action; it being argued that an action on the case was proper, as the coupons were negotiable instruments, passing by delivery, and having all the incidents of negotiable paper, and therefore it is not necessary to hold the bond itself in order to bring an action on the coupon. But this is clearly a suit to recover interest upon a sealed instrument, and, consequently, the action should be in debt or covenant. The coupons were merely evidences of the amount of interest due, and the fact that they can be collected without producing the corresponding bond, makes no difference.

Rule discharged.

Oral opinion by BIDDLE, J.

C. P. No. 2. March 3, 1879.

Bradley v. Totten.

Sci. fa. sur mechanic's lien—Defective return of the sheriff.

Rule to strike off judgment.

A *scire facias* had issued upon a mechanic's lien upon which a return was made, "Made known by posting, *nihil habet* as to William H. Totten." Judgment was entered for want of an appearance.

It was shown by depositions that when the writ of *sci. fa.* was posted on the house it was occupied by the defendant and his family, and that the defendant had no knowledge of the suit until notice of the sheriff's sale under the judgment was posted on the house. A defence was also alleged on the merits, to wit, that the lien, which had expired, had been revived by a trick.

Michener, for the rule.

If there is any one living in the house the sheriff is bound under the Act of Assembly to serve the writ by leaving it with the person in possession; any other service is irregular.

Kane *v.* Schmidt, 2 WEEKLY NOTES, 487.
Wistar *v.* City of Philadelphia, 5 Id. 279.

Booth, contra.

THE COURT. The return of the *scire facias* is defective, and will not support a judgment for want of an appearance.

Rule absolute.

C. P. No. 2. Feb. 13, 1879.

Bickford v. Ice Company.

Pleading—Practice when a special plea amounts to the general issue.

Rule to strike off special plea.

Assumpsit. Pleas, non-assumpsit, and payment with leave, and a special plea setting forth that the defendant had given two promissory notes in payment and discharge of the promises and undertakings mentioned in the declaration. The plaintiff took this rule to strike off the special plea on the ground that it amounted to nothing more than the general issue.

S. P. Hanson, for the rule, cited—

Savage *v.* Everman, 20 Sm. 316.

HARE, P. J. The proper practice is to strike off pleas on motion only when they are plainly frivolous, or vexatious, or inappropriate to the action. Unless they are manifestly of this character plaintiff must be put to his demurrer.

Rule discharged.

C. P. No. 3. April 5, 1879.

Rothermel v. Polytechnic College.

Affidavit of defence law—Book entries—Entries not charged to any one—Insufficient to entitle plaintiff to judgment.

Rule for judgment, for want of a sufficient affidavit of defence.

Assumpsit. The plaintiff filed the following paper:—

Rothermel, etc. *v.* College. C. P. No. 3. Mch. '79, 601.

" 1876, Oct. 9, 2 tons sm'l stove coal, @ $6, storing 40 c., ...	$12.80
Nov. 23, 2 tons sm'l stove coal, @ $6, storing 40 c., ...	12.80
etc. etc. etc.	
Total, ...	$76.30
Credits, ...	44.20
	$32.10

" The above is a true and correct copy of the plaintiff's book of original entries, upon which this suit is brought.

" ROTHERMEL, att'y for pl'ff."

The defendant filed a suggestion that the copy filed was not within the affidavit of defence law, as it was merely a list of dates, articles, and figures, and was not an account against or with any person.

P. F. Rothermel, Jr., for the rule, argued that the recent case of Richardson *v.* Snyder (6 WEEKLY NOTES, 414), ruled that the heading of the account was of no moment, and that the caption in this case was sufficient to supply the defect in the account.

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A. B. Guilbert, contra, cited—
Wall *v.* Dovey, 10 Sm. 212.
Bergner *v.* Baumblatt, 1 WEEKLY NOTES, 145.
Kahn *v.* Marquis, Id. 221.
THE COURT. Rule discharged.

C. P. No. 4. April 5, 1879.

Shuster v. Bonner.

Foreign attachment—Service on return day—Time for taking judgment for want of appearance.

Rule to strike off judgment and set aside *fi. fa.*

On September 14, 1878, a writ of foreign attachment in debt was issued, returnable the third Monday of September, under which the sheriff on the return day attached the real estate mentioned therein. Judgment for want of an appearance was entered on March 19, 1879, and a *fi. fa.* issued on March 29, 1879.

John I. Rogers, for the rule.

By the Act of June 13, 1836 (Purd. Dig. 719), the defendant was entitled to two full terms in which to make defence. September 14, 1878, was Saturday, and the writ was executed on Monday, the return day. June term, therefore, is the earliest time at which the plaintiff is entitled to judgment by default, that being the third term after the service.

Kelly, contra.

The plaintiff ought not to lose a term because the sheriff was negligent. The practice has always been to include the term to which the writ is returnable; two full terms had therefore elapsed at the time of the judgment. It is no objection to the execution of a writ previously issued that it was served upon the return day.

Heberton *v.* Stockton, 2 Miles, 164.
Boyd *v.* Sewill, 2 Clark, 327.
Wood *v.* Foster, Ibid. 328.

The case of foreign attachment is ruled by the analogy of a summons.

The plaintiff is entitled to judgment at the third court after the effects were seized.

Grant *v.* Hickcox, 14 Sm. 335.

THE COURT. The plaintiff was not entitled to judgment until "the third term after the execution of the writ." The first term *after* the execution of the writ was December term. The judgment was therefore premature.

Rule absolute.

Per THAYER, P. J.

C. P. No. 4. April 5, 1879.

Wheelan et al. v. Stedman et al.

Practice—Service of summons on agent of non-resident, temporarily within the jurisdiction of the Court—Act of 21 April, 1858.

Rule to set aside sheriff's return and to quash the writ.

Case. The summons was served under the Act of April 21, 1858 (Purd. Dig. 44), upon the agent of the defendants, who were non-residents, while temporarily in Philadelphia.

The deposition showed that the defendants were a firm carrying on their business in Lawrence, Massachusetts, of dealing in all kinds of machinery on commission, and that they had no office in Philadelphia. That one Haines, also of Massachusetts, had bought a quantity of machinery in Philadelphia, which he had employed the defendants to pack and ship for him, giving them power to dispose of any or all of it here, should a purchaser be found. The sheriff incorporated these facts in his return, and also the affidavit of the agent of the defendants, on whom the service had been made, stating that he had been sent to Philadelphia for the sole purpose of superintending this single commission, with orders to return as soon as it should be accomplished.

R. Morgan Jennison and *Samuel Dickson*, for the rule.

R. L. Ashhurst, contra.

The defendants were engaged here in carrying on their regular business; the service was therefore certainly good under the Act.

THAYER, P. J. We do not think that a single transaction, as this appears to have been, is sufficient to bring the defendants within our jurisdiction under this Act.

Rule absolute.

C. P. No. 4. March 3, 1879.

Armstrong v. Shaw.

Practice—Judgment entered in absence of defendant's attorney, when not stricken off—Affidavit of defence law—Notice to counsel—Duties of counsel when absent.

Rule to strike off judgment.

The plaintiff issued a writ of summons returnable on the first Monday of February. The counsel for the defendant entered his appearance, and upon examination of the record on February 10, found that no copy of the instrument sued upon had been filed. On that night the defendant's counsel left the city upon professional business, returning on February 24, which was judgment day. He found awaiting him a sealed envelope, addressed to him, containing notice of the filing of copies of notes, and of an intended motion for judgment. The defendant was at once sent for, and an affidavit of defence was filed about two o'clock; but judgment for want of such had been entered in the mean time. The messenger who carried the notice to the office of the defendant's counsel was informed that he was out of town. No notice was sent to the defendant.

Sypher, for the rule.

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Upon knowledge of the absence of defendant's counsel, notice should have been sent to the defendant. If the notice had come by mail, and the plaintiff had not known of the absence, the case would have been different.

The Court has power to strike off a judgment for cause, either appearing on the record or by depositions.

Hutchinson *v.* Ledlie, 12 C. 112.

THE COURT (per THAYER, P. J.). If counsel absent themselves from their places of business, they should authorize some one to take charge of their business. We do not think that the plaintiff is obliged to do anything more than he has done. His judgment is regular.

Rule discharged.

The defendant then took a rule at bar to open the judgment, and let the defendant into a defence, which rule was made absolute by consent.

Orphans' Court.

March 19, 1879.

Stanton's Estate.

Testamentary guardian—When required to give security—Act of March 29, 1832—Duties and responsibilities of guardians—Funds of minors used by guardian in business—Separate accounts should be kept of each minor's estate—Allowance for maintenance.

Sur petition for allowance, and to compel guardian to enter security, and answer.

The petition of Ellen F. Stanton, wife of the decedent, and mother of the minors William P. and John A. Stanton, alleged that the decedent left a will, by which he bequeathed $2000 to collateral relations, and the residue of his estate to the petitioner and two minor children, and appointed James V. McGarvey, the respondent, executor and guardian of his children. That the decedent had, during his life, negotiated a life insurance in favor of his wife, and that, shortly before his death, and two days before the execution of his will, he persuaded her to transfer said policy to the aforesaid minors, which she accordingly did. That the aforesaid legacies absorbed nearly all the personalty, and that there was not sufficient for her own and the minors' support. The proceeds of the life insurance, $5000, had been paid into the hands of the guardian, who is a builder, and conducts building operations. The petitioner prayed that the guardian be required to enter security, and that he be ordered to allow a suitable sum out of their estate for their maintenance. The petitioner elected to take against her husband's will.

The answer set forth that the respondent, being a testamentary guardian, was not required to enter security; that the personal estate of decedent was not sufficient to pay the legacies, a portion of which remain unpaid; that in the opinion of the respondent, the interest on the sum received upon the policy of life insurance ($300) would be sufficient for the support of the minors, he not wishing, unless ordered by the Court, to apply any of the principal of the estate for this purpose. The respondent alleged himself to be perfectly solvent, and that decedent's real estate consists of vacant lots, and other unproductive real estate; and annexed to his answer an account, charging himself with the $5000 and annual interest thereon at the rate of six per cent.

John B. Colahan, for the petitioner.

P. Duffy, contra.

April 5, 1879. THE COURT. This petition is twofold: first, that the respondent, a testamentary guardian, be required to enter security for the protection of the minors' estate; and second, that he be directed to expend a suitable amount out of their estate for their maintenance.

While a testamentary guardian and an executor, from the trust and confidence reposed by the testator, are not primarily required to enter security for the faithful performance of their duties, and the safe custody of the estate committed to them, yet the law has wisely provided that the Courts, whenever such circumstances are shown as justify their interposition in behalf of minors, or parties interested in estates, shall require guardians and executors to enter security adequate for the protection of their wards, or creditors, or legatees, as the case may be. As to guardians, see Act of March 29, 1832 (Purdon, 412, pl. 40). And among the safeguards placed around a minor's estate, are the requirements of the same Act, that every guardian shall, within thirty days after any property of his ward shall have come into his hands or possession, or of any person for him, file in the office of the clerk of the Court, a just and true inventory and statement, on oath or affirmation, of all such property or estate. And also, at least once in every three years, and at any other time when so required by the Court, render an account of the management of the minor's property under his care, which account shall be filed in the office of the clerk of the Orphans' Court for the information of the Court, and the inspection of all parties concerned. These duties we fear are too often overlooked and neglected, it being considered a sufficient compliance with the law to file a final account upon the ward attaining majority. Again, it is the plain duty of a guardian to keep the moneys of his ward separate and apart from his own, and invest the same in his name as guardian, in securities authorized by law. And if he use the

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moneys of his ward in his own business, he will not only be charged legal interest thereon, together with any profits accruing from such use of the funds, or if a loss occur, be held personally liable, and deprived of compensation or commissions. The object of the law is to preserve intact a minor's estate, so that, upon attaining lawful age, he may receive it, undiminished, save by the expense of his maintenance and education. And if his guardian exposes the estate to risk of loss or destruction, and neglects faithfully to care for the interests of his ward, it will be not only ground for requiring security, but, instead, his absolute dismissal. In McKennan's Appeal (3 Casey, 237), it was held, that if an executor apply the funds of the estate to the payment of his own debts, it is sufficient reason to demand security, and his solvency is no answer to the citation. (Halloway's Appeal, 3 WEEKLY NOTES, 556.) And if a guardian uses his ward's money for his private purposes, he may be removed without first requiring security; and such action may be taken on the application of any relative or friend of the infant. (Green's Estate, 3 Brewster, 427; 7 Phila. Rep. 502.) And ignorance of duty, whereby the ward's interests have been prejudiced, is ground for the removal of a guardian. (Nicholson's Appeal, 8 Harris, 50.)

The petitioner in this case, the mother of the minors, alleges that their guardian received in 1877 nearly five thousand dollars as their estate, for which he has not entered any security, although requested so to do, and she fears that said amount may be wasted or lost by the guardian, who is a builder and engaged in building operations. The guardian in his answer alleges that he is solvent, and, independent of his business, is the owner of a large amount of valuable real estate. That he has never been requested to enter security as said guardian, but willingly and cheerfully submits himself to the order of the Court, to enter such security as may be deemed fit and proper. The guardian also presents, as part of his answer, an account, showing the condition of the minors' estate, wherein he charges himself with the principal received, and interest thereon from the date of receipt to January 1, 1879. No testimony has been submitted to us upon the subject, but it is safe to infer from the silence of the guardian as to any investment having been made by him, he is making use of the fund and crediting the minors with interest thereon. And, notwithstanding his solvency and ownership of valuable real estate, their estate is thus subject to the risk of losses in business to which it should not be exposed, and must be guarded against. We must, therefore, direct the guardian to enter security for the better protection of the minors' estate, and invest the moneys thereof in securities authorized by law in his name as guardian.

As to the subject of the allowance, it appears that the guardian has heretofore paid to the mother of the minors, for their support, the entire amount of interest with which he has charged himself, and, in addition thereto, several hundred dollars of the principal of the fund. While an equal share of the estate belongs to each of the two minors, who are quite young, but eight and two years of age, yet we cannot assume that the cost of their maintenance is also equal. And it is hardly necessary to say, that the estate of one cannot be applied to any extent for the use and benefit of the other. The guardian should keep a separate account with each of his wards. And although he has taken the responsibility of expending the entire income, and also a portion of the principal, without authority from the Court, yet they are still entitled to a reasonable and necessary amount for their support, and the guardian cannot withhold the income until he is reimbursed the principal. As we have not been furnished with the information to enable us to determine the proper allowance for the minors, or whether the expenditure heretofore made by the guardian was proper or necessary, and what proportion thereof should be charged to the minors respectively, for the present we must decline to make any order upon the second branch of the petition. The guardian is, however, ordered to enter security and invest the moneys in his hands belonging to his wards, as will appear from the decree filed herewith.

Opinion by HANNA, P. J.

Jan. 1879.

Eckfeldt's Estate.

Legacies—General and specific—Bequest of railroad stock—Dividends thereon—When payable to legatees.

Sur petition for rule to show cause why executors should not transfer a legacy of railroad stock, with the dividends thereon, and answer.

The petition of the Fidelity Insurance, Trust, and Safe Deposit Company, guardian of John E. Sulger, a minor, set forth that Charlotte M. Eckfeldt died July 16, 1877, leaving a will and several codicils thereto, by which she bequeathed to the said minor "ten shares of Germantown and Norristown Railroad stock"; she further directed that all her legatees should receive the full amount of their legacies, the collateral inheritance tax to be paid from the residue. The prayer was that the Court grant a rule on the executors to show cause why they should not transfer the said ten shares of stock to the petitioners, and pay over to them the accrued dividends thereon.

The answer of the executors and trustees alleged that at her death the decedent was possessed of large numbers of railroad shares, including eighty-nine shares of the Germantown and Norristown

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Railroad; that the above-mentioned bequest of ten shares of this stock is a general and not a specific legacy, and that the respondents have always been ready and willing to transfer to the petitioner the said shares of stock, but that the petitioner having demanded the payment of the accrued dividends thereon, the respondents desire to submit themselves to the order of the Court.

Isaac Sulger, for the petitioner.

John Blackburn, contra.

February 1, 1879. The COURT. If the legacy of stock in this case was, as was claimed, specific, is would necessarily follow that all dividends thereon which accrued after the testatrix's death, belonged to the legatee, and were improperly brought into the account filed by the executor. Specific legacies are considered as separated from the general estate and appropriated at the time of the testator's death; and consequently, from that period, whatever profit or produce accrues therefrom, belongs to the legatee. (Williams on Executors, *1220.)

If such were the case, an obstacle in the way of granting the prayer of the petition would be found in the decree confirming the account in which dividends so received were debited as part of the general estate and brought into the balance for distribution.

We are, however, of opinion, that the legacy was general and not specific. The well settled rule is that courts are averse to construing legacies to be specific; and the intention of the testator with reference to the thing bequeathed must be clear. (Kirby *v.* Potter, 4 Vesey, 748; Webster *v.* Hale, 8 Vesey, 410; Walls *v.* Stewart, 4 Harris, 275.) The reason for this is, that while a specific legacy has some advantage, viz., that it does not abate with pecuniary legacies, and that it carries profits from the testator's death, it is, at the same time, subject to the risk of being addeemed by being disposed of in the testator's lifetime, or of not being found at the time of his death.

That the legacy is of a *part* only of a larger number of shares of stock belonging to the testator is not sufficient, *ipso facto*, to prevent it from being specific. (Kirby *v.* Potter, *supra;* Mullins *v.* Smith, 1 Dr. and Sm. 204.) Such a legacy may be either specific or general according to the circumstances. It is never *demonstrative;* a demonstrative legacy is always *pecuniary*, differing, however, from an ordinary legacy in being referred to a particular fund or source of payment. (Walls *v.* Stewart, 4 Harris, 275.)

With regard to legacies of stock, the rule is thus laid down in Hawkins on Wills, *301: "A legacy of stock, of whatever denomination, is not *prima facie* specific, but is a general legacy, although the testator may have had stock of the description mentioned sufficient to answer the bequest." (Simmons *v.* Vallance, 4 Bro. C. C. 345; Purse *v.* Snaplin, 1 Atk. 414; Sibley *v.* Perry, 7 Vesey, 523.)

It is true that a different rule applies where the testator uses language showing clearly an intention to dispose of the *identical* stock which he owned at the date of the will; as where he speaks of them as "my stocks," "stocks *belonging to me*," etc. etc., or where he directs his *executor* to *transfer* them to the legatee. (Hosking *v.* Nicholls, 1 Y. and C. C. C. 479; Ashton *v.* Ashton, 3 P. Williams, 384; Ludlam's Est., 1 Harris, 189; Blackstone *v.* Blackstone, 3 Watts, 335.)

But the mere possession by him of such stock at the date of the will, without words of reference to fix its identity as the subject of the bequest, is not sufficient to make the legacy specific. (Blackstone *v.* Blackstone, *supra.*) For the testator *might* mean, "only to direct his executor to purchase, with his general estate, so much stock in the fund described; and, therefore, that *clear intention* which is required to make a legacy specific does not exist." (Williams on Executors, *999.)

In Robinson *v.* Addison (2 Beav. 515), where a testator having fifteen and a half shares of a certain canal stock bequeathed five and a half shares to A., five to B., and five to C., it was held that the legacies were not specific. In that case the stock given was seldom in the market, and it was argued that for this reason, apart from the fact of the disposal of the precise number of shares, the testator must have intended to give these specific shares, and not that his executor should purchase them for the legatee out of the general assets. But the Court said: "It is clear that if he had meant to give only the shares which he then had, he might have designated them as *his*. That the mere circumstance of his having at the date of his will a particular property of equal amount to the bequests of the like property which he has given *without designating it as the same*, is not a ground upon which the Court can conclude that the legacy is specific. . . . . The shares, though not frequently sold, are nevertheless occasionally bought and sold, and may be had for money."

There is nothing in the present case to take it out of the general rule. The bequest is one of several of "ten shares of Germantown and Norristown Railroad stock," simply. It is not "my stock" or "stock belonging to me," nor are there words showing present ownership, or indicating identity in any manner whatever.

It follows that the legatee was not entitled to the dividends accruing within the year after the testator's death (see Webster *v.* Hale, 8 Vesey, Jr., 410), and the petition must, therefore, so far as it asks for these, be dismissed.

Decree accordingly.

Opinion by PENROSE, J.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, MAY 8, 1879.* [NO. 2.

Supreme Court.

Jan. '79, 219. March 14, 1879.

Walsh v. The Commonwealth ex rel. Evans.

Erection of new counties—Act of April 17, 1878 (P. L. 17)—Art. IV., Sec. 8, of the Constitution—How long officers appointed by the Governor, on the erection of a new county, are entitled to hold, when the county was proclaimed within three months of the next general election—The word "vacancy" defined.

When a new county is erected, a "vacancy" in its offices "happens" within the meaning of Art. IV., Sec. 8, of the Constitution.

Where a new county was proclaimed on Aug. 21, 1878, and the next general election occurred on Nov. 5, 1878: *Held* (MERCUR and GORDON, JJ., dissenting), that no election for officers of the new county could be held until the second general election succeeding its erection, and that the Governor's appointees were entitled to hold over until the term of those who should be chosen at such election.

Meaning of the word "vacancy" as applied to an office, discussed by WOODWARD, J.

Error to the Common Pleas of Lackawanna County.

Quo warranto, issued at the relation of R. Evans against P. M. Walsh, to show by what warrant he exercises the office of county surveyor of Lackawanna County.

The suggestion of R. Evans, filed January 22, 1879, averred that on November 5, 1878, he had been duly elected county surveyor of Lackawanna County, to serve for the term of three years from the first Monday of January, 1879; but that, notwithstanding the said election, the respondent Walsh used and still does use the functions of the said office; and the relator prayed due process of law, etc. A rule on P. M. Walsh to show cause why a quo warranto should not issue against him having been made absolute, and the quo warranto having issued, the respondent filed an answer setting forth that, in accordance with "An Act to provide for the division of counties, etc.," and proceedings had thereunder, the county of Luzerne was, on Aug. 21, 1878, divided, and the county of Lackawanna erected therefrom, with all the rights, powers, and privileges of other counties of this Commonwealth; that by reason of the erection of said county of Lackawanna a vacancy in the office of county surveyor of said county happened less than three months before the next general election, and the respondent was, on Aug. 21, 1878, appointed by the Governor of the Commonwealth to be the county surveyor of Lackawanna County, to fill said vacancy, and duly commissioned by the Governor to hold the said office with all its rights, etc., until the end of the next session of the Senate; that by virtue of said commission he had entered upon the duties of his office, and that he is entitled to hold the said office until his successor is duly elected and qualified; and that there can be no legal election for the said office until the second general election succeeding the appointment of the respondent.

The relator demurred to the answer, and on February 26, 1879, judgment of ouster was entered, *pro forma*, against the respondent, whereupon he took this writ, assigning for error the entry of the judgment.

I. H. Burns and *L. Amerman*, for the plaintiff in error.

The case falls directly within Sec. 8, Art. IV., of the Constitution, which provides that if a vacancy shall happen within three calendar months of the next general election, an election for the office shall be held at the second succeeding general election. The 11th and 15th sections of the Act,* providing for the erection of new counties, do not conflict with this provision, because no incumbent for the offices could, in this case, be duly elected and qualified within the meaning of that Act before the second succeeding general election; but if they do conflict, the statute must give way. The other side answer that the respondent was not appointed to fill a vacancy that happened, but to an office created by the New County Act; but when the new county was erected, it had all the

* Sec. 11 of the Act of April 17, 1878 (P. L. 17), providing for the erection of new counties enacts that—

"The Governor shall immediately appoint and commission for the new county officers as provided by law, who . . . . shall continue in office until the next general election, and until their successors shall be duly elected and qualified."

Sec. 15 of the same Act provides that, "At the next general election after the erection of said new county, the qualified electors shall elect the said several county officers, as aforesaid mentioned, to hold their offices as is provided by law."

Sec. 8, Art. IV., of the Constitution provides that, "The Governor shall have power to fill any vacancy that may happen . . . . in a judicial office, or in any other elective office which he is or may be authorized to fill; . . . . but in any such case of vacancy in an elective office, a person shall be chosen to said office at the next general election, unless the vacancy shall happen within three calendar months immediately preceding such election, in which case the election for said office shall be held at the second succeeding general election."

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rights and powers, and all the offices of other counties, and these offices were without incumbents. Webster defines "vacancy" as "the state of being destitute of an incumbent; a place or office not occupied, or destitute of a person to fill it;" and other authorities define it similarly.

Stocking *v.* State, 7 Indiana, 329.
Collins *v.* State, 8 Id. 344.
Biddle *v.* Willard, 10 Id. 63.
Dillon on Municip. Corporations, § 161, note 4.
State *v.* Adams, 2 Stewart's Ala. Reports, 231.
Gormley *v.* Taylor, 44 Georgia, 79.
Giles *v.* Russ, 49 Id. 115.
14 Opinions U. S Att'y-Gen'l, 2.

The provision in Sec. 2 of Art. XIV. that "all vacancies, not otherwise provided for, shall be filled in such manner as shall be provided by law" has not the meaning attributed to it on the other side; it was merely intended to allow the Legislature to vest the power of appointment of county officers in other hands than those of the State executive, if they should see fit.

E. Merrifield (with him *H. M. Edwards* and *H. W. Palmer*), for the defendants in error.

The election at which the relator was elected was universally participated in, the respondent, among others, being a candidate; and it was held in direct accordance with the 15th section of the Act, providing for the erection of new counties. The relator is, therefore, entitled to the office, unless the Act is in violation of the Constitution; and this must be clearly shown by our opponents.

Speer *v.* School Directors, 14 Wr. 150.

A vacancy cannot happen, except in an office which has been filled.

Sergeant's Constitutional Law, 373.
McCrary's Amer. Law of Elections, Section 237.

There are two kinds of vacancies contemplated by the Constitution: one referred to in Sec. 8, Art. IV., and the other in Sec. 2 of Art. XIV., which provides that "all vacancies not otherwise provided for shall be filled in such manner as may be provided by law." Sec. 8, Art. IV., provides for vacancies happening from death, resignation, promotion, or removal; the vacancy in this case was created by the act of the people, and comes clearly within Sec. 2, Art. XIV. That the word "vacancy" has a limited meaning was decided by this Court in Com. *v.* King (4 Norris, 103), and that case rules this one.

The people should not be deprived of their right to elect their officers, except for good reason. Here, sufficient time intervened between the erection of the new county, and the election, to give ample notice to everybody.

Com. *v.* Swift, 4 Wharton, 201.
State *v.* Messmore, 14 Wisconsin, 163.

March 31, 1879. THE COURT. On the 17th of April, 1878, the "Act to provide for the division of counties of this Commonwealth and the erection of new counties therefrom" was passed. Proceedings to promote the division of the county of Luzerne and the erection of the county of Lackawanna were at once begun. These proceedings were perfected on the 21st of August, 1878, when the Governor declared by proclamation that a majority of the votes cast, at the election held under the terms of the Act, on the 13th of August, 1878, had been in favor of the creation of the new county, and that thenceforth in the words of the 9th section "said new county was established, with all the rights, powers, and privileges of other counties of this Commonwealth." In the eleventh section the Governor was required immediately to appoint and commission the officers for the new county who should continue in office until the next general election, and until their successors should be duly elected and qualified. Patrick M. Walsh, the defendant in this quo warranto, was appointed surveyor the day the establishment of the new county was proclaimed.

At the general election held on the 5th of November, 1878, the relator, Richard Evans, received a majority of the votes cast for county surveyor. The term for which the defendant was commissioned was "until the end of the next session of the Senate," and he resisted the relator's claim to the office because, as he alleged, the election of county officers at the general election of 1878 was undue and illegal. The ground was taken that it had been held in violation of the eighth section of the fourth article of the Constitution, declaring that "in any case of vacancy in an elective office, a person shall be chosen to said office at the next general election, unless the vacancy shall happen within three calendar months immediately preceding such election, in which case the election for said office shall be held at the second succeeding general election." Less than three calendar months intervened between the date of the defendant's commission and the date of the election. Insisting that the office of surveyor was vacant when he was appointed, the defendant asserted his right to retain it until the final adjournment of the session of the Senate in 1879.

The relator, on the other hand, denied that he was such an elective officer as was contemplated in the constitutional provision. He contended that the design of the Legislature in the eleventh section of the Act was to bridge over the interval between the creation of the county and the next election by directing the Governor to appoint new officers instead of directing that their duties should be performed by the existing officers of the county of Luzerne. He relied on the second section of the fourteenth article of the Constitution requiring that "all vacancies not otherwise provided for shall be filled in such manner as may be provided by law."

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Invoking that direction as one of the grounds to support his claim, he began this proceeding to obtain possession of the office, and prosecuted it to a judgment *pro forma* of ouster against the defendant.

Was the office of surveyor of the county of Lackawanna vacant in the constitutional import of the word on the 21st of August, 1878? The verb "to vacate" in its English form has acquired an active sense through a long period of transition by popular usage and in consequence of its early adoption as a technical legislative and legal term. "To leave empty," "to cease from occupying," "to make void" undoubtedly express the different meanings in which as a verb the word has come to be employed. But it does not follow that its derivatives have acquired exclusively equivalent meanings in popular, or legislative, or legal usage. In its original Latin form the word was invariably used to define the state and condition of some existing thing at some particular point of time. It had no transitive power whatever.

It meant "to be empty, void, or vacant," "to be void or free from, or without, to lack or want a thing." Vacant lands are described as lands that were "uninhabited or uncultivated." The Roman law gave the word precisely the same meaning. Vacant possessions were defined in the pandects to be such as were "free, unoccupied, ownerless" (Dig. 38, 17, 2). And many of the derivatives from the English verb, retain the exact meaning of the original Latin word. To be "vacant" in its primary sense is "to be deprived of contents, empty, not filled." The first definition of vacancy is "the quality of being vacant; emptiness." The words "vacant lands" so familiar in the Pennsylvania Courts, convey as to description of subject matter, the precise idea which Cæsar conveyed in explaining the public policy of the Suevi. Surrounding their own territories they desired, to as wide an extent as possible, *vacare agros* (De B. Gal. iv. 3). Usage has warranted the employment of these words in an enlarged and broader sense, but the primary and strictly grammatical meaning which they still retain is identical with their exclusive original signification. The result is that the word "vacancy" aptly and fitly described the condition of an office, when it is first created and has been filled by no incumbent. The need to strain and torture terms would lie in the opposite direction.

Was the claim of the relator sustainable on other grounds? When the defendant was commissioned, executive, legislative, and popular action had established the county of Lackawanna, and with it the office of surveyor. It was an existing, unfilled elective office. The duty of the Governor was clear. He derived his original power to appoint from the Constitution, and that had authorized him to issue a commission in the event of a vacancy in any elective office. It is true the statute had directed him to appoint the officers of Lackawanna, but without that direction, if the offices had been established, by special enactment, it would still have been his constitutional duty to issue the commissions. The eleventh section directed that the officers appointed by the Governor should retain their places until the next election, and until their successors should be *duly* elected and qualified. Due election and qualification could only result from action in accordance with the Constitution and existing laws. If the county had been organized before the 5th of August, 1878, the legality and regularity of the election on the 5th of November would have been unquestionable. But until the 21st of August it was uncertain whether the county would ever have existence at all. The proclamation changed what had been a project into a vital actuality. The moment the life of the county began there came into being the several county offices specified in the first section of the fourteenth article of the Constitution. They were not places to be filled by clerks or agents, or deputies *pro hac vice*.

They were elective offices, and they were vacant. All the conditions, under which it was the constitutional duty of the Governor to select incumbents, subsisted. Is it possible that in view of such conditions the Legislature could have the power, even if they had so intended, to take these offices out of the operation of the constitutional provision? But they could have had no such intention. When the Act was passed, it was as uncertain that the organization of the county would be perfected three months after the next election as it was that it would be perfected three months before. And on what principle can the second section of the fourteenth article apply in any way to this question? They were "vacancies not otherwise provided for" which were to be "filled in such manner as should be provided by law." But these vacancies were such as had been provided for. They were vacancies in elective offices which the Governor had power to fill. The provisions of the Act of the 17th of April, 1878, must be construed in its connection with the provisions of the Constitution, and the officers of the county of Lackawanna must stand on the same footing as if their places had previously been occupied, and they had succeeded to them by appointments to supply vacancies produced by causes of ordinary and familiar kinds.

It was strongly urged at the argument that no ground of reason or convenience existed in this case to justify an interference with the right of the people to elect their officers in the autumn of 1878. It was said that there was ample time

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after the proclamation to select candidates, and to provide that the rights of parties, individuals, and the community should be secured from hazard. If this Court had the power to say this, it is possible that this suggestion would be adopted. It is true that all formal details relating to assessments, revision of lists, the furnishing of ballot-boxes and blanks, and the notice to be given by the sheriff, could have been arranged in this interval of seventy-six days. But cases might occur where the interval would be forty, thirty, twenty, or ten days. And it would be necessary to go into an inquiry, in each instance, into the adequacy of time to prepare for the election. To guard against a shifting rule like this, fortunately for the community and the Courts, the Constitution has established an abiding and pervading system. It was the opinion of its framers, that the work of selecting officers for the government of the Commonwealth and of the counties of the Commonwealth should be carefully and thoughtfully done. Haste, impulse, and evil temper will enter into political contests, whatever safeguards may be thrown around the ballot, and whatever may be the period allowed for deliberation. But the Constitution has established the unbending rule that three full months shall be the period within which to prepare for an election to supply a vacancy, and during which mistakes may be corrected, prejudices may be overcome, ignorance may be enlightened, excitement may be allayed, and passions may subside. It has not been suggested that this election resulted in the choice of a surveyor who was not entirely competent, and did not possess every requisite qualification for the duties of the position. But it has sometimes happened that in haste, and under the influence of prejudice, very important offices have been filled not only by very incompetent, but by very bad men.

It has not been thought necessary to encumber this opinion with quotations from the authorities bearing on this question. They are overwhelmingly preponderant in favor of the position of the defendant, and have been marshalled with great ability in his counsel's original and supplementary briefs. Indeed in this connection, the Court have pleasure in acknowledging the benefit they have derived from the careful, skilful, and thorough preparation of this cause by the counsel for both the parties. A single remark in regard to the Commonwealth *v.* Swift (4 Wh. 186), each of the cases of Broom *v.* Hanley (9 Barr, 513), and The Commonwealth *v.* King (4 Norris, 103), needs only to be made. The only point ruled in the first, was that the Constitution of 1838 did not create a vacancy in the office of Recorder of Deeds, and that the power remained in the Governor to appoint under the Constitution of 1790, until the general election in 1839. In the second, it was decided that the death of a person elected to fill the office of clerk of the Orphans' Court before he had qualified himself according to law, did not create a vacancy, but the incumbent who was commissioned to fill the office until his successor should be qualified, held over. In the third case, the sheriff of McKean County died about three weeks before the general election of 1875, in the third and closing year of his term, and as the people of the county could have devoted the whole of the three years to preparation for the election of his successor, it was held of course that the appointee of the Governor could retain the office only to the time when the new term began in January, 1876. Nothing decided in either of those cases touches the points in issue here.

The judgment of ouster is reversed at the costs of the relator. And it is now ordered, adjudged and decreed, that judgment on the demurrer, in favor of the defendant, be forthwith entered. And it is further ordered, adjudged and decreed, that the said defendant recover his costs of said relator to be levied by execution, as in cases of debt.

Opinion by WOODWARD, J. MERCUR and GORDON, JJ., dissent.

Oct. & Nov. '78, 62½, 110, 111, 112. Nov. 14, 1878.

Millville Mutual Fire Insurance Company v. Wilgus.
City Insurance Company v. Same.
Ben Franklin Insurance Company v. Same.
Kenton Insurance Co. v. Same.

Contract—Insurance—Insurable interest—Equitable interest—Construction of insurance policy as to what constitutes entire, unconditional, and sole ownership of property.

W. bought property at an Orphans' Court sale, took possession, paid half the purchase-money, and became bound for the payment of the other half in one year. He took out policies of insurance upon the property, containing a condition that if the interest of the assured be any other than the entire, unconditional, and sole ownership for the use and benefit of the assured, it must be so represented to the company, and expressed in the policy, otherwise the policy to be void. The exact nature of his interest was not specified in the policies. The property was destroyed by fire before the final payment of purchase-money, and receipt of deed. In an action against the insurance company to recover the insurance:

Held, That W.'s title, though an equitable one, nevertheless vested in him the entire, unconditional, and sole ownership, subject to the payment of the balance of purchase-money, and that he was entitled to recover.

Error to Common Pleas No. 1, of Allegheny County.

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Assumpsit, by Thomas B. Wilgus against the Millville Mutual Fire Insurance Company, and covenant against the other three companies above named, all upon policies of insurance. The first named case was tried in January, 1878, before STOWE, P. J., and the others were tried together in March, 1878, before BAILEY, J. The four cases were argued together in the Supreme Court. The following were the material facts:—

Wilgus, on Feb. 12, 1876, bought, for $6000, from the administrators of E. Toynbee, deceased, at a sale ordered by the Orphans' Court of Fayette County, certain real estate of said decedent, known as the Toynbee distillery, situate in Bridgeport, Fayette County, Pa. The terms of the sale were one-half upon confirmation thereof, and the balance in one year after confirmation, with interest. Wilgus immediately took possession, and began to make improvements. The sale was confirmed March 6, 1876, upon payment of half the purchase-money. Between March 9 and June 1, 1876, Wilgus effected insurance upon the property to the amount of $23,500, and among the policies taken out by him were those in suit, being one dated May 1, 1876, issued by the Millville Company for $2500, and four dated May 16, 1876, issued respectively by the four companies above named, each for $1410. These policies all contained the following condition:—

"And it is also a condition of this insurance that if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured . . . . it must be so represented to the company, and expressed in the written part of this policy, otherwise the policy shall be void."

Wilgus did not inform the companies of the exact nature of his ownership, and it was not expressed in the policies. The evidence showed that the agent to whom he applied for the insurance asked Wilgus if he owned the property in fee, and Wilgus replied that he did; but that in writing to the agent June 10, 1876, he said "I told you I owned it in fee simple, not knowing the exact meaning of the term, which I believe is without encumbrance of any kind. I owe $3000, payable one year from April, being the last payment on all the property." The agent, however, testified that he never received this letter.

On the night of June 22, 1876, the property was destroyed by fire. The companies above named refusing to pay, these actions were brought.

The Court, answering the points submitted, said to the jury that while as a general principle a failure to express the true nature of ownership in policies containing such a condition would avoid them, yet under the evidence in these cases as to plaintiff's representation in regard to his title and interest, that principle did not apply here to bar his right of action; that if the jury believed Wilgus had paid half the purchase-money, and had become bound for the other half, had taken possession and begun to make improvements without objection, then he became the equitable owner of the entire property, had an insurable interest therein, and any loss to the buildings subsequent thereto was his loss; that such an ownership was the entire, unconditional, and sole equitable interest in the property.

Verdict and judgment in favor of plaintiff against the Millville Company for $2410.82, and against each of the others for $1267.82. Defendants took these writs, assigning for error, *inter alia*, under specifications differently numbered in the different cases, the answers of the Court substantially given above.

Weir Gibson (*G. L. B. Fetterman*, and *W. G. Guiler* with him,) for the plaintiffs in error.

Wilgus had an equitable estate to the extent of the purchase-money paid, but that he was the entire, unconditional, and sole owner for the use and benefit of the assured, is denied upon principle and authority. The wording of similar policies has been construed in the following cases:—

Ins. Co. *v.* Bronger, 6 W. P. D. Bush, 146.
Ins. Co. *v.* Curry, 13 Ib. 312.
Rohrbach *v.* Ins. Co., 62 N. Y. 47.
Ins. Co. *v.* Brennan, 58 Ill. 159.
Ins. Co. *v.* M'f'g Co., 31 Mich. 346.
Hinman *v.* Ins. Co., 36 Wis. 159.
Ins. Co. *v.* Lawrence, 2 Peters, 25.
Reynolds *v.* Ins. Co., 2 Grant, 326.

The nature and extent of his interest not having been represented to the companies, and expressed in the policies, the contracts were void.

D. T. Watson (*Knox & Reed*, and *J. G. Wood* with him), contra.

Wilgus had an equitable interest in the whole property.

Siter, James & Co.'s Appeal, 2 Casey, 180.
Reed *v.* Lukens, 8 Wright, 202.
Ins. Co. *v.* Updegraff, 9 Harris, 519.

In Reynolds *v.* Ins. Co. (*supra*), the exact title was essential, because the company was a mutual one, and, moreover, the insured stated in reply to a direct question that no encumbrances existed.

See Morgan *v.* Scott. 2 Casey, 54.
Ins. Co. *v.* Brolaskey, 11 Casey, 282.

This equitable interest of Wilgus in the whole property was the entire, unconditional, and sole ownership for the use and benefit of the assured within the meaning of the policies.

Merrill *v.* Ins. Co., 6 Reporter, 237.
Strong *v.* Ins. Co., 10 Pickering, 40.
Curry *v.* Ins. Co., Ib. 542.
Tyler *v.* Ins. Co., 12 Wend. 507.
Coursin *v.* Ins. Co., 10 Wright, 328.
Wood on Insurance, 477.
May on Insurance, Sec. 76.
Hough *v.* Ins. Co., 29 Conn. 10.
Gaylord *v.* Ins. Co., 40 Mo. 13.

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January 6, 1879. THE COURT. These cases all involve the same principle, and were argued together. The plaintiff below had purchased the premises upon which these insurances were effected at an Orphans' Court sale, the terms of which were one-half cash, and the other half in one year. He made the first payment, and before the year expired the loss occurred. The condition of the policies relied on to avoid them, was "that if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured," it must be so represented and expressed.

The plaintiff's title was an equitable one, but it nevertheless vested in him the entire, unconditional, and sole ownership, subject to the payment of the balance of the purchase-money. This balance was practically an encumbrance. It is true the legal title was in the vendors, but they could use it only to enforce the payment of the price agreed upon. In this respect it is exactly the case of a mortgage—which vests the legal title in the mortgagee for the same purpose. Had the property been swallowed up by an earthquake, the entire loss would have fallen on the plaintiff. In Reynolds *v.* The State Mutual Ins. Co. (2 Grant's Cases, 326), there was a representation that the property was not encumbered. The language of the opinion, indeed, favors the idea that an equitable owner cannot insure beyond the purchase-money paid. Yet Mr. Justice BLACK adds: "If we regard the difference between a legal and an equitable title as totally immaterial (and perhaps we ought so to regard it), then the unpaid balance of the purchase-money must be treated as an encumbrance." It is clear that if the owner could not insure beyond the purchase-money paid, he would be often entirely without indemnity. He is personally liable for the balance of the purchase; he may have made expensive improvements, or the property may have greatly appreciated. It is very easy for the insurance company, by proper questions, to draw out the exact nature of the title of the insured. In the cases before us no inquiry was made as to encumbrances. According to the law of Pennsylvania the insured had a right to consider himself as the entire, unconditional, and sole owner. There is nothing in the remaining assignments requiring notice.

Judgments affirmed.

Opinion by SHARSWOOD, J. AGNEW, C. J., and WOODWARD, J., absent.

Jan. '79, 262. Jan. 30, 1879.

Third Reformed Dutch Church's Appeal.

Estoppel—Church—Account of rents and profits of church property during a change of ecclesiastical relations—Res adjudicata.

Where a church corporation has accepted and enjoyed a decree in equity in an action presented in its behalf by some of its members, it cannot afterwards in another proceeding substantially the same be allowed to say that the former proceeding was not instituted and prosecuted for its benefit, and that it is not bound by such portions of the decree therein as are unfavorable to it.

The Third Reformed Dutch Church, upon surrender of the church property according to the decree in Jones *et al. v.* Wadsworth *et al.* (4 WEEKLY NOTES, 514) filed a bill in equity in the name of the corporation against the trustees of the corporation to restrain them from prosecuting actions at law upon notes of the corporation, and asking for discovery and account of rents and profits of the church property during the period of change in the ecclesiastical relations of the church. The Court below, after a hearing on demurrer, dismissed the bill:

Held (affirming the decree of the Court below), that there was no equity in the demand upon the defendants to discover and account for funds which admittedly were paid out for the salary of the minister and other expenses of maintaining the church.

Appeal from the Common Pleas No. 2, of Philadelphia County.

Bill in equity, filed by the Third Reformed Dutch Church of Philadelphia against Henry J. Fox *et al.*, trustees of the corporation complainant.

The bill set forth that the complainant was the owner of certain real and personal property including a lot of ground and church buildings thereon in the city of Philadelphia held in trust for members adhering to the mode of faith and church discipline of the Reformed Church in America: that on June 9, 1873, the defendants, who were duly elected trustees under the charter of the corporation became members of the Immanuel Presbyterian Church, an unincorporated religious association connected with the Presbyterian Church in the United States and conducting its services in a different form and not maintaining the mode of faith and church discipline of the Reformed Church in America; that by becoming members of the Immanuel Presbyterian Church they ceased to be members and trustees of the corporation complainant; that the defendants refused to surrender possession of the complainants' property retaining it in their possession from June 9, 1873, to November 23, 1876, and diverting the property from the trusts to which it was subject by misapplying it to the uses of the Presbyterian Church; that during the same period the defendants have collected and received pew rents and profits of the complainants' property to an amount exceeding $9000, for no

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part of which have they accounted to the complainants; that on February 14, 1874, Daniel S. Jones *et al.*, members of the corporation complainant, filed a bill in equity against Rev. Chas. Wadsworth for a decree for the surrender to Jones of all the complainants' property, in which the Court on November 21, 1876, entered a decree according to the prayer of the bill; that from this decree the plaintiffs appealed, assigning for error the action of the Court in not directing an account; that on February 19, 1877, the Supreme Court (see Jones *et al. v.* Wadsworth *et al.*, 4 WEEKLY NOTES, 514) affirmed the decree of the lower Court, in obedience to which the defendant surrendered the church property to Jones, the only remaining trustee; that to that suit the corporation appellant was not a party; that the defendants have refused to account, and that the defendants have severally brought actions at law against the complainants upon their promissory notes to the amount of $2800, to which the complainants have a defence by way of set-off, exceeding the claims, in the rents and profits of the corporation misapplied by the defendants, which defence is properly cognizable in a court of equity in a bill for an account.

The bill prayed for (1) an account (2) an injunction to restrain the actions at law, (3) discovery, (4) general relief. The defendants demurred on the ground, (1) that the right to an account was *res adjudicata* determined in Jones *v.* Wadsworth, (2) that the bill was multifarious, (3) and that an account for damages resulting from a tort could not be set-off against action at law.

After a hearing upon the demurrer, the Court (HARE, P. J.) delivered an opinion dismissing the bill, which is printed at length in the report of the case in the Court below, 5 WEEKLY NOTES, 399, *q. v.* The complainants took this appeal, assigning for error the dismissal of their bill.

C. Stuart Patterson and *Wm. A. Porter*, for the appellants.

The right to account is not *res adjudicata*, for in Jones *v.* Wadsworth the bill was filed by individual members and not as here by the corporation. Assuming that the complainants were a party to the record, in that case the decree could not be conclusive against them, because the bill contained no prayer for an account, and because the record shows that the plaintiff was refused leave to amend by adding a prayer for an account, and that refusal was affirmed in this Court. Whenever a judgment in a former case is relied upon as conclusive in another, it may be shown by evidence *aliunde*, not inconsistent with the record, that the particular point was not adjudicated.

Coleman's Appeal, 12 Sm. 252.

Here the record shows conclusively that the question alleged to have been adjudicated was not permitted to be raised.

By rule of Court the complainants were compelled to go into the same Court in which the actions at law were commenced.

Rule of Court adopted Dec. 30, 1876, 3 WEEKLY NOTES, 258.

A. B. Shearer, for the appellee.

If the appellant's right to an account was before the Court in Jones *v.* Wadsworth, then the question is *res adjudicata*.

(1) Did the complainants in that case stand in a relation of privity with the complainants in this case? The complainants in that case were members of the Reformed Church for whom the property was held in trust; here the corporation is complainant. Those who adhere or submit to the regular order constitute the true congregation, and also the true corporation, if there be an incorporation.

Winebrenner *v.* Colder, 7 Wr. 256.

The substitution of a party differing only in name cannot avail to escape the effect of a decree in which the parties are substantially the same.

Peterson *v.* Lothrop, 10 Casey, 223.

The position of the complainants is that of a party who avails himself of a part of a decree and attempts to repudiate another part of the same decree.

(2) Was the question of liability to account before the Court in Jones *v.* Wadsworth? The master in that case reported a decree directing an account, which was refused in the decree of the lower Court, which on appeal was affirmed.

The argument that even if the complainants had been a party to the record in Jones *v.* Wadsworth, they could not have been concluded because the bill contained no prayer for an account, is unsound. A bill praying for the removal of a trustee for mismanagement and for the delivery over of the property in his hands implies a prayer for an account. But no special prayer for an account was necessary for it was included under the prayer for "general relief."

March 3, 1879. THE COURT. Without adopting all the reasons assigned by the learned President of the Court below, it will be enough to say that the former proceeding in equity, relied on as a defence, and the present were substantially between the same parties. The present corporation appellants accepted, and have enjoyed the benefit of the decree in the first case so far as it was in their favor, and they ought not to be allowed now to say that the proceeding was not instituted and prosecuted for their benefit. The complainants representing them in that case demanded an account in the interest of the corporation, and it was refused. It was properly placed upon the ground of estoppel, because the whole congregation, including the sole remaining trustee, had

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acquiesced in the change of the ecclesiastical relations of the church, and it was not alleged then, nor is it alleged now, that a single dollar of the income was appropriated to any other than the legitimate purposes of the worship of God and the preaching of the Gospel. There is no equity in the demand now reiterated on the defendants to discover and account for the funds which it is conceded they received and paid out for the salary of the minister and the other expenses of maintaining the church. The nine thousand dollars in pew rents was evidently contributed for the very purposes to which it was appropriated.

Decree affirmed, and appeal dismissed at the costs of the appellants.

PER CURIAM.

Jan. '78, 157. February 12, 1879.

Callen v. Lukens.

Landlord and tenant—Covenant sur ground rent deed—Set-off—Evidence—Admissibility of parol testimony to vary written instrument—Affidavit of defence law—Practice—Function of supplemental affidavit of defence.

To render evidence of a contemporaneous parol agreement admissible to vary materially or contradict a writing, it must be alleged that upon the faith of the parol agreement the written instrument was signed.

PER CURIAM. "We cannot agree that a supplemental affidavit is confined to an explanation of the original, and cannot set up a different defence; such a course, however, is suspicious, and requires that the new defence should be closely scrutinized."

Error to the Court of Common Pleas, No. 2, of Philadelphia.

Covenant sur ground rent deeds, by Lukens against Callen. The terre-tenant, Calvert, filed an affidavit of defence, setting forth that by a certain building-agreement made between the plaintiff, the defendant, and himself, he, the deponent, took the title to the property, subject to the ground-rents, which had been reserved by the plaintiff on a prior conveyance to the defendant; that he, the deponent, was to erect certain houses, and the plaintiff was to make certain advances; that the advances had not been made as agreed, and that as to the last one the deponent's receipt was obtained by fraud; that the deponent had lost more than twice as much as he would have had to pay in ground rent, by reason of being obliged to leave the house in an unfinished condition, thereby losing the rents.

Upon a rule for judgment for want of a sufficient affidavit of defence, the Court ordered a supplemental affidavit, and one was filed, setting forth that when the papers were signed he noticed that the provisions for making advances were not such as he had anticipated, and that he drew the plaintiff's attention to it; that the plaintiff said the alterations could not then be made, but that if the deponent would consent to the papers being executed as they had been prepared, "the payments should be arranged to the satisfaction of the deponent." The affidavit further alleged that a certain agreement was made by the plaintiff to do certain work on the walls, which had not been done, and that the plaintiff had "charged" the affiant with fourteen dollars more than was agreed to for insurance.

After argument the Court entered judgment for want of a sufficient affidavit and supplemental affidavit of defence; whereupon the terre-tenant took this writ, assigning for error the entry of judgment.

Thomas J. Diehl, for plaintiff in error.

The defences set up were a fair set-off to the plaintiff's claim, and were admissible to contradict the ground-rent deeds.

Act 1705, 1 Sm. 49.
Carman *v.* Ins. Co., 6 W. & S. 155.
Speer *v.* Sterret, 3 Casey, 192.
Hunt *v.* Gilmore, 9 Sm. 450.
Mangle *v.* Stiles, 7 Casey, 72.

Jos. M. Pile, for defendant in error.

The province of a supplemental affidavit is to explain the original, and no new defence can be set up in it.

1 Tr. & H. 381.

This proposition is so well settled that it has not been considered necessary to cite the repeated rulings upon the subject.

March 17, 1879. THE COURT. We cannot agree with the learned counsel of the defendant in error that a supplemental affidavit is confined to an explanation of the original, and cannot set up a new and different defence. Such a course, however, is suspicious, and requires that the new defence should be closely scrutinized. The original affidavit in the case before was evidently drawn by the plaintiff in error himself or some unprofessional friend. The defence set up in it was plainly contradicted by the written agreement. The supplemental abandons this defence and sets up a new one founded upon a reform of the contract; but, though it alleges an agreement at the time of executing the writing, it fails to allege that upon the faith of the new agreement the contract was signed. This is essential to the admission of parol evidence of an agreement to vary materially or contradict a written contract. (Miller *v.* Henderson, 10 S. & R. 290; Boyd *v.* Breece, 3 Phila. Rep. 206.) No new agreement is, however, averred, but only a promise that the payments should be arranged to the satisfaction of affiant. How this shows any defence is not explained. The subsequent

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agreement alleged to have been made by the plaintiff below to pay the expenses of putting the wall in a proper condition to build on was clearly without consideration. As to the fourteen dollars for insurance, affiant says that plaintiff charged him with it, but not that he paid it, either in account or otherwise. Taking the two affidavits together, we think they fail to make out any available defence in that clear and unambiguous manner which has always been required in such instruments.

Judgment affirmed.

PER CURIAM.

Jan. '79, 168. March 13, 1879.

Matthewson v. Wilson.

Evidence—Practice—Depositions—Auditor's notes.

The notes of the testimony of a witness taken before an auditor, without any proof of their genuineness or accuracy, are not depositions and are inadmissible in evidence as such.

Error to the Common Pleas of Luzerne County.

This was a feigned issue by Matthewson and others, lien creditors of P. W. Stockbower, against P. H. Wilson, to try the legality of a certain judgment alleged to have been confessed by Stockbower to Wilson in fraud of the plaintiff's rights.

Upon the trial, before DANA, A. L. J., notes of the testimony of Z. H. Stockbower, previously taken before an auditor who had been appointed in the case, but not sworn to by the auditor as correct, were offered in evidence by the plaintiff to contradict the defendant's testimony establishing his claim. It was proved that diligent efforts had been made to subpœna the witness, who lived over forty miles from the county-seat and out of the county, but without success. It appeared further that the witness was at the time actually within the county, but was concealing himself to avoid service of the subpœna.

The offer was objected to and ruled out by the Court, who offered however to allow the plaintiffs a continuance so as to enable them to procure the attendance of the witnesses at a future trial.

Verdict and judgment having been rendered for the defendant the plaintiffs took this writ of error, assigning as error the rejection of the evidence offered above.

S. B. Price, for the plaintiff in error.

Depositions taken on a rule to open judgment are admissible afterwards upon the trial of the issue if the witness is dead or out of the jurisdiction of the Court.

Riegel *v.* Wilson, 10 Sm. 388.
Eckman *v.* Eckman, 18 Sm. 460.

And by analogy, under the Act of 28 March, 1814, Purdon, 625, pl. 24, a deposition of this character taken before the auditor, out of the proceedings before whom this very issue arose, should certainly have been admitted. That the witness was within the county does not affect the case, inasmuch as it also appeared that he was evading the subpœna, and lived more than forty miles from the court-house.

Winton and *Brundage*, contra.

The evidence offered was not a deposition, but merely the notes taken before an auditor, who was not called to testify as to their accuracy, and hence does not come within the rule of Court in regard to depositions.

March 31, 1879. THE COURT. It was not a deposition which was offered, but the notes of the testimony of a witness taken before an auditor, without any proof of the notes. This of itself would be ample reason for the rejection of the testimony. But on looking at the rejected testimony we fail to perceive its materiality, and are of opinion that the plaintiffs in error were not injured.

Judgment affirmed.

PER CURIAM.

Common Pleas—Law.

C. P. of Lancaster County. March, 1879.

County of Lancaster v. Lancaster County National Bank.

National banks—Taxation—Bank building owned by bank, as part of its capital—When not liable to taxation for county purposes.

Where part of the capital of a national bank is invested in a building used for banking purposes, and the bank pays into the State treasury the tax of one per cent., prescribed by Act of Assembly, upon the par value of all its shares, the building cannot be taxed for county purposes, although the cashier occupies the part of the building not used for banking as a residence.

Case stated, showing the following facts:—

On January 20, 1879, the Lancaster County National Bank paid into the State treasury a tax of one per centum upon the par value of all the

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shares of said bank, having elected to collect the same from the shareholders of said bank, as provided in the Act of Assembly of March 31, 1870, § 4 (Purd. Dig. 143, pl. 97). Part of its capital and profits is invested in its bank building, situated in the Second Ward of the city of Lancaster, assessed for taxation at a valuation of $16,000. The part of the building not required for the banking business is occupied by the cashier and his family.

If the Court shall be of opinion that the said building is liable to taxation for county purposes, then judgment for plaintiff for $40, with costs; if not, then judgment for defendant, with costs; either party to be at liberty to take out writ of error, etc.

J. Hay Brown, for plaintiff.
Wm. Aug. Atlee, for defendant.

April 5, 1879. THE COURT. The question presented by the facts is, whether or not said banking building should be assessed, and the bank be compelled to pay tax upon it?

The Act of Assembly of March 31, 1870, § 4, under and by virtue of which the Lancaster County National Bank paid into the State treasury a tax of one per centum upon the par value of all its shares, declares that: "In case any bank or savings institution, as aforesaid (section 3 having stated that 'all the shares of national banks, located within this State, and of banks and savings institutions incorporated by this State, shall be taxable,' etc.), shall elect to collect annually, from the shareholders thereof, a tax of one per centum upon the par value of all the shares of said bank or saving institution, and pay the same into the State treasury, on or before the 20th day of January in every year, the said shares, capital and profits shall be exempt from all other taxation under the laws of this Commonwealth; and the law regulating the compensation of county treasurers for receiving moneys for the use of the Commonwealth, and paying over the same, is hereby extended to the cashiers of said banks and savings institutions."

This bank, as "The Lancaster County Bank," was, by its original charter, which has been revived from time to time, prior to the National Banking Act, authorized to "hold such lands, tenements and hereditaments as shall be requisite for its accommodation in the convenient transaction of its business."

It has been decided in Pennsylvania, that "a house erected as a toll-house by an incorporated canal company, and so built as to be occupied not merely as the collector's office, but as *his family residence*, is, *notwithstanding* the fact of its being the residence of the collector, and a building of some pretensions, a constituent part of the canal, and cannot be assessed for taxation under the Acts of 1834 and 1844. (Schuylkill Nav. Co. *v.* Commissioners of Berks County, 1 Jones, 202; Lehigh C. & N. Co. *v.* Northampton County, 8 W. & S. 334). That the *works* of an incorporated *gas company* are not taxable as *real estate*, for State and County purposes. (West Chester Gas Co. *v.* County of Chester, 6 Cas. 232). That a *general* statutory provision, exempting corporate property from taxation, embraced only such property as was essential in the execution of its purposes, and did not cover property held by the corporation (outside of the house in which its business was transacted), as a mere convenience. (Lehigh C. & N. Co. *v.* Northampton Co., 8 W. & S. 334; Railroad *v.* Berks County, 6 Barr, 70; Carbon Iron Co. *v.* Carbon County, 3 Wright, 251; Lackawanna I. & C. Co. *v.* Luzerne County, 6 Wright, 424; Proprietors of Meeting-house in Lowell *v.* City of Lowell, 1 Metc. 538.)

In Iowa it has been held that the personal property and assets of national banks, such as safes, office furniture, etc., are not taxable by the State. (Bank *v.* Young, 25 Iowa, 311.)

In New Jersey, that a general exemption of property of the corporation, but subjecting the stock in the hands of the stockholders to taxation, exempts the *surplus funds* and *lands* of the corporation. (State *v.* Tunis, 3 Zabr. 546.)

In Georgia, that exemption of capital stock exempts property of the company necessary to carry on business. (Railroad Co. *v.* Mayor and Councils of Rome, 14 Ga. 275.)

In Kentucky, that where the charter of a bank exempts its property from all taxation, in consideration of the annual payment of a certain percentage on its capital, property of the bank cannot be taxed, either by the State or the County. (Farmers' Bank *v.* Commonwealth, 6 Bush. 127.)

In Maryland, that the stock of a banking corporation is the representative of its whole property, and when a tax has been laid on the stock in the hands of the shareholders, the real and personal estate of the corporation becomes exempt from taxation, as to tax both the real and personal property and the capital stock would amount to a double tax, which is illegal and unjust. (Gordon *v.* The Mayor of Baltimore, 5 Gill. 231; McCulloch *v.* Maryland, 4 Wheat. 316.)

In Minnesota and New York, that the banking office and lot owned and occupied as its place of business by a national bank, is not liable to assessment and taxation as *real estate* against the bank, under laws of a State which taxes the shares of such bank at their actual value, *without reduction for real estate*. (Commissioners *v.* Bank, 23 Minn. 280; Commissioners of Rice County *v.* Citizens' National Bank, 67 N. Y. 516; Thompson's National Bank Cases, 300, 326.)

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In Connecticut, see Town of New Haven *v.* Bank of New Haven (31 Conn. 106).

And we think the same may fairly be deduced from the decision of our own Supreme Court, as it will be found reported in Everitt's Appeal (21 P. F. Smith, 216).

The case stated, or special verdict, finds that this bank has, within the time prescribed by section 4 of the Act of March 31, 1870, paid into the State treasury a tax of one per centum upon the par value of *all its shares;* that *part* of its *capital* and profits are invested in its *bank building.* It has, therefore, as is shown by the case presented, paid a tax on the shares represented by its bank building—a building necessary to carry on its business, and in which its business is actually transacted.

A banking house is one of the indispensable accessories, and is necessarily incident to the business of banking. It is true that the case stated shows the house to be one of some size and pretensions, larger than is absolutely necessary for mere banking rooms or office, and that the cashier, an officer of the bank, resides in that portion thereof which is not necessarily used for the purposes of banking. It does not appear that he pays any rent for the portion of the house he occupies.

Being of opinion that under the Act of March 31, 1870, the decisions above cited, and the facts presented in the case stated, the banking house of the Lancaster County National Bank, and the lot or piece of ground whereon the same is erected, is not subject to assessment and taxation for county purposes, we enter judgment for the defendant, with costs.

Opinion by LIVINGSTON, P. J.

C. P. of Montgomery Co. Jan. 31, 1879.

Wendell v. Simpson et al.

Arbitration—Award—Appeal by defendant "in forma pauperis"—Act of June 16, 1836—What constitutes a pauper under the Act.

Rule for leave to enter an appeal "*in forma pauperis.*"

Sci. fa. sur mortgage.

A rule of reference having been entered by the plaintiff, an award of arbitrators was filed Dec. 31, 1878, in favor of the plaintiff for $2714. On Jan. 17, 1879, the defendants filed a petition setting forth that they had a just defence to said action, but were "unable, by reason of extreme poverty," to pay the costs of an appeal, and praying that defendants be allowed to enter an appeal *in forma pauperis,* without payment of costs or entry of security.

Louis M. Childs, for the rule, cited the Act of June 16, 1836, § 28 (Purd. Dig. 86, pl. 57). This Act, after providing in what cases an appeal from an award of arbitrators may be taken, and for the payment of costs and entering security, contains the following proviso:—

"*Provided,* That if the party against whom any award shall be made as aforesaid, not being the party by whom the rule of reference was taken out, shall apply by petition to a Judge of the Court in which such action is depending, and shall therein set forth that, by reason of poverty, he is unable to pay the costs of the suit, as aforesaid, and shall make affidavit of such facts, it shall be lawful for such Judge, after due notice to the opposite party, if he shall be satisfied of the truth of the statements in such petition, to make an order that the appeal of such party in the case shall be good, although the costs shall not be paid by him, as aforesaid."

G. R. Fox, contra.

C. A. V.

March 1, 1879. THE COURT. This case has given the Court much consideration. So far as either the researches of counsel or investigation by the Court has revealed, there is no Pennsylvania case which has adjudicated or construed the 28th section of the Act of June 16, 1836. The English Chancery reports abound with cases upon the general subject, but no rule has been established, as yet, in Pennsylvania. The rule of the English Chancery, and of the English Courts generally, was that no one who could truthfully swear that he was not worth five pounds after all his debts were paid, could, by such simple asseveration, be allowed to sue or defend *in forma pauperis.* It was ruled, that it was only *prima facie* ground to admit him as a pauper, but no more; otherwise, many persons living in great splendor and luxury would be so entitled. (Per Sir JOHN NICHOLL, in Lovekin *v.* Edwards, 1 Phillimore, 183.) And HOLT, C. J., held that a parson who had a living of £20 per annum ought to be dispauperized, notwithstanding he was indebted more than his living was worth, the learned Judge saying it was no ground for allowing a plaintiff to sue *in forma pauperis,* to state that his property was mortgaged. (2 Salk. 507; 1 Adams, 127; Spencer *v.* Bryant, 11 Vesey, Jr., 49; *ex parte* Shaw, 2 Vesey, Jr., 40.) In New York, where a similar provision exists by statute, the same rule seems to prevail; and there it seems the rule was so applied, that costs, accruing before application made to defend upon this ground, were required to be paid. (Brown *v.* Story, 1 Paige, Ch. Rep. 588.) The general rule in chancery is well summed up in Daniel's Chan. Pr. 41–49 r. It is apparent that under the English rule, and the New York statute and practice, this application would fail. The party defendant is vested with a title to realty worth $5500, and costing nearly $7500. This she holds, and the process against her is *in rem,*

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and pursues this very estate. It is true that it is encumbered for more than it is worth, but it is within the English rule laid down by HOLT, C. J., in 2 Salk. *supra*, and the cases already cited. She has only now in the world, so far as the evidence discloses, but about $100 worth of personal property.

Is the English rule to be applied to our statute? I am satisfied, after much thought, that it ought not to be. The section under which this application is made, is in these words: [The Court here quoted the proviso, *ut supra*.] It will be observed that poverty of a disabling character is the requisite. The law fixes $300 as the sum which a debtor has a right to retain for his support, and I am inclined to think that when the proposed appellant has only that value in household goods, and has a family actually using such goods, that he or she is in the condition of poverty contemplated by the Act. The whole matter is intended to be left to the discretion of the Judge, upon the facts, as to whether they demonstrate poverty of the character indicated. It is very clear that if encumbered real estate, though encumbered far beyond its value, yields an income to the proposed appellant that enables him to live in a condition of comfort and elegance wholly incompatible with pauperism, the order would not be made permitting him to appeal without the payment of costs. If this real estate were a farm, either rented or cultivated by the holder of the title, and thus producing revenue, I would not make the order, although it was shown the proposed appellant had but $300 or less of other property. Nor would such order be made if the proceedings were on an ordinary mortgage. But in this case, while the plaintiff sues upon a mortgage, the mortgage was executed and delivered as security to the contractor who erected the building, and the defence alleges that the work was not properly done. This, though in form a proceeding *in rem*, involves the execution of a contract *in personam*. But it is said that the Act under consideration is repealed by the Act of May 3, 1852, § 1. (P. L. 541.) This Act provides "that the 12th section of the Act of 25th of April, 1850, shall not be so construed as to embrace executors, administrators, or other natural persons sued or suing in a representative capacity." I am unable to see that this statute repeals the provisions as to appeals *in forma pauperis*. It is only an extension of the right to appeal without the payment of costs. The two provisions can well stand together upon the principle of the maxim, "*ut res magis valeat quam pereat.*" I prefer to thus construe our Act, rather than adopt the rigid and technical rule of the English Courts, and those of New York. The right to a trial by jury is one which the spirit of our legislation and judicial decisions has always regarded with jealous care. It would seem, when poverty is made the test of inability, and the character of that poverty is to be determined by judicial discretion, that no harm can or will follow. A rigid rule must always defeat the equities of the contending parties, either plaintiff or defendant. Where one is allowed to appeal without paying costs, he becomes a pauper for all purposes connected with the case, until dispauperized, and consequently no security can be required upon the appeal.

But I am satisfied that in allowing the proposed appellant to proceed *in forma pauperis*, the Court has the power to impose terms, and in this case the terms imposed are that the defendant shall enter her appeal in five days from this date, and shall at once enter a plea, and that the case be placed on the trial list for the May special term in the order of its priority, at which time it must be tried, unless an imperative legal ground requires its continuance.

Rule absolute, upon the conditions stated.

Opinion by Ross, P. J.

C. P. No. 3. March 10, 1879.

Martin v. Smith.

Notes given for a patent right—Act of April 12, 1872—Bona fide holder of note without notice that it was given for a patent right—Effect of the surrender, induced by misrepresentation, of the note for one in which the words required by the statute are written—Suit by the holder upon the original note without possession—Want of consideration—Equity.

Rule for a new trial.

Assumpsit on a promissory note given by T. Hart Smith to Jas. H. Mearns, and by the latter sold to the plaintiff, Chas. F. Martin. By the testimony for the plaintiff, it appeared that T. Hart Smith had purchased from Jas. H. Mearns an interest in certain patent rights for the sum of $1000, for which he gave to Mearns two promissory notes for $500 each, dated June 1, 1877, at twelve months. Mearns sold one of these notes to Martin, the plaintiff, upon which the present suit was brought.

A month or more after, Mearns called upon Martin and informed him for the first time that the two notes given by Smith were given for the purchase by Smith of an interest in certain patent rights; and that he, Mearns, had since learned that a note so given was not valid unless the words "Given for interest in a patent right" were written on the face. Martin answered that if such was the case, he was willing to have those words placed upon the note, to make it valid, as it had been purchased in good faith and paid for

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in full. Mearns then proposed that Martin should take the other note still held by him, and which he had procured to be altered by the insertion of the omitted words, and which was identical in all other respects with the one sold to Martin. The notes were then, at the solicitation of Mearns, exchanged. The note at maturity, having been protested for non-payment, was put in suit.

Plaintiff declared on the note originally given to him which, as above explained, did not have those words on its face.

Defendant offered to show that the note in suit was given for patent rights purchased by him from Jas. H. Mearns, and that the patent rights for which it was given have never been transferred to him, and that the consideration therefore failing, the note in the hands of this plaintiff is subject to the equities existing between the original parties to the note.

The offer of the defendant was overruled by the Court, and the jury were directed to find for plaintiff. The jury so found.

The exclusion of this testimony and charge of the Court were assigned as reasons for a new trial.

Walter L. C. Biddle and *Charles Hart* showed cause.

Plaintiff has declared on the note originally given to him, which did not have those words on its face. A court of equity would have compelled the surrender to plaintiff of the original note by reason of the misrepresentations which led to its exchange. He can now, therefore, sue upon that note as though chancery had compelled its surrender, inasmuch as equity in Pennsylvania is enforceable through common law channels.

Gavin W. Hart (with him *David W. Sellers*), for the rule.

The consideration of the note having failed, it was subject in the hands of plaintiff to the equities existing between the original parties, T. Hart Smith and Jas. H. Mearns, by virtue of the first section of Act of April 12, 1872 (Purd. Dig. 1173, pl. 3). The plaintiff having exchanged notes his rights were to be determined by the note in his hands and by that alone.

C. A. V.

March 15, 1879. THE COURT. The plaintiff in this case, in the usual course of business, and in good faith, bought a note. He was, therefore, a *bona fide* holder for value. Subsequently and under a misrepresentation, he exchanged that note for one upon the face of which appeared the words "Given for interest in a patent right." If the *narr.* had been framed upon the last-mentioned note, doubtless it would have been error to have excluded the evidence rejected at the trial. Such, however, was not the case, and the rights of the plaintiff were exactly the same under the pleadings as though the original note, and it alone, was the subject of controversy. Under the testimony but two notes, each for $500, existed, and one of them was altered as above specified. The maker is not injured, and it would be a fraud upon the plaintiff to permit this suit now to fail for any reason which could not have affected his title to the original note.

Rule discharged.

Opinion by LUDLOW, P. J.

C. P. No. 4. March, 1879.

Wilson v. Freeman & Co., and the Executrix of Thomas R. Steel.

Fixtures—Distinction as between vendor and vendee, and landlord and tenant—What chattels annexed to freehold pass as fixtures to purchaser at sheriff's sale.

Motion to continue special injunction.

In February, 1879, the plaintiff became the purchaser at sheriff's sale of a house used as a tavern, taken in execution and sold as the property of Thomas R. Steel. These premises were fitted up with a number of fixtures appertaining to the business of selling liquor. James A. Freeman & Co., auctioneers, announced that on March 10, 1879, they would sell all the personal property of the late Thomas R. Steel remaining on the above-mentioned premises. A special injunction was obtained restraining Freeman & Co. from selling the following articles, mentioned in the auctioneers' catalogue, on the ground that they were part of the realty, viz.: beer pump, walnut bar, with copper sinks, racks, shelf, lemon squeezer, etc.; stained wall fixtures and closet; counter and desk; wall fixtures, and signs on the front; gas fixtures; lamp and awnings.

Joseph R. Rhoads, for the motion.

As to the general doctrine of fixtures see—

Elwes *v.* Mawe, 2 Sm. L. Cas. 248. Judge HARE's note.

The criterion in Pennsylvania is the intention to annex, not the character of the physical annexation.

Hill *v.* Sewald, 3 Sm. 271.
Seeger *v.* Pettit, 27 Id. 437.

A mortgagee has a right to fixtures erected after the mortgage was given as against the mortgagor or his executor.

Roberts *v.* Bank, 7 Harris, 71.
Harlan *v.* Harlan, 3 Id. 507.

John O'Byrne, contra.

The law presumes in favor of trade that a tenant who attaches fixtures to the lands intends to remove them.

Hill *v.* Sewald, 3 Sm. 274.
Seeger *v.* Pettit, 27 Id. 437.
Gibbons on Fixtures, 3, 4, 7.

In a contest between the executor and heir at law the same principle prevails.

Gibbons on Fixtures, 3 and 4.

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Mere physical attachment does not make a fixture part of the realty.

White's Appeal, 10 Barr, 252.
Voorhis *v.* Freeman, 2 W. & S. 117.
Coleman *v.* Lewis, 3 Casey, 291.

March 29, 1879. THE COURT. The question whether a chattel which has been affixed to the freehold and made part of the realty shall preserve that character or be reconverted into personal property depends upon the circumstances under which it arises. The same thing which would descend to the heir or pass to the vendee as realty may be subject to removal as personal property when claimed by a tenant or other person. As between heir and executor, and vendor and vendee, the rule with regard to what shall be considered a part of the realty is much more strict than that which exists between landlord and tenant. As between the former, annexations which are made for the benefit of trade or the more effectual prosecution of the business in which the ancestor or vendor was engaged, will be regarded as permanently annexed to the freehold, although if the question were between landlord and tenant the right of removal might be exercised.

The general right of a vendee to treat chattels annexed to the freehold as part of the freehold and not as mere fixtures stands upon the same footing as that of the heir, and between heir and executor nothing which is strongly attached to the freehold, and which cannot be removed without violence, can be removed by the executor. When chattels are so annexed to the freehold they become as between such parties incidents of the realty, and are governed by the law which regulates the realty. They are accordingly subject to dower, and descend to the heir instead of vesting in the executor. They pass, moreover, to a vendee of the land in all cases, unless expressly excepted by the terms of sale. The cases upon this subject are so fully collected in Judge HARE's learned note to Elwes *v.* Mawe (2 Sm. L. Cas. 248), that it is unnecessary to refer to them in detail here.

Applying these principles to the case in hand we are of opinion that all the fixtures mentioned in the bill, except the gas fixtures, lamp, awnings, and signs, belong to the realty, and must obey the general rule *quicquid plantatur solo, solo cedit.*

It is, therefore, ordered that the special injunction be continued as to all the articles mentioned in the bill, except those above specifically named.

Opinion by THAYER, P. J.

Orphans' Court.

April 9, 1879.

Estate of Braining Minors.

Guardian of non-resident minors—Where the Orphans' Court of this county appointed a guardian of the estate of minors resident in a foreign State, and the minors subsequently removed into another county of this State and procured there the appointment of a new guardian, the Orphans' Court here will not direct the guardian appointed by them to pay over the minors' estate to the new guardian—Guardians' triennial and final accounts—Final accounts only will be audited.

Sur petition for order upon guardian to pay over minors' estate.

On August 25, 1877, Benoni Frishmuth was appointed guardian of the estate of the minors, by the Orphans' Court of this county, they being residents of the State of New York. On December 31, 1877, he filed an inventory and account of the moneys received by him. On April 19, 1879, the petition of C. C. Mumford was presented to the Court, setting forth that, on May 15, 1878, he was appointed guardian of said minors by the Orphans' Court for the county of Wayne, Pennsylvania, where he and his wards resided, and had duly entered security. He, therefore, prayed an order upon said Benoni Frishmuth, guardian appointed by this Court, to pay over to him the balance due the said minors, appearing from his account filed December 31, 1877. The counsel for petitioner also moved for an order, that said account be placed upon the audit list, which was agreed to by the counsel for the guardian residing in this county.

Lewis Stover, for petitioner.
J. M. Meyer, for resident guardian.

April 30, 1879. THE COURT. It appears that the guardian residing in this jurisdiction was appointed in accordance with the provisions of the Act of Assembly relating to non-resident minors. He, therefore, became entitled to collect and receive all moneys belonging to his wards, whether realized from their estate situate in this or any other county of the Commonwealth, and it was unnecessary and irregular, upon the minors becoming residents of this State, to procure the appointment of another guardian. We must, therefore, decline to recognize the appointment of a second guardian and direct the payment to him of the estate of the minors, thus

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subjecting them to double costs and commissions. We are also inclined to think that the Orphans' Court of the county of Wayne, and perhaps the minors also, were misled, as the petition of the latter states they had no guardian in Pennsylvania, whereas, at that time, a guardian had been appointed by this Court. Again, even did the guardian appointed in this county desire to be relieved from the trust, we could not audit his "inventory and account." That is but a triennial account for the information of parties interested, and is never audited. To enable a guardian to be discharged, either during the minority of his wards, or upon their attaining majority, he must file in the office of the register a final account, including all the items set forth in the triennial account previously filed in the office of the clerk of the Court. This will be audited, and thus the entire management of the minors' estate will be scrutinized by the Court. (Act of March 29, 1832, Purdon 413, pl. 42.) For these reasons the petition is refused.

Opinion by HANNA, P. J.

March 17, 1879.

Sterr's Estate.

Decedents' estates—Direction to sell real estate—Equitable conversion—Election to take land as such may be manifested by matters in pais—Practice—Effect of filing replication—Where petitioner sets a cause down for argument upon bill, answer and replication, without affording an opportunity to take testimony, the effect is the same as if heard upon bill and answer alone.

Sur petition for citation, answer, and replication.

At the argument the following facts appeared: Thomas S. Sterr died November 25, 1871, leaving a will which provided, *inter alia*, as follows:—

"I give, devise, and bequeath unto my wife, C. Matilda Sterr, all my property, real, personal, and mixed, of what nature or kind soever, and wheresoever the same shall be at time of my death, during her life, and at the death of my said wife, C. Matilda, it is my desire and will that the property aforesaid shall be sold and the proceeds thereof be equally divided among my children, viz., Hartwell, Thomas J., Lavinia F., and George Henry Sterr, share and share alike."

C. Matilda Sterr died during the lifetime of the testator, his four children surviving him. On the 29th day of November, 1871, letters of administration *cum testamento annexo* were granted to Hartwell Sterr. George Henry Sterr died in October, 1874, in his minority, unmarried; Lavinia F. Sterr intermarried with the petitioner in March, 1878, and died in October of the same year, intestate and without issue; and on November 1, 1878, letters of administration on her estate were granted the petitioner. The testator, in addition to other property, died seized of certain real estate assessed at $13,000, which has not been sold as directed by the will, and of which his administrator has collected the rents, amounting to about $2500 per annum, but has rendered no account of them. An administration account was filed in 1872, but contained no charge of the rents or profits of the real estate, and was confirmed without reference to an auditor.

Albert B. Watson, the administrator and husband of Lavinia F. Sterr, deceased, filed two petitions setting forth the above facts, and praying that a citation issue to Hartwell Sterr, administrator c. t. a., commanding him to file an account of the rent and profits of the said real estate received, and to show cause why he should not furnish proper security and proceed to sell the real estate and distribute the proceeds in conformity with the will of the testator.

To these petitions the administrator filed answers, averring that he had filed his final account of the administration of the personal estate of the decedent, and that all parties therein interested had signed a certificate that they were satisfied, and desired the Court to confirm the same without audit, and that he has in his hands no personal estate of the decedent unadministered; that no conversion was effected by the will of the testator, the power to sell not having been given to any one; that shortly after his death all the children of the decedent of full age, and those not of lawful age by their guardian, agreed and elected to take the real estate of which the decedent died seized, as land, and thereupon constituted the respondent their agent to collect the rents for them, which he has done and paid to his several co-tenants or their guardians their respective shares, and that the wife of the petitioner came of age in 1873, and subsequently recognized and ratified the agreement above mentioned. To these answers replications were filed.

Geo. Bethune Adams, for petitioner.

Replications having been filed to the answers, the respondent is put to the proof of all new matter alleged.

Hengst's Appeal, 12 Har. 417.

The testator positively directs all his property to be sold and the proceeds divided among his children; this operates as a conversion, out and out, of the land into personalty.

Allison *v.* Wilson, 13 S. & R. 330.
Morrow *v.* Brenizer, 2 Rawle, 185.
M'Clure's Appeal, 22 Sm. 417.

The fact that no one is named in the will to execute the sale makes no difference under the Act of March 24, 1800 (Purd. Dig, 417.)

Bell's Appeal, 16 Sm. 498.
Acts of February 24, 1834 (P. L. 73); April 22, 1856

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(P. L. 532); and March 31, 1792, § 4 (3 Sm. Laws, 67).
Park *v.* Marshall, 4 Watts, 382.
Chew *v.* Nicklin, 9 Wr. 88.
Evans *v.* Chew, 21 Sm. 51.
Lantz *v.* Boyer, 31 Id. 328.

Accessorius sequitur naturam sui principalis, and therefore those entitled to the proceeds of the sale are entitled to the earnings of the land until the sale is made.

Leigh & Dalzell on Conversion, *48, Law Lib'y ed.
Commonwealth *v.* Forney, 3 W. & S. 358.
Beckley's Appeal, 3 Barr, 425.
Schaffer's Appeal, 10 Wr. 131.

Parties in interest, if *sui juris*, may, by joint unequivocal action, elect to take converted realty as land; but an infant cannot by any means take from it the impression of money.

Leigh & Dalzell on Conversion, *182.
Van *v.* Barnett, 19 Vesey, 102.

Neither can this change be made by his guardian for him.

Burr *v.* Tim, 1 Wh. 265.
Act of April 13, 1854, Purd. Dig. 1246.
Davis's Appeal, 10 Sm. 118.

George Henry Sterr died in infancy; therefore there could have been no election during his lifetime. By his death the status of the property became fixed, and his share went to his brothers and sisters under the intestate laws. Distributees under the intestate laws can never elect to take personalty as realty, and they could not trace a right to do this through George to the parent source, for where there is a conversion, the descent is broken and the beneficiaries take as purchasers.

An election must be by joint unequivocal action, and of such a character as to leave no doubt as to the intention.

Leigh & Dalzell on Conversion, *179.
Beatty *v.* Byers, 6 Har. 108.
Willing *v.* Peters, 7 Barr, 287.
Evan's Appeal, 13 Sm. 183.

Jacob E. Bowers, contra, presented no paper-book.

March 29, 1879. THE COURT (after stating the facts). That where real estate is ordered to be sold the parties interested may elect to take the land as such, and that such election may be manifested by matters *in pais*, is familiar law. No less so is the principle that the voidable act of a guardian may be ratified and made unavoidable by the ward upon attaining his majority, or, in case of his death before that time, by those entitled to his estate. The death of the minor and the subsequent ratification and recognition of the agreement by the sister when she became of age, were long prior to her marriage to the petitioner.

A replication having been filed March 1, 1879, counsel for petitioner on that day gave notice to the respondent's counsel that he "had ordered the case to be placed on the argument list for March," and it accordingly was argued March 17, 1879.

In general, the operation of a replication is to put the respondent to proof of the allegations in the answer not responsive to the petition, but set up by way of confession and avoidance. But where, without affording the defendant an opportunity to substantiate his answer by proof, the plaintiff sets down the cause for hearing on bill, answer and replication, the effect is the same as if heard on bill and answer alone, and the answer will be taken as true in every point. As to this the law is thus stated in Gilbert For. Rom. 45 (cited in Story's Eq. Pl. § 877): If the plaintiff, having filed a replication, "do not *move that the defendant may examine his witnesses within a definite time*, or that the cause may be set down upon the pleadings, ... and the cause be set down on bill, answer and replication, the answer must likewise be taken as true, because the plaintiff does not assign a probatory term to the defendant, and the replication alone is not a proper *litis contestatio* of the answer, unless you join issue by assigning a probatory term to the defendant."

Under the modern practice, to avoid such a result, the plaintiff should move for the appointment of an examiner, and rule the respondent to close his testimony "within a definite time."

The answers in the present case broadly assert the agreement of the parties as to the reconversion, and that the respondent has fully accounted thereunder for the rents collected. If the principle as above stated be now applied, it must follow that the petitions will have to be dismissed.

As there appears, however, to have been some misapprehension on this point, we will permit the petitioner to ask for the appointment of an examiner, and let the case proceed in the ordinary way. If this course should not be taken, we will dismiss the petitions.

Opinion by PENROSE, J.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, MAY 15, 1879.* [No. 3.

Supreme Court.

Jan. '77, 224. Feb. 19, 20, 1879.

Rickard v. North Penna. R. R. Co.

Negligence—Railroad company—Application of the doctrine of co-employés—Master and servant—Act of April 4, 1868—Construction of—Injuries to one not a passenger—Consignee of goods may place himself within the operation of the Act.

A consignee of goods in charge of a railroad company, by going upon the tracks and about the cars of the company, under the direction of its servants, for the purpose of receiving and taking away the goods consigned to him, subjects himself to the operation of the Act of April 4, 1868, and has no greater right of action against the company for injuries while thus employed than if he were a regular employé of the company.

MERCUR, WOODWARD, and TRUNKEY, JJ., dissent.

Error to the Common Pleas No. 2, of Philadelphia County.

Case, by Henry Rickard against the North Pennsylvania Railroad Company, to recover damages for personal injuries, caused by the alleged negligence of the defendant. Plea: "Not guilty."

Upon the trial, before HARE, P. J., the following facts appeared: The plaintiff went to the station at Sellersville, on the line of the defendant's road, to receive and take away some wood-piping, which had been sent to that place for him on the cars of the defendant. The piping was in a box car, standing on a siding off the main track. A companion of the plaintiff testified: "The agent of the company showed us where the pipe was. Rickard went into the cars to hand the pipe out to me, and I loaded it into a wagon." While so occupied, a number of cars were shunted on to the siding, striking the box car, and inflicting the injuries complained of.

The defendant offered no testimony.

Verdict for plaintiff, subject to the following point reserved, viz.: "Whether the plaintiff, by reason of his being on the premises of the defendants in the manner and for the purposes detailed in the evidence—that is to say, goods having been shipped to him, and he calling for them, and being directed by the defendants' servants to the car on which they were placed, which, standing on the siding, was unlocked, and being, with the defendants' permission, lawfully employed in getting them out for himself—is precluded from recovery against the defendants, by the provisions of the Act of April 4, 1868 (P. L. 58)."*

The Court in banc entered judgment in favor of the defendant upon the point reserved, whereupon the plaintiff took this writ, assigning for error, the refusal of the Court to enter judgment upon the verdict.

R. C. McMurtrie (with whom was *Lewis D. Vail*), for the plaintiff in error.

It was decided in Catawissa R. R. Co. *v.* Armstrong (13 Wr. 186), that where a person in the employ of one railroad company was injured by the cars of another company, who had the right to run their trains on the other road, the person so injured was not precluded from recovery on the ground that he was in the same general employ with the servants of the company whose cars caused such injury. It is probable that the Act of April 4, 1868, was passed in view of this decision.

Mulherin *v.* Del., Lack. & West. R. R., 31 Sm. 366.

If so, the legislative meaning of the words "engaged or employed" seems clear.

Two companies using the same road-bed have one switchman. Before the Act of 1868, the injured switchman would have had greater rights against the licensed company than against the employing company. To remedy such a defect as this, the Act was passed.

Rickard did not "voluntarily assume the relation," thereby, in the language of Chief Justice AGNEW in Kirby *v.* Penna. R. R. Co. (26 Sm. 506), "voluntarily placing himself within the operation of the Act." The law compelled him to go upon the tracks and about the cars in order to receive his goods. The consignee of goods in charge of a common carrier must take notice of the arrival of his goods, else the common carrier becomes a warehouseman.

M. & E. R. R. Co. *v.* Ayres, 5 Dutcher, 393.
Thomas *v.* B. & P. R. R. Co., 10 Met. 472.
McCarty *v.* N. Y. & E. R. R. Co., 6 C. 247.
Shenk *v.* Phila. S. Propeller Co., 10 Sm. 109.

The real ground of distinction is this: Was the plaintiff a servant of the defendant, or an assistant of a servant, or a mere licensee, or a mere volunteer? In all these cases he could not claim for any negligence, for they owe him no duty. But if invited by the company to come on their premises in the course of their business, then they do owe the duty. And a consignee assisting to

* This Act provides: "That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in and about any train or car therein or thereon, of which company such person is not an employé, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employé. *Provided*, that this section shall not apply to passengers."

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unload his goods with the consent of the company is in that position.

Holmes *v.* North Eastern R. R. L. R., 4 Ex. 254, 6 Ex. 123.

Wright *v.* R. W. L. R., 10 Q. B. 228, affirmed in 1 Q. B. Division, 252.

It was servants of the companies running joint roads that were intended. It is unreasonable to suppose that persons requested to come on their premises for the convenience of the company and in aid of their business, should be excluded from all rights to be treated with care. The intention of the Legislature was to put all employés of railroad companies using a road in common, on the same footing, and not to put the public, who in the course of business must go upon a railroad, in the position of assuming the risk of employés. If the defendants' interpretation of the Act is correct, this Court must decide that in the State of Pennsylvania a railway company is not liable for the grossest negligence, except the person injured be a passenger.

Wm. Rotch Wister (with whom was *J. McGregor Gibb*), for the defendant in error.

The words of the Act are very comprehensive and general. Rickard went upon the car voluntarily, and with the company's permission; he was, therefore, lawfully "engaged or employed" there. The meaning of these words appears unequivocally in the Act. The Act must be construed according to its plain import.

Dwarris on Statutes, *703.

Mulherin *v.* Del., Lack. & West. R. R. Co., 31 Sm. 366.

The Act was construed in the manner which we now contend for in the Kirby *v.* Penna. R. R. Co. (26 Sm. 506); and the precise point was viewed in an opposite light from that which the C. P. No. 2, took in this case, in an opinion recently delivered by the President Judge of C. P. No. 3, in Gerard *v.* Penna. R. R. Co. (5 WEEKLY NOTES, 251).

[SHARSWOOD, C. J. Was no opinion delivered in this case by the Court of C. P. No. 2, on the point reserved?]

None was delivered.

[SHARSWOOD, C. J. This Court has said before that whenever a decision is made on a point reserved, it should be accompanied by a written opinion.]

The principle involved in this Act has been enunciated outside of our own State.

Wyatt *v.* Gt. West. R. R. Co., 6 Best & Smith, 2 B. 709.

Cruty *v.* Erie R. W. Co., 3 Thomp. & Cook, 244.

It was the duty of the company to have delivered the goods to the consignee.

Shenk *v.* Phila. Steam Propeller Co., 10 Sm. 109.

Morris & Essex R. R. Co. *v.* Ayres, 5 Dutcher, 393.

The action of the servant in permitting Rickard to go upon the car was outside the scope of his authority; the company could not be bound by his wrongful act.

Towanda Coal Co. *v.* Heeman, 6 WEEKLY NOTES, 292.

March 10, 1879. THE COURT. Whatever else may be said of the Act of April 4, 1868 (P. L. 58), the charge of obscurity cannot be brought against it, neither can it be said that the legislative intent is not expressed with sufficient force. "When any person shall sustain personal injury or loss of life, while lawfully engaged or employed, on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employé, the right of action and recovery in such cases against the company shall be such only as would exist if such person were an employé."

Nothing can be more clear than the intent herein expressed; this Act includes "any person," old or young, male or female; yet care is, at the same time, taken by the use of the words "lawfully engaged" to exclude any possible presumption, which otherwise might arise in favor of a trespasser. Then again the comprehensive words "engaged or employed" are used in order to embrace every imaginable manner by which any one may or might be brought in, upon, or about the roadway, cars, or works of a railroad company. Nor is the proviso itself without significance as to the intent of the body of the Act, for the sweeping character of the preceding provisions is recognized in that a specific exemption in favor of passengers was regarded as necessary.

There is no room for doubt, therefore, that this Act does take up the plaintiff's case. He was "lawfully engaged" on the car of the company defendant in unloading his own goods. He might have waited until they were deposited by the company's servants upon the platform, or in the warehouse, when he might have received them without risk; he, however, voluntarily preferred to put himself in the position, and assume the duties of an employé, and so has brought himself directly within the provisions of the statute. In the language used in the case of Kirby *v.* The Penna. R. R. Co. (26 P. F. S. 506), he knowingly assumed the relation regulated by law, and thus placed himself under the operation of the law which governs that relation.

The judgment is affirmed.

Opinion by GORDON, J. MERCUR, WOODWARD, and TRUNKEY, JJ., dissent.

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Jan. '78, 184. Jan. 15, 1879.

Seyfert, McManus & Co. v. Lowe.

Bills and notes—Additions to name of indorser—When an agent acts for an undisclosed principal.

The rule that an addition to the signature of an indorser to a promissory note (*e. g.*, the word "President") will not exempt the indorsee from individual liability, does not extend to cases where the note remains in the hands of the original indorsee, who took it in payment of a debt due by a company of which the indorser was President, and with full knowledge that the indorsement was intended to be the contract of the company.

In an action upon a promissory note brought by the indorsee against the indorsers, the defendant filed an affidavit of defence setting forth "that the note was given to the People's Gas Company, of which I am President, and indorsed by me as President, and given to the plaintiff in payment of a debt due by the company:"

Held (affirming the judgment of the Court below), that the affidavit was sufficient.

Error to the Common Pleas No. 2, of Philadelphia County.

Assumpsit, by Seyfert, McManus & Co., against T. S. Lowe, upon the following promissory note:—

$688 $\frac{97}{100}$ Philadelphia, Nov. 29, 1876.

Three months after date, I promise to pay to the order of T. S. Lowe, Pres't, six hundred and eighty-eight $\frac{97}{100}$ dollars, without defalcation or discount, value received.

I. C. THOMPSON.

Indorsed, T. S. LOWE, *Pres't.*
Duly protested.

The defendant filed an affidavit of defence, suggesting that the copy of note filed is not such as would entitle the plaintiff to a judgment for want of a sufficient affidavit of defence; and averring that "the note sued upon was given to the People's Gas Company of Norristown, of which I am President, by I. C. Thompson, the maker, and by me as said President indorsed, and given to the plaintiffs, in payment of a debt due by said People's Gas Company to said plaintiffs."

The Court below discharged a rule for judgment, for want of a sufficient affidavit of defence (reported 4 WEEKLY NOTES, 560), whereupon plaintiffs took this writ, assigning for error the action of the Court.

Theodore F. Jenkins, for plaintiffs in error.

The indorsement of Lowe did not bind the gas company, because he did not state that he was acting as their agent. An agent acting for an undisclosed principal, renders himself responsible.

1 Add. Contr. § 82.
Thomas *v.* Davenport, 2 Sm. Lea. Cas. 380.
Tassey *v.* Church, 4 W. & S. 346.
McClure *v.* Bennet, 1 Blackf. 189.

The plaintiffs accepted the note in payment of a debt due by the Gas Company; the company's liability was thereby discharged; if now the indorser is not liable, from whom can we recover?

Francis D. Lewis (*Morgan*, with him), for defendant in error.

The plaintiffs took the note with a full knowledge that the indorsement was the contract of the company; there is nothing, therefore, to create an individual liability on the part of the defendant.

1 Pars. Bills, 95.
Mott *v.* Hicks, 1 Cowen, 513.
Roberts *v.* Austin, 5 Wh. 313.
Sharpe *v.* Bellis, 11 Sm. 69.

March 3, 1879. THE COURT. This writ of error was taken to the refusal of the Court below to enter judgment against the defendant for want of a sufficient affidavit of defence.

The note in controversy was signed by I. C. Thompson, as maker, and was payable to the order of T. S. Lowe, President, and indorsed by him as President. The suit was against Lowe individually. It is true, the mere addition of the word President after the name of the indorser, without designating the company of which he was the President, and which he intended to bind by his indorsement, would not avail for such purpose as to strangers.

But the affidavit of defence avers that "the note sued upon was given to the People's Gas Company of Norristown, of which I was President, by I. C. Thompson, the maker, and by me as said President, indorsed and given to the plaintiff in payment of a debt due by said People's Gas Company to said plaintiffs." While this averment is not as specific as it might have been, we are not prepared to reverse the Court below for holding it sufficient, especially in view of the fact that the only effect of our ruling will be to send the case to a jury. The plaintiffs were dealing with the Gas Company when they took the note from T. S. Lowe. They received it in payment of a debt due from the Gas Company, and therefore must have known that the indorsement of the note by the President was the indorsement by the company.

The order of the Court below discharging the rule for judgment, is affirmed.

Opinion by PAXSON, J.

Jan. '77, 17. Jan. 6, 1879.

Anderson, Administrator, v. Henzey.

Trusts and trustees—Testamentary trusts—Jurisdiction of the Court of Common Pleas—Act of June 14, 1836—Mortgage—Payment of the principal to a trustee duly appointed by the Common Pleas—Protection of the mortgagor and terre tenant upon the flight of the trustee.

The Act of 1836 did not take away the jurisdiction of

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the Court of Common Pleas over testamentary trusts where that jurisdiction had once vested.

In 1826 a testator devised certain property in trust to executors named in the will. The Court of Common Pleas, during a period of more than forty years, upon petitions of the parties in interest, appointed trustees in place of those discharged. One of the trustees, who was also administrator *d. b. n. c. t. a.*, invested the funds in a mortgage made to him as administrator. The last trustee appointed by the Common Pleas, and confirmed by the Orphans' Court collected the principal of the mortgage, and having paid the interest for several years to the cestuis que trustent, absconded, failing to account for the principal:

Held (affirming the judgment of the Court below), that under the circumstances of the case the trustee was duly authorized to receive the mortgage, and that the defendant ought not to be compelled to pay a second time.

PER CURIAM. Since the Act of 1836 it is the safest course in all cases of testamentary trusts to invoke the aid of the Orphans' Court.

Error to the Common Pleas No. 3, of Philadelphia County.

Scire facias sur mortgage by John H. Anderson, administrator *d. b. n. c. t. a.* of William Hyneman, deceased, against Marshall Henzey, with notice to William J. Thomason, terre tenant. The mortgage was made Dec. 13, 1851, by Marshall Henzey to John Livensetter, administrator *d. b. n. c. t. a.* of William Hyneman, to secure the payment of $2150.

William Hyneman died December, 1826, leaving a will by which he gave his wife a legacy of $400, to be paid to her in quarterly payments during her life, the remainder of his estate to his executors in trust for his three sisters during life, and upon their decease remainder over in fee to their children share and share alike. He then nominated his wife and Caleb Carmalt as executors. The latter acted as sole trustee under the will until October 21, 1835, when he declined and Christian Schrack was appointed trustee in his place by the Court of Common Pleas. Schrack was in turn succeeded by Henry Mecke as trustee, who served until February 7th, 1846, when John Livensetter was appointed trustee in his place by the Common Pleas. Hannah Collard, widow of the decedent, continued to act as executrix until February 4, 1847, when she was discharged and Livensetter was appointed administrator *d. b. n. c. t. a.*, who, while so acting, invested in this mortgage. On petition of the sisters, William B. Hood was appointed trustee in place of Livensetter June 19, 1852, by the Common Pleas, which appointment was afterwards confirmed by the Orphans' Court. Thomason, the terre tenant, paid Hood the principal of the mortgage May 30, 1857, upon which Hood entered satisfaction, and continued to pay the interest accruing upon the mortgage until the year 1868, when he left the State, having failed to account to the cestuis que trustent for the principal of the mortgage. The case was tried in the District Court November, 1870, when a verdict was entered for the plaintiff on a point reserved. Subsequently a rule for a new trial was granted, and it came before the Court in the form of a case stated.

HARE, P. J., in the District Court, delivered the following opinion:—

"This is an action of sci. fa. sur mortgage. In the year 1852, William B. Hood was appointed trustee under the will of William Hyneman, deceased, by the Court of Common Pleas, and this appointment was confirmed by the Orphans' Court in May, 1856. During the interval he collected a mortgage belonging to the estate, but failed to account for the proceeds to the cestuis que trustent. It is now alleged that the Common Pleas exceeded their jurisdiction in making the appointment, and that the payment to the trustee being consequently invalid, did not extinguish the debt. The present suit is brought by an administrator *de bonis non* to test this question. The point was reserved at the trial, and the evidence on both sides has since been reduced to a case stated.

"It is established under the authorities, that the jurisdiction of the Court of Common Pleas and Orphans' Court is concurrent as it regards testamentary trusts, unless they are conferred on the executor as such or *virtute officii*. (Brown's Appeal, 2 Jones, 337.) That the same person is designated as executor and trustee, is not enough to exclude the authority of the former tribunal; it must also appear that if he ceases to be executor, he cannot act as trustee. (Wheatley *v.* Badger, 7 Barr, 459.) In other words, the testator must have intended that in the event of a renunciation of the former office, both should devolve on the administrator *d. b. n. c. t. a.* Can such an inference be drawn in the present instance? To answer this question, we must have recourse to the will. The material words of that instrument are as follows:—

Item.—I do give, devise, and bequeath unto my executors, hereinafter named, all the rest, residue, and remainder of my estate, whatsoever and wheresoever, including what may be added thereto, by the reversionary interest of the property from which my wife's legacy is to arise, and including all moneys in the house or to my credit in bank at the time of my decease. To hold to them, their heirs, executors, administrators, and assigns, in trust and special confidence to make leases of the real estate, and convert the personal estate into money, and place the same out at interest, secured by bond, warrant, and mortgage, on good and sufficient real estate, during all the term of the joint lives of my three sisters, Mary Young, Elizabeth Sweeney, and Sarah Mills, and during all the term of the natural life of the survivors and survivor of them, and to receive the rents, issues, and profits, interest and income thereof, and pay and apply the same when and as received—

First. To the payment of all taxes and necessary repairs, to the premises, and in the next place, to pay over the net surplus thereof, in equal third parts, unto my said

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three sisters, during all the term of their joint lives, for their own sole and separate use, respectively, so, nevertheless, that the same shall not be in the power, nor in anywise subject to the debts, contracts, or engagements of their husbands, respectively, or of any future husband that either of them may marry, and that their receipts, respectively, shall, notwithstanding any coverture, or whether they be covert or sole, be always deemed and be taken to be good and valid discharges in law, for the share or shares to which they are respectively entitled, and from and immediately after the decease of either or any of my said three sisters, then I do order and direct, that the part and share of each of them so dying, shall go, and I do hereby order and direct, that the same shall be appropriated for and towards the education, maintenance, and support, of all and every the child or children of such of them, my said sisters, as so die, born, and to be born, until the time hereinafter appointed for the final division of my estate. . . . . And lastly, I do hereby nominate, constitute, and appoint, my said wife, Hannah Hyneman, and my friend, Caleb Carmalt, of the city of Philadelphia, conveyancer, to be executors of this my last will and testament, hereby revoking all other and former wills and testaments by me at any time heretofore made. I do declare this, and this only, to be and contain my last will and testament, and as such, desire that it may be executed by my friend, James Carmalt, brother of said Caleb Carmalt, in the case the latter shall happen to die before the same is carried into full and complete effect.

In witness whereof, I have hereunto set my hand and seal, this seventeenth day of September, in the year of our Lord one thousand eight hundred and twenty-two (1822).

W. HYNEMAN. [SEAL.]

"Is there anything in this language to intimate that the testator meant the trust to be inseparably linked with the executorship? He undoubtedly selected his wife and Caleb Carmalt as the fittest persons for both offices, but it would be too much to infer from this circumstance that he intended they should not administer the estate, unless they also accepted the trust. On the contrary, the fair deduction is, that, while he hoped and believed that they would consent to be trustees, as well as executors, it was not his design to make this a condition. If one was willing to act as trustee and the other as executor, there would be a nearer approach to the fulfilment of his purpose, than by entrusting the management of the estate to a stranger. This conclusion is strengthened by the nature of the trust, which concerned the real estate, and imposed numerous duties that could not properly be brought into an administration account. It was accordingly treated as severable from the outset, with the tacit consent of the parties in interest. Letters testamentary were granted in December, 1826, to Caleb Carmalt and Hannah Hyneman, but she did not accept or enter on the fulfilment of the trust, and Carmalt acted as sole trustee until October, 1835, when he declined, and Christian Schrack was appointed in his stead by the Court of Common Pleas. Schrack gave place to Mecke in 1844, who administered the trust until he was finally superseded by William B. Hood. Hannah Hyneman continued to act as executrix for many years, and was finally discharged upon the occasion of her second marriage, in 1847. We are now asked to say that these appointments and decrees, and the acts done under them, were not only irregular, but void, and that the defendant must pay the penalty of an error which he is alleged to have shared with every one who was concerned in the administration of the estate as judge, counsel, trustee, executor, legatee, or debtor.

"Such a conclusion obviously should not be entertained, unless as the result of a legal necessity from which there is no escape. If there were no other way, we might rely on the maxim, "*Contemporanea expositio fortissima est in lege.*" (The Attorney General *v.* Parker, 3 Atkyns, 577; The Bank of England *v.* Anderson, 3 Bingham's New Cases, Com. Pleas, 666; 2 Smith's Leading Cases, 518, 5th ed.) It should be remembered that the question of jurisdiction depends primarily on the intention of the testator, as disclosed in his will, and we should be slow to disregard the construction which was given universally to that instrument at the time. Laying this aside, and treating the subject as *res integra*, it is sufficiently clear, under the authorities, that this was a distinct and collateral trust, which might be exercised independently of the executorship, and if so, the Court of Common Pleas had jurisdiction.

"Judgment is entered for the defendant on the verdict and under the case stated."

This judgment was reversed on a writ of error to July Term, 1872, No. 41. Subsequently the case stated was withdrawn, a rule for a new trial was granted, and the case went again to the jury.

LUDLOW, P. J., said: "I adopt the opinion of Judge HARE in this case in whole and in part, and say to you that under the evidence your verdict should be for the defendant."

Verdict accordingly for the defendant.

The plaintiff took this writ of error, assigning as error the direction of the Court to the jury to find for the defendant upon the evidence.

F. F. Brightly (with whom was *Thomas Greenbank*), for the plaintiff in error.

Hood was incompetent to collect the mortgage given to Livensetter as administrator. Anderson alone, the succeeding administrator, had the right to collect the principal.

Act of Feb. 24, 1834, § 31, P. L. 77, Purd. Dig. 425.

The administrator *d. b. n. c. t. a.* can alone maintain an action to recover the assets of the estate remaining in the hands of a dismissed administrator.

Commonwealth *v.* Strohecker, 9 Watts, 479.
Commonwealth *v.* Barnitz, 9 Id. 252.

The Common Pleas, by the terms of the will, had no authority to appoint a trustee, and Hood's appointment was invalid.

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The proviso to the Act of June 14, 1836, § 15 (P. L. 632; Purd. Dig. 1417), gave the Orphans' Court exclusive jurisdiction over trusts created by will and vested in executors or administrators, either by the words of the will or by operation of law. Where the trust is vested in executors or administrators virtute officii, the Orphans' Court has exclusive jurisdiction.

Wapples's Appeal, 24 Sm. 104.
Heron *v.* Hoffner, 3 Rawle, 393.
1 Sugden on Powers, 143.

After the passage of the Act of 1836, the appointment of a trustee by the Common Pleas was absolutely invalid.

Thomason, the terre tenant, was guilty of laches or collusion in paying the principal of the mortgage to Hood. Before tendering payment he was bound to see that Hood was authorized to receive the principal.

Wood *v.* Maitland, 5 Leg. Gaz. 348.
McMurtrie *v.* The Penna. Co., 29 Leg. Int. 108.

John K. Valentine (with whom was *Charles Gilpin*), contra.

The question is whether an innocent party is protected who has paid to a trustee duly appointed by the Common Pleas, whose jurisdiction the parties in interest themselves have invoked. The fallacy of the argument on the other side lies in treating the estate as not having been settled; whereas, in point of fact, Livensetter derived no assets from his predecessor. It was a trust estate, and the Common Pleas for more than forty years appointed trustees under the will, of whom the last was confirmed by the Orphans' Court. It is well established that where a testamentary trust is vested in executors *nominatim*, the Court of Common Pleas has jurisdiction.

Wheatly *v.* Badger, 7 Barr, 461.

The trust was a permanent and continuing one. It was not to be executed by executors, but by the executors hereinafter named. Therefore the trusts, as they were distinct from the duties of the administrator, are within the jurisdiction of the Common Pleas.

Apple's Estate, 2 Phil. 171.

The cestuis que trustent are estopped from claiming repayment of the money received by Hood as trustee because he was appointed at their suggestion.

Hill *v.* Epley, 7 Casey, 334.
Pickard *v.* Sears, 6 A. & E. 474.

The terre tenant is protected by the exercise of the right of appointment by the Common Pleas.

Hassler's Appeal, 5 Watts, 176.
Johnson's Appeal, 9 Barr, 424.

January 20, 1879. THE COURT. It will not be necessary in this case to determine the exact line of demarcation between testamentary trusts vested in executors *nominatim* in which the Courts of Common Pleas and the Orphans' Courts have concurrent jurisdiction (Brown's Appeal, 2 Jones, 333), and where they are such trustees virtute officii, in which the jurisdiction is exclusively in the Orphans' Court. In 1835, when proceedings in equity under the Act of 14th April, 1828, were instituted in the Common Pleas, and Christian Schrack appointed trustee, that Court had undoubted jurisdiction. Schrack continued amenable to that Court. The Act of 1836 did not take away the jurisdiction, which had once vested. It follows that it could supply his place on his death or discharge. The parties had voluntarily placed this trust estate under the guardianship of that Court, and it would require express provision to divest its jurisdiction. It does not follow that the parties, after 1836, might not have abandoned that tribunal and resorted to the Orphans' Court. Indeed, since the Act of that year, it is the safest course in all cases of testamentary trusts to invoke the aid of the Orphans' Court. Here for more than thirty years the parties in interest considered this estate to be within the jurisdiction of the Common Pleas, and when a question was raised in 1866, the Orphans' Court, on the petition of the trustee appointed by the Common Pleas, confirmed his appointment. When the mortgage in question was given, Livensetter was both trustee by appointment of the Court and administrator. He died in 1852, and Hood was appointed trustee. From that time to 1866 Hood received the interest on the mortgage as part of the trust funds, and paid it over to the cestui que trust. No administrator de bonis non was raised till 1870, eighteen years after Livensetter's death. We think that, under all the circumstances of the case, Hood was duly authorized to receive the money on the mortgage, and these defendants ought not to be compelled to pay it a second time.

Judgment affirmed.

PER CURIAM.

Oct. & Nov. '78, 172. Nov. 13, 1878.

School District of Wilkins Township v. Milligan.

Statute of frauds—Interest in land—Parol contract for sale and abandonment of building erected by permission for special purposes upon land of another.

A school district had the privilege of occupying for school purposes certain ground belonging to M., who verbally agreed to pay, and the school board agreed to receive, a specified sum for the school house which for twenty-five years had stood upon his land, upon condition that the school board would not condemn his ground for the erection of a new school house, but would abandon his

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land and build elsewhere. In an action by the school district to recover from M. the amount he agreed to pay:

Held, that the contract was not within the statute of frauds; that the sale of the house to M. was a deliberate indication of an intent to abandon the property for school purposes; that it was not the deed of the school district that was necessary to execute the contract but its act of abandonment, and upon abandonment the property immediately reverted to the owner of the fee, and the matter became absolute, conclusive, and irrevocable; that therefore the school district was entitled to recover.

Error to the Common Pleas No. 1, of Allegheny County.

Assumpsit, by the school district of Wilkins Township against Robert Milligan to recover the price of an old school house sold by the plaintiff to the defendant.

At the trial before BAILEY, J., the following facts appeared: The lot on which the school house was built belonged to the defendant subject to occupation and use by the plaintiff only so long as used for school purposes. More room becoming necessary the school board appointed a committee to buy a piece of ground from the defendant, and if he were not willing to sell, to sell the old building to him, and see about purchasing ground elsewhere. The defendant declined to sell any ground, but referred the committee to his son, who acting as his father's agent, entered into a parol agreement with them to purchase the old building for $650, on condition that the school board would not condemn his father's property for the additional ground needed, but would leave his father's land, and get ground elsewhere for the new building; and he paid $10 down on account of the purchase.

The board, having built a new school house elsewhere, abandoned the old house and lot, and brought this suit to recover the balance of the purchase-money, with interest.

The jury rendered a verdict in favor of the plaintiff for $785, subject to the opinion of the Court in banc as to whether the contract was within the statute of frauds. Subsequently the Court entered judgment on the reserved question in favor of the defendant *non obstante veredicto;* whereupon the plaintiff took this writ, assigning the judgment for error.

W. L. Chalfant, for the plaintiff in error. The school district had merely a license or privilege to use defendant's ground for school purposes. A license or privilege to be exercised upon land is not within the statute of frauds.

Woodbury *v.* Parshley, 7 N. H. 237.
Ameriscoggin Bridge *v.* Bragg, 11 N. H. 102.
Prince *v.* Case, 10 Conn. 375.
Keyser *v.* School District, 35 N. H. 477.

Improvements made upon land do not constitute an interest in the land, and a parol promise to pay for them is not within the statute of frauds.

Spencer *v.* Darlington, 24 Sm. 286.
4 Kent Com. *450.
Brown on Statute of Frauds, sec. 233.
Frear *v.* Hardenbergh, 5 Johnson (N. Y.), 272.
Lower *v.* Winters, 7 Cowen, 265.
Bostwick *v.* Leach, 3 Day (Conn.), 476.

The true test is, has the party selling any *assignable* interest in the land. If not the case is not within the statute.

Whittemore *v.* Gibbs, 4 Foster (N. H.), 484.
Evans *v.* Roberts, 5 Barn. & C. 829.
Beegle *v.* Wentz, 5 Sm, 369.

This action is founded on defendant's promise to pay $650, in consideration that plaintiff would not condemn his land for school purposes. There was no transfer of any right, only an agreement not to exercise a right.

There was no necessity for a deed. Upon abandonment by plaintiff, the property *by operation of law* vested in defendant.

The contract was wholly performed by the plaintiff. They did not condemn defendant's ground, but built elsewhere.

John Dalzell (with him *John H. Hampton*), contra. Plaintiff had a base, qualified, or determinable fee in the land.

2 Blackstone Comm., Ch. 7.
Walsingham's Case, Plowd., 557.
1 Washburne on Real Property, 67, 77.
State *v.* Brown, 3 Dutch. 20.
Scheetz *v.* Fitzwater, 5 Barr, 126.

It was an estate which by possibility might endure forever. Its endurance depended upon whether plaintiff saw fit to maintain a school house there. The object of the contract was to determine the condition of the grant.

Plaintiff's interest was capable of assignment to anybody willing to use the land for school purposes.

If it was only a lease it is still within the very language of the statute, and so if it was merely a license. An executed license on the faith of which expenditures have been made gives absolute rights.

Huff *v.* McCauley, 3 Sm. 206.

There is a broad distinction between licenses to be exercised upon land which may be granted by parol, and such as amount to leases and require a writing.

Browne on Statute of Frauds, sec. 28.
Cook *v.* Stearns, 11 Mass. 533.

Contracts *about land*, if more is meant than a lease for three years, must be in writing.

Moore *v.* Small, 7 Harris, 465.
Washabaugh *v.* Entriken, 10 Casey, 74.
Shoofstall *v.* Adams, 2 Grant. 209.
Henry *v.* Colby, 3 Brewster, 171.
Galbreath *v.* Galbreath, 5 Watts, 146.
Pattison's Appeal, 11 Sm. 294.
Yeakle *v.* Jacob, *et al.*, 9 Casey, 376.

As to the land vesting in defendant upon abandonment "by operation of law," the abandonment was to result from the contract.

The agreement has never been performed by plaintiff. An abandonment has not been testified to or found, and so far as the evidence goes plaintiff's title is as good as it ever was.

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January 6, 1879. THE COURT. It appears from the evidence in this case, that for some twenty-five or thirty years the school district of Wilkins Township had occupied, for school purposes, a small lot of ground belonging to Robert Milligan, the defendant. A one-story brick school house had been erected thereon by the district, and used for the period above stated.

In the year 1874 the directors, considering it necessary to build a new and larger house, applied to the defendant in order to purchase from him, for this purpose, a lot of ground including the old site. He peremptorily refused to sell at any price. The committee who were appointed to wait upon him, then proposed to sell him the old house; he answered by referring them to his son John, a member of the Allegheny County Bar. They afterwards had an interview with John, which resulted in a sale to him, as agent for his father, of the old house for the sum of six hundred and fifty dollars; they agreeing, on the part of the school board, to withdraw from the property, and get a lot elsewhere on which to build the new school house. John, at that time, insisted on paying to the committee ten dollars, as an earnest of the bargain. This contract was duly reported to the board, was approved and recorded in the school book. Afterwards another location was selected, a new house built, the old house and lot abandoned, and thus surrendered to the defendant. All this seems very plain and unambiguous, and on the matter being submitted to the jury, a verdict was returned for the plaintiff. The Court, however, reserved a point put by the defendant, which point reads in this wise: "Taking all the evidence in the case, on the plaintiff's part, to be true, the contract proven is within the statute of frauds, and the plaintiff cannot recover." On this reserved point the Court entered judgment for the defendant *non obstante veredicto*. Our question then is, was this contract within the statute of frauds; was a deed from the directors to Milligan necessary to the execution of the agreement between these parties? This leads us to inquire what the bargain was about; what the school board had to sell, and what Milligan bought. For if the contract could not be executed without a deed from the directors, the judgment of the Court was right; but if it could be fully executed by a withdrawal by the school board from the premises, then the Court was wrong, and judgment should have been entered on the verdict for the plaintiff.

Now, according to the affidavit and admissions of the defendant, he was the owner in fee of the lot in question, and the school district entered and built its house, under a mere parol license that it should have the occupancy of it only so long as it was occupied for school purposes. Without stopping to consider whether the minutes reciting and approving the sale of the house, entered upon the school book, would or would not be a sufficient note in writing under the statute, we may ask, What had the district in the property that required a writing of any kind in order to transfer it to Milligan? It had the old house; it had the right by permission of the owner to occupy the lot on which the house stood as long as it was used for school purposes; but the very moment the school district abandoned the house and lot, that moment this property reverted to the owner of the fee, and there was nothing left in the district upon which its deed could operate. What then has the statute to do with this case?

The board sold the old house to Milligan, which in itself was a deliberate indication of an intent to abandon the property for school purposes, and the matter was made absolute, conclusive, and irrevocable, by the withdrawal of the board from the possession of the premises, thus leaving Milligan the sole and absolute owner and occupant. Thus we see that it was not the deed of the district that was necessary to execute the contract, but its act of abandonment. That the defendant bargained for, and that he got; that gave him all the district ever had, all it did or could sell to him, and nothing now remains for the entire fulfilment of this contract but the payment of the money by the defendant.

The judgment is reversed and set aside, and it is ordered that judgment be entered on the verdict for the plaintiff.

Opinion by GORDON, J. WOODWARD, J., absent.

Jan. '77, 98. Jan. 7, 1879.

Finney v. Huston.

Practice—Scire facias to revive judgment, issued by plaintiff's administratrix—Omission to suggest plaintiff's death, when cured by pleading over.

A. entered judgment against B. A scire facias to revive this judgment was issued by his administratrix, but no suggestion of his death appeared on the record. B. pleaded payment with leave, etc., and judgment was, in due course, obtained by the plaintiff in the sci. fa.

Held, that the judgment was properly entered, notwithstanding the plaintiff's failure to suggest her intestate's death, as her right to sue was admitted by B.'s plea.

Error to the Common Pleas No. 3, of Philadelphia County.

Scire facias to revive a judgment. Judgment on a single bill was entered by Samuel Huston against Finney; subsequently a scire facias to revive the judgment was issued at the instance of

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"Annie Huston, administratrix of the estate of Samuel Huston, deceased," against Finney, with notice to the terre tenant. The defendant pleaded payment with leave, etc.

Verdict and judgment for the plaintiff. The defendant and terre tenant took this writ, assigning for error the entry of judgment, when, *inter alia*, the record did not show any suggestion of Samuel Huston's death, or any substitution of an administratrix.

H. Budd, Jr. (with him *Manderson*), for the plaintiff in error.

R. R. Croasdale, contra.

Jan. 20, 1879. THE COURT. In the Court below judgment was entered on a single bill in favor of Samuel Huston against Charles Finney. A scire facias was issued by Annie Huston, administratrix of Samuel Huston, to which the defendant pleaded payment with leave. The error now assigned is that the record does not show any suggestion of the death of Samuel Huston. But the defendant's plea admitted the right of the plaintiff to sue, and the judgment of the Court below was, therefore, right.

Judgment affirmed.

PER CURIAM.

July '78, 124. Jan. 29, 1879.

Singer Manufacturing Co. v. Hackett.

Replevin—Judgment of non pros. in action of—Practice—Errors and appeals—What not assignable for error.

The rule of Court permitting a judgment of *non pros* for want of a narr. extends to actions of replevin.

The refusal of the Court below to strike off such a judgment is not assignable for error.

Error to the Common Pleas No. 1, of Philadelphia County.

Replevin, by the Singer Manufacturing Co. against Alice Hackett for one sewing machine of the value of $70. Security having been entered, the sheriff returned "Replevied as commanded. Summoned. The defendant's property so replevied, delivered to the plaintiff."

The writ issued October 30, 1874, and was returnable the first Monday of the following November. On November 21st, 1876, the defendant ordered a judgment of *non pros* for want of a narr.

The rule of Court under which the judgment was entered is as follows:

"Unless a declaration be filed within twelve months from the first day of the term to which an action is brought, or an appeal is entered, a non pros shall be entered by the prothonotary as a matter of course, unless the parties otherwise agree in writing filed, or the Court upon cause shown shall extend the time."

Plaintiff took a rule to strike off this judgment which after argument was discharged by the Court. Plaintiff thereupon took this writ, assigning as error the action of the Court.

N. H. Sharpless, for plaintiff in error.

In the action of replevin after the property has been replevied, the defendant becomes the *actor*, and is interested in having the suit concluded, it is therefore not unreasonable for the plaintiff to expect him to move. The plaintiff is obliged to make the defendant sure before his writ issues. If the words of the rule of Court apply to a replevin, it is submitted that its reason does not.

The judgment as entered by the Court below is void for uncertainty. Does it forfeit the bond? Is it a judgment *de retorno habendo?* Or merely for costs?

Cather *v.* Bray, 5 WEEKLY NOTES, 142.

Hennershotz, for defendant in error.

A judgment of *non pros* in an action of replevin has been held to be regular.

Murgatroyd *v.* McLure, 4 Dall. 342.
Curtis *v.* Kyamy, 2 Pitts. 87.
Gamble *v.* Greaves, 7 Phila. 433.

February 24, 1879. THE COURT. If a judgment of non-suit is in any case proper in an action of replevin, of which there seems no question (Murgatroyd *v.* McLure, 4 Dall. 342; Morris on Replevin, 28, 33), this case was certainly within the comprehensive terms of the rule of Court, empowering the Prothonotary, unless a declaration be filed within twelve months from the first day of the term to which the action is brought, to enter a *non pros*. Of the effect of such a judgment we are not called upon to express an opinion. It was entirely within the sound discretion of the Court below, to give the plaintiff relief by striking off the judgment if there existed any ground for their equitable interposition, but their refusal to interpose, cannot be reviewed by this Court.

Judgment affirmed.

PER CURIAM.

Common Pleas—Law.

C. P. No. 4. March, 1879.

Freeman v. City of Philadelphia.

Negligence—Municipal corporation—City of Philadelphia—Whether liable for the negligence of its servants—Distinction, as to liability, between acts performed for its corporate benefit, or for the public good without benefit to it in its corporate capacity—Its Fire Department.

Sur rule to take off non-suit.

On the trial the plaintiff proved that, while he

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was driving his horse, attached to a wagon, on Arch Street in the city of Philadelphia, he was run into and seriously injured by the rapid and reckless driving of one of the engines of the fire department of the city, while in charge of one of the members or officers of the department, and claimed damages for the injuries sustained. The Court, on motion, entered a non-suit, on the ground that the engineers of the fire department and their subordinates were not servants of the city in such sense as to bind it for their acts of negligence while engaged in the performance of their duty.

John A. Owens, for the rule.

The fire department is a branch of the city government created by ordinance.

City Ordinances, 1870, p. 590.
Jour. of Com. Councils, 1875, vol. i. p. 422 et. seq.

The city is bound to keep its highways in a condition to secure the safety of persons lawfully using them.

City *v.* Dean, 2 WEEKLY NOTES, 467.
Maxwell *v.* City, 7 Phila. 137.
2 Hilliard on Torts, 396, 400.

A municipal corporation may be liable in an action on the case for an act which would warrant a like action against an individual, provided such act is done by the authority of the corporation or of a branch of the government authorized to act for the corporation upon the subject to which the particular act relates.

2 Hilliard on Torts, 414.
Lacour *v.* Mayor of New York, 3 Duer, 406.

The city of Philadelphia is responsible for the consequences of the reckless driving of the chief engineer of the fire department whilst attending to his duties.

Buchanan *v.* City, 2 WEEKLY NOTES, 600.

The case of Elliott *v.* City (7 Phila. Rep. 128) decides that the city is not responsible for the acts of a policeman, and this, it is urged, rules the present case. The Court there said that "a policeman's duties depended upon circumstances which are infinitely varied, and which it is impossible to foresee." But the simple duty of the driver of a fire engine is to travel so as not to cause his vehicle to become a nuisance to persons lawfully upon the public highway. Besides the opinion in Elliott *v.* City is based upon the authority of Fox *v.* Northern Liberties (3 W. & S. 106), and that case turned upon the seizure and loss of the plaintiff's horse by the superintendent of police *in the exercise of a legal discretion.*

Charles E. Morgan, Jr., contra.

The test of liability in this and kindred cases is the nature of the duties entrusted to the official.

Where the duties to be performed are of a corporate or municipal character, the municipality is responsible for their performance in a careful and thorough manner; but where, on the other hand, the functions to be exercised are of a public or governmental nature those to whom they are entrusted, although selected and paid by the city, are not its servants, but public officers, for whose misfeasance or nonfeasance the city is not responsible. The right to establish and maintain a fire department is a part of the governmental power of the State.

The city is not liable for the conduct of a police officer who makes an unlawful arrest.

Elliott *v.* City, 7 Phila. 128. (Approved 25 Sm. 347.)

The rule here invoked has been adopted by the courts of many of the States.

Hafford *v.* City of New Bedford, 16 Gray, 297.
Fisher *v.* City of Boston, 104 Mass. 87.
O'Meara v. City of New York, 1 Daly, 425.
Hayes *v.* City of Oshkosh, 33 Wis. 314.

The case of Buchanan *v.* City (2 WEEKLY NOTES, 600), cited by the other side, should not be regarded as an authority, as the question was not presented to the Court.

April 5th, 1879. THE COURT. The plaintiff, while driving his horse attached to a wagon on Arch Street in this city, was run into and seriously injured by the rapid and careless driving of one of the engines of the fire department of the city, while in charge of one of the members or officers of said department, and the case as presented raises the question whether the city is liable for such negligent conduct?

By the Act of Assembly of February 2, 1854 section 42 (P. L. page 43), it is enacted: "That the Select and Common Councils of the city of Philadelphia shall be and they are hereby authorized and directed to organize a police department in and for the said city, and may organize, if necessary, a fire department subordinate to or independent of that of police, and to make, ordain, and establish all useful laws and ordinances for the regulation thereof, and for the preservation of the public peace, the suppression of riots and disturbances, and for the extinguishment of fires and the protection of property threatened, and for this purpose the said Councils shall be and hereby are vested with ample power and authority in the premises."

The Select and Common Councils, by an Ordinance of December 29th, 1870, directed the formation of a fire department (whose services were to be paid for by the city) by the appointment of seven fire commissioners, who were directed to purchase engines and hose, etc., and to appoint a chief engineer, five assistants, and as many foremen, enginemen, hosemen, hook and ladder men, etc., as might be, from time to time, required.

The municipal corporation of the city of Philadelphia is an artificial being, created by the Legis-

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lature of the State for the purpose of executing and carrying out such projects as might be deemed essential or of advantage to it as a corporate body, and also for the exercising or executing of such discretionary powers of government as might be delegated to it by the sovereign power of the State.

In exercising or performing acts for its corporate benefit it is liable like an individual for the action of its agents or servants, but in performing acts discretionary on its part, or for the purposes of government, and for the general public good, without benefit to it, in its corporate capacity, it is not liable for the acts of its appointees or officers. The municipal corporation is but the representative of the State or of the public, and the officers or individuals employed are not the employés of the corporation, but are public officers, exercising acts for the common good.

Municipal corporations, to the extent that they are authorized or directed to exercise public governmental powers and perform public governmental duties solely for the general good, are governmental agencies, and entitled to immunity in respect to the acts of their subordinate officers or agents. They are auxiliaries of the government.

Public duties are, in general, those which are exercised by the State or a part of its sovereignty for the benefit of the whole public, and the discharge of which is delegated or imposed by the State upon the municipal corporation. They are not exercised by the State or the corporation for its own emolument or benefit but the protection of the entire population.

Private or corporate powers are those which the city is authorized to execute for its own emolument, and from which it derives special advantage or for the increased comfort of its citizens, or for the well ordering and convenient regulation of particular classes of the business of its inhabitants, but are not exercised in the discharge of those general and recognized duties which are undertaken by the government for the universal benefit. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for the purpose of private emolument or advantage, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. (See Weightman *v.* The City of Washington, 1 Black. 49; Hart *v.* City of Bridgeport, 13 Blatchford, 289; County Commissioners *v.* Duckett, 20 Md. 477.)

It was determined, in Elliott *v.* The City (7 Phila. 128), in a very able opinion by our learned President Judge, that the city was not responsible for the negligence or misfeasance of a police officer in not taking proper care of the property of a person lawfully arrested, nor would the city be responsible for a false arrest by one of its police officers.

This decision has been cited with universal approval, and was subsequently affirmed by our Supreme Court (in 25 P. F. Smith, 347) in which Chief Justice AGNEW, delivering the opinion of the Court said, that it was such an ample discussion of the question in the case that it was unnecessary to do more than affirm the judgment upon it. The police department was created by the same Act and for the same purpose as the fire department. It was part of the same system intended for the public benefit and protection.

Police officers are personally liable for their malfeasance or nonfeasance in office, but for neither is the corporation responsible. The corporation appoints them to office, but does not in that act sanction their official delinquencies, or render itself liable for their official misconduct. For their failure to suppress a riot it has been determined a city is not liable, nor is it liable for the destruction caused by a mob consequent thereon, except by statutory enactment, as is applicable to Philadelphia by Act of 31st of May, 1841. The extinguishment of fires in a city is not a corporate duty, but is an act exercised in pursuance of the sovereign power conferred for the benefit and protection of all the inhabitants, and relieves them from a common burden and danger. It is not for the immediate benefit of the corporation, as such, nor is its expense assessed upon owners of buildings alone, or any special class of persons whose property is pecuniarily benefited or protected thereby, and it makes no difference whether the Legislature prescribed the duties of the officers or delegated the powers to the city to do so.

In Hafford *v.* The City of New Bedford (16 Gray, 297) where the city was authorized to establish a fire department, and where the plaintiff was run over and injured by a hose carriage driven carelessly along the highway (a case in every respect like the present), Chief Justice BIGELOW said: "Where a municipal corporation elects or appoints an officer in obedience to an Act of the Legislature, to perform a public service, in which the city or town has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community, such officer cannot be regarded as a servant or agent, for whose negligence or want of skill in the performance of his duties a town or city may be held liable. The members of the fire department of New Bedford, when acting in the discharge of their duties, are not servants or agents in the employment of the city, for whose conduct the

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city can be held liable; but they act rather as officers of the city, charged with the performance of a certain public duty or service, and no action will lie against the city for their negligence or improper conduct when acting in the discharge of their official duty."

So in Fisher *v.* The City of Boston (104 Mass. 87), a case also like the present, the preceding case was affirmed in an able opinion by Judge GRAY, who held that the firemen were public officers, and that their acts were their own official acts, and not the acts of the municipal corporation or its agent.

In Jewett *v.* The City of New Haven (38 Conn. 373), it was held that the charter of the city must be regarded as imposing a public duty for the public welfare, and that the fire department, established and organized under the provisions of the charter, when engaged in extinguishing fires were performing a public governmental act for the general good, and that the members of the fire department were not such servants of the city as that an action would lie against the city for their negligence or misconduct while acting in discharge of their official duty.

The same ruling was held in Torbush *v.* The City of Norwich (38 Conn. 225); Walcott *v.* The City of Swampscott (1 Allen, 101); Barney *v.* The City of Lowell (98 Mass. 570); City of Chicago *v.* Turner (80 Ill. 419); City of Chicago *v.* McGraw (75 Ill. 566).

In the case of O'Meara *v.* The City of New York (1 Daly, 425), which was an action to recover for injuries done plaintiff while standing on the sidewalk, where he was knocked down and run over by a fire engine while in charge of firemen, Judge BRADY said, speaking of the fire department: "Its members owe their allegiance to the city, not as members of the corporation, but as members of an organization identified with the administration of the city government, and forming a part of its protective police."

In Hayes *v.* The City of Oshkosh (33 Wis. 314), where the plaintiff's house was set on fire by sparks from a fire engine, it was held the city was not liable.

So in Howard *v.* The City of San Francisco (51 Cal. 52), where plaintiff's horse and buggy were injured by a member of the fire department, it was held the city was not liable. So we might continue to a great length with authorities on analogous subjects. Whilst no case in Pennsylvania is directly in point with the present, we may be content with showing the leaning of our Supreme Court in Elliott *v.* The City, *supra*, and also in the case of Grant *v.* The City of Erie (19 P. F. Sm. 423), which was an action against the city to recover damages for allowing certain reservoirs, intended to supply water for extinguishing fires, to fall into decay, by reason whereof plaintiff's houses were destroyed by fire, it was held that as it was discretionary with the city to construct the reservoirs, it was not liable.

To maintain this action would be opening the way to make the city liable for the wrongful act of every public officer, a proposition never contemplated in the creation of the municipal corporation.

Whilst it may be a hardship upon the plaintiff to be thus injured, the public good requires that he should look to the individual who occasioned the injury, and not to the corporation within whose bounds it happened. No power but the Legislature can impose such a liability upon the city, and it has wisely remained silent.

There being no liability upon the part of the city, the non-suit was properly entered.

Rule discharged.

Opinion by ELCOCK, J.

C. P. No. 2. March 3, 1879.

Schweinberg v. Paul Lodge No. 6.

Amendment — Unincorporated societies — Addition of defendants in suits against.

Rule to amend record by adding names of defendants, with leave to issue an *alias* summons to bring them in.

Suit had been brought in a magistrate's court against an unincorporated society doing business as "Jean Paul Lodge No. 6, Improved Order," etc. From the judgment there rendered the society, after obtaining a rule of Court to enable it to do so, filed an appeal *nunc pro tunc*. This rule was taken to add the names of ten members of the society as co-defendants.

Knittel, for the rule.

Rule absolute.

Orphans' Court.

March 17, 1879.

Bardsley's Estate.

Decedent's estates—Claim by widow of the decedent's estate as her own—Where a husband receives the income of his wife's separate estate, with her consent, the presumption is that she intended it to be expended for the benefit of her family—Liability of husband to render an account.

Sur exceptions to adjudication.

At the adjudication of the account of Harriet Bardsley, administratrix of the estate of Robert

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Bardsley, deceased (before ASHMAN, J.), the following facts appeared:—

The decedent died August 24, 1877, intestate, leaving surviving him a widow, the accountant, three daughters, children by a former wife, and three grandchildren, children of a deceased daughter by his first wife.

The accountant had acquired considerable property through her first husband, one George Brown, who died in 1860, prior to her marriage with the decedent in 1864. This property consisted of certain pieces of real estate located in various parts of the city, and her second husband had been in the habit of collecting the rents and managing the property since his marriage with her, and she claimed a balance of such rents due her from the estate of $15,601.87, covering a period of thirteen years.

The entire amount of the balance for distribution was $8067.51, and out of the estate the widow claimed and received her $300 exemption. The Auditing Judge held that under McBride's Appeal (22 Sm. 480) this claim was not within the jurisdiction of this Court; that it was not that of a creditor, legatee, or next of kin; the widow must seek her remedy elsewhere; that as owner she had weakened her claim by charging herself in the inventory and account with these moneys as the property of decedent, and had received her $300 exemption, and that the claim was not as strong as is required by the Court in Hamill's Estate (4 WEEKLY NOTES, 404). The claim was therefore disallowed.

To this ruling exceptions were filed by the widow.

George Junkin, for the exceptant.

Since the Act of 1848 the presumption is that when a husband receives money from his wife's estate it is for her benefit, and an agreement to repay it will be binding on his estate.

Johnston *v.* Johnston's Ex.'s, 7 Cas. 450.
Mellinger *v.* Bausman, 9 Wr. 529.
Graybill *v.* Moyer, 9 Wr. 530.
Martha Mann's Appeal, 14 Wr. 375.
Hinney *v.* Phillips, 14 Wr. 382.
Bachman *v.* Killinger, 5 Sm. 414.
Bergey's Appeal, 10 Sm. 408.

When a husband uses his wife's money, with her consent, for the benefit of the family, without agreement to pay interest, he will not in general be liable for interest. But if he uses it for his own purposes he will be liable for interest.

May *v.* May, 12 Sm. 206.

The only rule as to proof to fix liability on a husband for his wife's money received by him, is that it must be sufficient to satisfy the tribunal that it preponderates over all theories to the contrary.

Young's Estate, 15 Sm. 101.

Cavin, contra.

There is no evidence that the decedent had no estate of his own. This money was used for the benefit of his wife and himself.

Junkin, in reply.

There must be *affirmative proof* that the money went for household expenses. There has been no such proof here.

Nolen's Appeal, 11 H. 38.

March 29, 1879. THE COURT. In considering the questions presented by the exceptions we shall be aided by the decisions of the English courts with regard to the liability of a husband for property received by him from the estate of the wife under a deed for her separate use; her powers of disposal there, so far as concerns personal property so held, being, unless restrained by the instrument creating the trust, precisely such as in this State, in the absence of a trust, a married woman has of property under the Act of 1848. It is well settled by those decisions that while the wife may, if she chooses, in the absence of a restraining provision, give personal property so held to the husband, yet there is no presumption where he has received it that she has done so. The burden of proof is upon him, and failing to establish the fact, he is held accountable as a mere trustee. (Rich *v.* Cockel, 9 Vesey, 369; Bennet *v.* Davis, 2 P. Wms. 316.)

This doctrine, however, has reference only to the principal of the wife's separate estate; and the same remark may be made with regard to the decisions in Pennsylvania under the Act of 1848, where a similar view has been taken. (See Johnston *v.* Johnston's Administrator, 7 Casey, 450; Mellinger *v.* Bausman, 9 Wright, 529; Bergey's Appeal, 10 Smith, 408; Hamill's Appeal, Daily Legal News, March 14, 1879.)

But with regard to income, a very different rule prevails, so far at least as the English courts are concerned, and no Pennsylvania authority has asserted anything to the contrary. "Where," says Judge STORY (Eq. Juris., § 1396), "the husband, with the consent of the wife, is in the habit of receiving the income, profits and dividends of her separate estate, courts of equity regard the transaction as showing her voluntary choice thus to dispose of it for the use and benefit of the family."

The distinction between principal and income seems to be recognized in Mellinger *v.* Bausman and in May *v.* May (12 Smith, 206), and in Hamill's Appeal, where, while the husband's liability for the principal was admitted, it was said he would not, under ordinary circumstances, be liable for interest. (See also Martha Mann's Appeal, 14 Wright, 375.)

Of course where it appears that the receipt of the income by the husband has been without the consent of the wife, or against her express direction, he will be held to an account for all that may have come to his hands.

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It is true that Judge STORY states that the husband receiving the income with the wife's assent will be liable to an account for the last year; but the reason for limiting his liability being as stated, it is not easy to see why the last year should be excepted from the rule, especially where he has died, and the account is sought from his estate. The law on this point is still unsettled.

"If," says Mr. Lewin (Lewin on Trusts, *642), "the husband receive the wife's separate income, though there was a clause against anticipation, and the wife survives, it is clear that she or her personal representative cannot claim against his estate *more* than one year's arrears; but it is still *sub judice* whether the wife or her representative can claim even so much. Lord MACCLESFIELD, Lord TALBOT, Lord LOUGHBOROUGH, Sir WILLIAM GRANT, and Lord Chancellor BRADY, held that the wife or her representative could claim nothing. On the other hand, in the judgment of Sir T. SEWELL, Lord CAMDEN, Lord KING, Lord HARDWICKE, Lord ELDON, Sir J. LEACH, and Lord ST. LEONARDS, the husband's estate is liable to account for one year. The more commonly received opinion in the profession is thought to be that an account for one year should be given."

The cases denying the account altogether are Powell *v.* Hankey (2 P. Wms. 80); Fowler *v.* Fowler (3 P. Wms. 353); Squire *v.* Dean (4 Brown C. C. 326); Smith *v.* Camelford (2 Vesey, Jr., 716); Arthur *v.* Arthur (11 Jr. Eq. R. 511).

Those conceding the liability for one year are Burdon *v.* Burdon (2 Mad. 286, note; Id. 287, note); Countess of Warwick *v.* Edwards (1 Eq. Ca. Ab. 170); Townsend *v.* Windham (2 Vesey, Sr. 7); Peacock *v.* Monk (Id. 190); Parkes *v.* White (11 Vesey, 225); Thrupp *v.* Harman (3 M. & K. 513); Lea *v.* Grundy (1 Jur. N. S. 953); Sugden on Property, 169.

With the law thus unsettled, it cannot be said that the Auditing Judge in denying the account altogether was in error.

What Lord MACCLESFIELD says, in Powell *v.* Hankey (*supra*), may well be applied here:—

"For ten years together the wife had permitted the husband to receive this interest, without making the least objection, either to the husband, or to the debtors who paid the money, or to her own trustees. It should be therefore intended that she consented to the husband's receipt of this interest; that the contrary construction might have been a hardship upon the husband, who (probably) depended on the wife permitting him to receive this as a gift, and on such a presumption might have lived in a more plentiful manner, the comfort whereof the wife must have shared in; and if she, ten or twenty years afterwards, should be allowed to make her husband a debtor for all this money (which she might do by the same reason as now, after his death, to charge his executors), this might ruin the husband, or, in case of his death, prove equally prejudicial to his children."

Exceptions dismissed, and adjudication confirmed.

Opinion by PENROSE, J.

U. S. District Court—Admiralty.

May 2, 1879.

The Barque George Kingman.

Personal damage—Authority of master to punish seaman—Evidence.

Libel for personal damage by Mayhorn against Howes, master of the barque.

The libellant was hired as cook and steward of the barque on a voyage to Portugal and back to this port, which was duly performed. During the voyage he was accidentally scalded by hot water, and alleged that before his recovery the master forced him to return to work with threats and oaths. That soon afterwards the master assaulted him, by kicking him in the face, which resulted in a temporary scar. That upon another occasion the master again assaulted him, and knocked him down with his fist. Each of the assaults was deposed to by one other member of the crew. There was no evidence of any permanent injury to the libellant.

Upon the part of the master both assaults were denied, the kicking entirely, and as to the blow with the fist, the master deposed that the libellant attempted to pass him on deck on the windward side, and that he merely removed him by a slight push; also, that he was unsatisfactory as a cook, and very insolent under reproof.

The master's testimony was not corroborated by other witnesses.

E. F. Pugh, for libellant, cited—

Payne *v.* Allen, 1 Sprague, 304.
The Agincourt, 1 Hag. 271.
Parsons on Maritime Law, 464.
Abbott on Shipping, 178, and notes.
The Enchantress, 1 Hag. 395.

Henry Flanders, for respondent.

Irrespective of the oath of the master, this is at most a case where the master was compelled to punish an insubordinate seaman.

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Fuller *v.* Colby, 3 Wood & M. 10.
Forbes *v.* Parsons, Crabbe, 283.

THE COURT (BUTLER, J.), referring to the danger both of encouraging such suits, and of refusing parties redress in such cases, held that the assaults had been sufficiently proved, and that as the answer denied the assaults, it was not competent for the respondent to rely on a justification.

Decree for libellant for one hundred dollars, with costs.

U. S. Circuit Court—Law.

March 22, 1879.

Goss & Phillips' Manufacturing Co. v. Gerhard.

Practice—Costs—Feigned issue—Security may be required in interpleader issue from non-resident defendant, if really the plaintiff.

Rule on the defendant in an interpleader issue to enter security for costs.

The plaintiff, a non-resident, brought suit and obtained judgment in October, 1878. Execution issued, and certain goods, consisting of the stock of a lumber yard, were seized as the property of the defendant, but were claimed by defendant's brother. Upon the hearing of the rule for an interpleader, the claimant asked that the defendant in the feigned issue (the original plaintiff) be directed to enter security for costs; but the Court (BUTLER, J.) refused to make such order unless the claimant filed an affidavit disclosing his title, and made the rule absolute. Thereupon the claimant took this rule and filed his affidavit, stating that he had purchased the goods from the defendant in the execution, on the 7th of Aug. 1878. A valuable consideration for the purchase was stated. Since the purchase deponent had been in full, absolute, and exclusive possession of the goods.

Rich, for the rule.

The nominal defendant is, in fact, the plaintiff, and, being a non-resident, should enter security for costs.

Mason, contra.

If the facts stated in the affidavit are true, the defendant in the feigned issue would not, in any event, be required to pay costs.

Mausley *v.* Moore, 1 WEEKLY NOTES, 268.

The affidavit shows that the claimant is the actual as well as nominal plaintiff.

THE COURT. While it is true that the party who is actually the defendant may, under the rule of Court, require security for costs, although nominally he is plaintiff, the facts here disclosed by the affidavit show a case in which the burden of proof is upon the claimant to satisfy the jury that he obtained the goods *bona fide*, and paid full value for them. He is the actual as well as the nominal plaintiff.

Rule discharged.

Oral opinion by BUTLER, J.

Nov. '76, 66. Western District, March, 1879.

Price, Receiver of the Venango National Bank v. Yates.

National banks—Liability of stockholders—Statute of limitation—Laches.

The liability of a stockholder in a national bank is not such a "bad or doubtful debt," as is contemplated by Section 5234 of the Revised Statutes of the United States, and, therefore, a Court cannot order it to be "sold or compounded."

The Comptroller of the Currency, having directed the enforcement of the said liability in Pennsylvania more than six years after the stock was subscribed (which direction was a prerequisite to bringing such action) suits were brought accordingly in the U. S. Circuit Court:

Held, that the State statute of limitations was effectively pleaded.

Motion for judgment on points reserved.

Assumpsit, by Price, Receiver of Venango National Bank against Yates, to enforce the latter's individual liability as stockolder.

The bank in which the defendant was a stockholder passed into the hands of a receiver in 1866. The following year, the receiver, without authority from the Comptroller of the Currency, brought suit in the Common Pleas of Venango County, Pa., to enforce the individual liability of the defendant and other stockholders. An application was then made to that Court for an order to compound the suits, pursuant to authority supposed to be conferred by Section 5234 of the Revised Statutes of the United States. The order was granted and the suits compromised accordingly. Subsequently, in 1876, the Comptroller directed the enforcement of the individual liability of the stockholders and this action was then commenced. The jury returned a verdict for the plaintiff, subject to the two questions of law reserved, as stated below in the opinion of the Court.

H. A. Miller (with him *Dodd & Lee*) for the plaintiff.

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C. Heydrick, contra.

March 21, 1879. THE COURT. Two questions were reserved at the trial of this case, and a verdict was taken for the plaintiff subject to the opinion of the Court upon these questions:—

(1) The first question involves the effect of an order of the Court of Common Pleas of Venango County, Pa., for the composition of the claim now in suit.

In 1867 suit was brought in that Court by the Receiver of the Venango National Bank against the present defendant to enforce his personal liability as a stockholder in that bank, which is also the subject of the present suit. On the 23d of March, 1869, the Receiver, with the assent and concurrence of Judge Dirrickson, then acting as the representative of the Comptroller of the Currency, and as the counsel of the Receiver, made a written application to the Court for an order to adjust and settle the suit by the payment of twenty-five dollars by the defendant, whereupon an order was made by the Court that "the Receiver may settle and compound the said suit and the claim involved therein on the terms prayed in the proposition." The sum offered was afterwards paid to the Receiver. The order of the Court was made in the exercise of authority supposed to be given to it by Section 5234 of the Revised Statutes, and without an order of the Court, which it was competent to make, the composition could have no effect. By a separate classification in the Act of Congress of the subject of the suit, as well as by the import of the terms of the Act, the contested claim is excluded from the category of "bad or doubtful debts," which alone the Court is authorized to order the Receiver to "sell or compound," and hence the alleged composition was ineffectual for want of power in the Court to direct or sanction it.

(2) Is this suit barred by delay in the institution of it? It is brought to enforce the personal liability of a shareholder in a national banking association. This liability is clearly contractual. By his stock subscription the shareholder stipulates to pay an additional sum equal to the par value of the shares subscribed for by him to discharge the debts of the association when he is legally called upon to do so. The obligation to pay is assumed when the subscription is made, and proof of the subscription is plenary evidence of the whole of the shareholder's enjoyment, and of his consequent individual liability. This liability then accrues at the date of the subscription, but is not enforceable until needed to meet the debts of the Association, and until the Comptroller has so decided and instructed the Receiver. Hence it has been held, that this action of the Comptroller is an essential preliminary to a suit against a shareholder. (Kennedy *v.* Gibson, 8 Wall. 498.) A right of action upon the contract does not, therefore, accrue until the Comptroller has acted; and by the terms of the general Currency Act, all suits by or against a Receiver are alike cognizable by the State and Federal Courts. Where there is this concurrence of jurisdiction, a State statute of limitation may be pleaded as effectively in a Federal Court as it could be in a State Court; and, in such case, the Federal Courts will follow the decisions of the local State tribunals, and will administer the same justice which the State Courts would administer between the same parties.

The Supreme Court of Pennsylvania has repeatedly recognized the general rule, that an act necessarily preliminary to the commencement of a suit upon a contract, must be done within six years to avert the bar of the statute, unless sufficient reason for the delay is shown. In Laforce *v.* Jayne (9 Barr, 410), it was applied, the Court saying, "It was ruled in the case of Codman *v.* Rogers (10 Pick. 112), that although an action will not lie in some cases without a previous demand, and that in such cases the statute did not run until demand, nevertheless the demand ought to be made in a reasonable time, and when no cause for the delay is shown it ought to be made within the time limited by the statute for brining the action." The same doctrine was reaffirmed and decisively applied in the Pittsburgh and Connellsville R. R. Co. *v.* Byers (8 Casey, 22), and in the Pittsburgh and Connellsville R. R. Co. *v.* Graham (12 Casey, 79).

The application of this principle in this case is peculiarly appropriate. The date of the defendant's subscription, when his alleged indebtedness accrued, does not appear, but it existed before the 5th of May, 1866, when the Receiver was appointed. Nothing was done to authorize a legal demand upon the defendant to respond to his individual liability, until the 28th of June, 1876, when the Comptroller decided that the enforcement of this liability to its full limit was necessary, and instructed the Receiver accordingly. This suit was shortly afterwards brought. Not only six, but more than ten years from the date of the defendant's enjoyment, was permitted to elapse before the essential conditions precedent to a legal call upon him to pay were performed. The delay seems to have been purely arbitrary—at least it is unexplained—and hence the strongest considerations of justice, and the obvious policy of the Act of Congress, demand that the defendant should not be vexed with litigation touching a claim which has about it such an odor of staleness.

Let judgment be entered for the defendant, *non obstante veredicto*.

Opinion by MCKENNAN, Cir. J.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, MAY 22, 1879.* [No. 4.

Supreme Court.

Jan. '79, 38. March 18, 1879.

Wyncoop v. Cooch.

Constitutional law—Right of trial by jury, when not impaired—Proceedings by purchaser at sheriff's sale to recover possession—Act of May 13, 1871, relating to Schuylkill County.

Under the Act of May 13, 1871 (P. L. 820) A. filed a petition, setting forth that he was purchaser at sheriff's sale of certain premises; that he had given three months' notice to the person in possession who was the defendant in the execution, to surrender possession of the premises, which the defendant had refused to do, and praying the Court for a rule to show cause why a writ of possession should not be awarded. A. also filed an affidavit by a constable who alleged that he had served the notice, as in the petition set forth. The defendant's answer suggested that the Act authorizing these proceedings was unconstitutional, but the Court issued the writ prayed for:

Held (affirming the judgment of the Court below), that these proceedings were not in derogation of the right of trial by jury.

The unjust possessor of lands in such cases has no common law right to a notice to quit, and such notice, being unnecessary, may be proved as the Legislature may direct.

One part of an Act may be unconstitutional, and the remaining parts may be upheld.

Error to the Common Pleas of Schuylkill County.

The case was heard in the Court below upon petition and answer under the Act of May 13, 1871 (P. L. 820), relating to Schuylkill County.

The petition of Cooch set forth that by virtue of a writ of levari facias, in which he was plaintiff, and Wyncoop and wife were defendants, he had purchased certain premises as the property of the defendants; that the defendants were in possession of the premises at the time of the sale; that after the acknowledgment of the sheriff's deed, and at least three months before the filing of this petition, he had given the defendants notice to surrender the premises which they had failed to do. The petition prayed for a rule on the defendants to show cause why possession of the said premises should not be surrendered to the petitioner.

A rule *nisi* having been granted, the defendants filed exceptions setting forth, *inter alia*, that the Act of Assembly under which the rule was entered was unconstitutional. Before the return of the rule, the petitioner filed an affidavit by one Strauch, a constable, that he had served the petitioner's notice upon the defendants as in the petition set forth. The exceptions and the rule having been set aside, the Court directed the defendants to answer. The defendants' answer suggested, *inter alia*, that the Act providing for these proceedings was unconstitutional. After argument the Court awarded the writ of possession prayed for, and the defendants took this writ, assigning that order, *inter alia*, for error.

D. C. Henning, *Hughes & Farquhar*, and *B. W. Cumming*, for the plaintiffs in error.

The Act of May 13, 1871, is in derogation of the right of trial by jury and unconstitutional. Section 7 devolves upon the Court or Judge, in case of a finding for the petitioner, the duty "to assess such damages as they or he shall think right, against the defendant person or persons in possession, for the unjust detention of the premises." As the assessment of damages is discretionary, no error in the measure adopted could be successfully assigned. This provision being an integral part of the proceeding and inseparably connected with it, the whole Act is unconstitutional.

J. Lineaweaver and *W. B. Wells*, contra.

The vice complained of is embodied in section 7, as to the assessment of damages. The remedy is not known to the common law nor to the English statutes in force in Pennsylvania at the time of the adoption of the first Constitution, and hence is not in derogation of the right of trial by jury.

Byers & Davis *v.* The Commonwealth, 6 Wr. 89.
Ligat *v.* The Commonwealth, 7 H. 456.
Van Swartow *v.* Id., 12 Id. 131.
Rhines *v.* Clark. 1 Sm. 96.

But even if section 7 be void, the present proceedings not being under that section but under other and unobjectionable parts of the Act may be sustained. It is familiar law that part of an Act may fall and part stand.

Lea *v.* Bumm, 2 Norris, 237.

March 31, 1879. THE COURT. The main contention of the plaintiffs in error is that the Act of May 13, 1871 (Pamph. L. 820), entitled "An Act to obtain possession of real estate by purchasers at coroner's, sheriff's, and Orphans' Court sales within the county of Schuylkill," is unconstitutional, being in derogation of the right of trial by jury secured in the Bill of Rights by the declaration, "Trial by jury shall be as heretofore, and the right thereof remain inviolate." The object of this provision was to preserve the jury as a tribunal for the decision of all questions of law and fact in criminal trials, and of all questions of fact in civil causes. Such it had been theretofore, and it was ordained by the people that such it should continue to be thereafter inviolate. Thus it was determined by this Court that an Act of Assembly authorizing the Court to

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enter a compulsory non-suit in a case where on all the facts given in evidence there was no legal liability in the defendant, was constitutional. (Munn *v.* Pittsburgh, 4 Wright, 364.) "The complaint," says Mr. Justice STRONG, "that the constitutional right of trial by jury has been violated is made without due consideration. The province of a jury has always been to determine facts. What is the law applicable to those facts has always been a question for the Court. In ordering the non-suit the Court conceded all the facts which the jury could have found and simply declared that under the law as applicable to them there was no liability on the part of the defendants." This principle is so obvious that it needs no elaborate vindication. Was there any question of fact, which in an action of ejectment brought by a purchaser at sheriff's sale against the defendant in the original judgment, or any person claiming title under him by deed or conveyance subsequent to the judgment, which by this Act is submitted to the decision of the Court? We put out of the case the seventh section, which provides for an assessment of damages against the defendant person or persons in possession because there was no such assessment in this case, for it may well be that one or more provisions in a statute are unconstitutional, and the other provisions not so. We look in vain through this Act for any clause or section which violates the rule as laid down in Munn *v.* Pittsburgh. As to the defendant in the judgment, or other person claiming under him subsequent to the judgment, the judgment and sheriff's deed duly acknowledged are conclusive, and matters of law exclusively for the Court. So it has been uniformly held from Culbertson's Lessee *v.* Martin (2 Yeates, 443), to Drake *v.* Brown (18 P. F. Smith, 223). "A purchaser at sheriff's sale," said Mr. Justice AGNEW, "is not bound to show more than his deed and the proceedings under which it was made to recover the possession from the defendant in the execution."

By the 10th, 11th, 12th, and 13th sections of the Act under consideration it is provided that "if the person or persons in possession shall make oath or affirmation that he has not come into possession, and does not claim under the defendant in the execution, but in his own right, or that he has come into possession under title derived to him from the said defendant before the judgment under which the execution and sale took place, and shall become bound in a recognizance with one or more sufficient sureties in the manner provided, the said Court or Judge shall forbear to give the judgment aforesaid." By the 11th section a summons is directed to issue to such other persons under whom the possessor claims, and on his making oath or affirmation to his title, and giving recognizance, the Court or Judge shall forbear to enter judgment.

The form of the oath and recognizance are given, and the parties are then referred to a common law action of ejectment. It is unnecessary to show either by argument or decided cases that there is nothing in all this which derogates from the right of trial by jury.

The jurisdiction of justices of the peace, the compulsory arbitration law where the right of appeal has been encumbered with similar provisions, have uniformly been held to be constitutional. (Emerick *v.* Harris, 1 Binney, 416.)

As to the proof of notice to the person in possession being submitted to the Court, it is sufficient to remark that there is no common law right to notice in such a case. The unjust possessor of land, which the defendant below as against the plaintiff was, can be turned out of possession by real action or ejectment without any notice. To provide for notice in the case in hand was a mere act of grace by the Legislature, and as they need not have provided for it at all, they can constitutionally enact that it shall be proved in any mode and before any tribunal. The purpose of the constitution undoubtedly was to preserve the jury trial wherever the common law gave it, and in all other cases to let the Legislature and the people do as their wisdom and experience might dictate. (Van Swartow *v.* Commonwealth, 12 Harris, 131; Dunmore's Appeal, 2 P. F. Smith, 374; Paschall Street, 31 Ibid. 118.)

Judgment affirmed.

Opinion by SHARSWOOD, C. J.

Jan. '79. March 6, 1879.

Gring's Appeal.

Equity—Subrogation—Where allowed—Assignment of judgments—Rights of subsequent creditors—Laches.

A joint judgment debtor who has been forced to pay the whole debt, and who subsequently shows that he was in fact only a surety in the joint judgment, is not entitled to be subrogated to the rights of the creditor in the judgment as against subsequent judgment creditors, unless he has exercised due diligence in having the judgment assigned to his use.

A judgment entered against A. and B. on a joint and several judgment-note, was paid by a sheriff's sale of A.'s property; subsequently, before an auditor appointed to distribute the proceeds of a sale by the assignee for the benefit of creditors of B.'s property, A. appeared and claimed to be subrogated to the plaintiff's rights in the original judgment, on the ground that he had only been a surety in the note; the judgment was not assigned to his use until nearly a year after the plaintiff in the original judgment had been paid in full, and until after the sale by the assignee; and the balance (after the payment of prior judgments), which he claimed, was also claimed by a creditor whose judgment dated some years prior to the original sale of A.'s property:

Held (affirming the judgment of the Court below), that A. was not entitled to subrogation.

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Appeal from the Common Pleas of Berks County.

This was an appeal by David H. Gring from a decree sustaining exceptions to the report of an auditor appointed to distribute the proceeds of a sale by the assignee for the benefit of creditors of the property of David Gring. The evidence before the auditor showed that on April 26, 1873, a judgment for $1450 was entered in favor of H. Mull against David Gring and David H. Gring, on their joint and several judgment-note. On Sept. 6, 1875, a judgment was entered against J. H. Gring, David Gring, and David H. Gring, in favor of L. Gensemer, who subsequently assigned it to D. Gensemer. On Oct. 2, 1876, David Gring executed a deed of assignment for the benefit of his creditors, to H. Mull. On Feb. 23, 1877, execution was issued on the Gensemer judgment above, and on April 14, 1877, the real estate of David H. Gring was sold under a *vend. exp.;* the proceeds were sufficient to pay the Mull judgment in full, and the Gensemer judgment in part. Mull receipted in full for his judgment on the sheriff's execution docket.

On Sept. 8, 1877, H. Mull, the assignee for the benefit of creditors of David Gring, sold his assignor's real estate for $14,764.13, less some expenses, and an auditor was appointed to distribute the fund. Before him the following judgment creditors appeared:—

J. Moore, March Term, '71, ...	$4000
C. Evans, March 28, '72, ...	7000
J. Moore, March Term, '73, ...	1800
H. Mull, April Term, '73, ...	1450
J. G. Seltzer, April Term, '74, ...	2000

The first three judgments were satisfied in full out of the fund, and a balance then remained of $813.05; this was claimed by J. G. Seltzer on his judgment, and also by David H. Gring, under the Mull judgment, for $1450, of April Term, '73, which had been assigned to Gring's use on April 27, 1878. Gring claimed that he was entitled to be subrogated to the rights of Mull in this judgment, on the ground that he had only been a surety in the judgment-note on which judgment had originally been entered against David Gring and himself. Testimony to this effect was produced before the auditor, and the auditor found that David H. Gring had been a surety in the judgment-note, and awarded the above balance to him. Exceptions to the report being filed, the Court (SASSAMAN, J.) sustained the exceptions, and awarded the balance to J. G. Seltzer, on account of his judgment, saying, *inter alia*, "It is a principle well established that subrogation will not be allowed to the prejudice of other creditors, though the party were originally but a surety for his co-defendant (Gosweiler's Estate, 3 P. & W. 200); and that the proceeds of sale are distributable among the lien-creditors as they appear at the time of sale. If the sheriff has returned money made to a former execution, the judgment thereby paid cannot be rehabilitated by an order of subrogation made after sale. (Douglass's Appeal, 12 Wright, 223.) . . . It cannot be permitted that a secret equity may be held unasserted until holders of legal rights have been thrown off their guard and lost their opportunity to protect themselves by attending a sale against it, and then be brought forward to the injury of those who had no notice of their existence."

David H. Gring took this appeal, assigning for error the sustaining the exceptions to the auditor's report, and awarding the above balance to J. G. Seltzer.

A. G. Green (with him, *Wm. M. Goodman*), for appellant.

A surety, on paying the debt, is entitled to be subrogated to all the rights of the creditor against the principal debtor.

Erb's Appeal, 2 P. & W. 296.
Yard *v.* Patton, 1 Harris, 287.

An actual assignment is not necessary.

Lloyd *v.* Barr, 1 Jones, 48.
Gossin *v.* Brown, Id. 531.
Bailey *v.* Brownfield, 8 Harris, 45.
Cottrell's Appeal, 11 Harris, 294.

H. W. Bland, for appellee.

The appellant is estopped from setting up, as against the appellee, a subsequent judgment-creditor without notice, his secret equity, the appellee having parted with his money upon the actual state of the record, which imported a joint and several liability of David Gring and the appellant.

Water's Appeal, 11 Casey, 523.
Lewis *v.* Carstairs, 5 W. & S. 209.
Ackla *v.* Ackla, 6 Barr, 233.
Graff *v.* R. R. Co., 7 Casey, 496.
Martin *v.* Ives, 17 S. & R. 364.
Pickard *v.* Sears, 33 E. C. L. R. 115.

"It is a settled principle that the holder of an equity must be vigilant in asserting it, if he would have the aid of a chancellor. Laches in such a holder always postpones him to one who may have been injured by his inertness."

Douglass's Appeal, 12 Wr. 225.

Here the appellant, after having paid the judgment against his alleged principal, remained quiet over a year without any assertion of his secret equity; he permitted the record to show, during all that time, that the judgment of Mull against his principal was paid.

Subrogation will not be allowed to the prejudice of other creditors, though the party claiming were originally surety.

Goswiler's Appeal, 3 P. & W. 200.
Himes *v.* Keller, 3 W. & S. 404.

March 24, 1879. THE COURT. We regard the conclusion at which the Court below arrived

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as entirely correct. To all appearances the two Grings were joint debtors in the Mull judgment, which appeared from the records to have been fully satisfied by the money made upon the Gensemer writ.

If indeed the appellant was surety, then he was entitled to have the judgment marked to his use, but for all other purposes it was, in fact, satisfied. As between himself and subsequent creditors, this was a matter of grace, and could not be so exercised as to produce results inequitable to third parties. As was said in Himes *v.* Keller (3 W. & S. 401), a substitution which will work a prejudice to other creditors not parties to the arrangement, will be made only in a clear case. So in Armstrong's Appeal (5 W. & S. 352), it was held that substitution is a matter of benevolence and equity, and that regard is always had in such questions to third persons whose rights may be affected thereby. Subrogation was, therefore, refused to one who was bail for stay of execution, as against subsequent judgments, and this, as it would seem, because such bail effected a delay in the collection, not indeed of the later judgments, but of the precedent one, which perchance might, in the mean time, have been paid or collected in relief of those that were junior. The principle in all those cases of subrogation is one of equity merely, and must be exercised with due regard for the rights of others. (Wallace's Est., 9 P. F. S. 401; McGinnis's Ap., 4 Harris, 445.) This, too, involves the rule that this right must be exercised with due diligence; laches, in this particular will operate to forfeit such equity as against one injured by the inertness of the holder thereof. So it was held that where a judgment, as in the case in hand, had been satisfied, the surety could not interpose, after a sale of the debtor's property upon a subsequent writ and claim, subrogation to the exclusion of a later judgment. Now the money which went to the payment of Mull's judgment was made by the sale on the Gensemer *vend. ex.*, April 14, 1877; and the decree for the appropriation of this money was entered on the 26th of May following. From this date David H. Gring was entitled to have this judgment marked to his use; this, however, he neglected to have done until the following April, long after the sale of David Gring's property, and only about a month before the sitting of the auditor who was appointed to distribute the proceeds of that sale. In the mean time, as we have before remarked, there was nothing to show that the Grings were not joint debtors in the Mull judgment; nothing to warn other creditors that it had not been fully and finally paid off and satisfied by the proceeds of the Gensemer writ. It was in this manner that the surety allowed his equity to sleep in secrecy, until he discovered that the fund produced by the assignee's sale might be made to reach the Mull judgment if that of Seltzer could by any means be crowded out. This was too late. A subsequent creditor could not thus be disappointed by a secret equity which was sprung upon him without previous notice, just when he had a right to expect that his claim would be satisfied. We must regard this case as within the spirit, if not within the very letter, of Douglass's Appeal above mentioned.

Decree affirmed, with costs to be paid by the appellant.

Opinion by GORDON, J.

Jan. '78, 117. March 4, 1879.

Appeal of the Fogelsville Building and Loan Association.

Practice—Lien of judgment—Liquidation of damages—Judgment upon scire facias to revive.

A general judgment upon a *scire facias* to revive a judgment is a lien, though no liquidation of damages be filed.

Such a judgment points the subsequent purchaser or incumbrancer directly to the original judgment, and thus furnishes him with the notice to which he is entitled.

Appeal from a decree of the Court of Common Pleas of Lehigh County confirming the distribution reported by the auditor in the matter of the assigned estate of Granville Gernert. The following facts appeared:—

Granville Gernert made a general assignment for the benefit of his creditors; the personal property proving insufficient, the assignee, on November 17, 1876, presented a petition praying the Court to order a sale of certain parcels of real estate under the Act of February 17, 1876, "free and discharged from all liens, etc.;" the Court ordered the sale, and referred the fund arising therefrom to an auditor for distribution.

Before the auditor the fund was claimed by Charles A. Gernert upon a judgment entered April 1, 1870, revived April 8, 1875, and by the Fogelsville Building and Loan Association upon two mortgages recorded July 24, 1874, and Sept. 30, 1875, respectively. The auditor found that there were no liens between those of Gernert and of the building association, nor between the two mortgages of the association. The fund was insufficient to satisfy both claimants.

Chas. A. Gernert's judgment was a judgment confessed on a single bill, and was revived by

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amicable *scire facias*, as follows (after giving term and number, etc.):—

It is hereby agreed that the Prothonotary of Lehigh County enter an amicable action upon the records of the Courts of Common Pleas of the county aforesaid, as of No. 695, of January Term of 1875, and that a judgment be forthwith entered therein in favor of the plaintiff above named, and against the defendant above named. And that the judgment aforesaid, No. 243 of April T. 1870, be revived according to the Act of Assembly, with costs.

No reference was made to the amount of the judgment.

The following are the entries in the judgment index:—

Original Judgment.

Gernert, Granville	Charles A. Gernert	April T. 1870, 243	Note | April 1, 1870, $1500.00 | April 1, 1870 | April 8, 1875, revived to January T. 1875, No. 695.

Revival.

Gernert, Granville	Charles A. Gernert	January T. 1875, 695, Rev. of April T. 1870, No. 243 | April 8, 1875 |

The building association claimed that the judgment of revival was irregular by reason of the omission to assess the damages either in the agreement to revive, or upon the judgment index.

The auditor having awarded the fund to the judgment creditor, the mortgagee excepted.

The Court (MEYERS, P. J.), held that:—

"The object and purpose of the judgment dockets is simply notice. It would seem that an entry of revival by *am. sci. fa.* on the judgment docket is notice to subsequent purchasers and incumbrancers, whether the amount is liquidated and noted on the docket or not. The only inference that legitimately can be drawn from such an entry of revival without the amount stated (so far as third parties are concerned) based on a written agreement of the defendant that the judgment, referring to the number and term thereof, shall be revived and continued for another period of five years, is that it is a revival for the entire amount with interest. Between the judgment creditor and debtor himself, no such inference is necessary as the latter would be at liberty to show at any time that the amount of the debt had been reduced. But as against third persons who may become purchasers or incumbrancers such inference seems to be plain and reasonable."

The exceptions were, therefore, dismissed, and the report confirmed. The exceptant appealed, assigning as error the action of the Court.

W. D. Luckenbach (*Edward Harvey* with him), for appellant.

A purchaser or subsequent incumbrancer is not bound to inquire, or look elsewhere than to the judgment docket, and is not affected by constructive notice, unless the entry in the judgment docket conform to the requirements of the law.

Fulton's Est., 1 Sm. 214.
York Bank's Ap., 12 C. 461.
Ridgeway, Budd & Co.'s Ap., 3 H. 181.

The requirements of the law were not complied with.

Act March 26, 1827, 1 Purd. Dig. 280, § 5.
Act March 29, 1827, Ibid. 822, § 18.

If the agreement of April 8, 1875, had been an agreement to confess judgment it would undoubtedly have been void, for the failure to mention any amount of the indebtedness; by analogy, then, it would seem to be void as an agreement to revive.

Evan Holben, for appellee.

The point in this case has been ruled in Dreifuss *v.* Denmark, C. P. of Tioga County (32 Legal Intelligencer, 337). The design of the Act requiring the judgment upon the *sci. fa.* to revive to be docketed is to give notice to subsequent purchasers, etc.—this is as well done by a note referring to the original, where the amount can be ascertained as it would be in any other way.

March 24, 1879. THE COURT. There is nothing in any of the Acts of Assembly upon the subject of the revival of judgments which requires that when a judgment is revived the amount of principal and interest then due should be liquidated. A general judgment upon the scire facias to revive, that the judgment be revived for another period of five years, is all that is prescribed.

Such has been the uniform practice. No doubt it may often be advisable where no interest has been paid on the debt to ascertain the amount. But the judgment of revival points the subsequent purchaser or incumbrancer directly to the original judgment where the amount is fixed, and a simple calculation ascertains the interest due upon it.

Decree affirmed, and appeal dismissed at the costs of the appellants.

PER CURIAM. PAXSON, J., absent.

[See Bryan *v.* Eaton, 4 WEEKLY NOTES, 493.

From the paper books in the above case it would seem that the Gernert judgment was the first lien, and that the building association mortgages immediately followed; if, therefore, the former had been held to have been improperly entered, so that its lien was lost, the latter would then have become the first mortgages, and would not have been discharged by the sale (Act of Feb. 17, 1876, § 4). Hence if the appellant's contention had been adopted he would have been equally unsuccessful in obtaining payment out of the fund. This point does not seem to have been adverted to.]

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Jan. '79, 30. Feb. 30, 1879.

James v. Harper.
James's Appeal.

Bailment—Pledge of chattels for loans of money—Retention by broker of pledgee's collaterals—Subsequent advances to pledgor by broker—Decedents' estates—Power of administrator to bind the estate by his mere agreement in such a way as to take the assets out of the course of legal distribution.

Whether a person holding personal property in pledge for money loaned can retain such property as security for advances subsequently made, depends upon the understanding and agreement of the parties at the time such subsequent advances were made.

B. negotiated a loan of money through a note broker for which he gave his notes, on which he assigned as collateral security a large amount of whisky, with power to sell in case of non-payment at maturity. The pledgee allowed the broker to retain the collaterals and the warehouse receipts for the whisky. The pledgor subsequently borrowed money from the broker, but gave no specific pledge as security. The pledgor died insolvent before the maturity of the notes for which the whisky was pledged. In his account to the administrator of sale of the whisky the broker deducted his advances and a charge for commission in addition to that for brokerage, which the administrator disallowed:

Held (affirming the decree of the Court below), that the appellant was not within the equitable rule that a pledge of chattels, without any distinct proof of a contract for that purpose, might be held until the subsequent debt was paid as well as the original debt, because the right of possession and legal title to the collaterals was in the pledgee, for whom the appellant had acted merely as a broker.

Per PAXSON, J. The administrator of an insolvent estate cannot by his mere agreement bind the estate in such a manner as to take the assets out of the course of distribution provided by law.

Appeal from the Common Pleas No. 1, of Philadelphia County.

Bill in equity, filed by B. W. Harper, administrator of the estate of John P. Bankson, deceased, against Wm. A. James, trading as James & Co. The bill set forth that the decedent borrowed during his lifetime from the defendant large sums of money, assigning as collateral security therefor a large number of barrels of whisky and certain shares of the Hannisville Distilling Company; that the decedent's estate was insolvent, and his books in such confusion that the plaintiff could not ascertain the condition of the decedent's account with the defendant; that the defendant had sold 179 barrels of the whisky, retaining the remainder and the shares of the Hannisville Distilling Company: and that the defendant intended upon the maturity of certain notes to sell the collaterals pledged therefor, which would result in their sacrifice. The bill prayed for discovery, an account, an injunction to restrain the defendant from selling the collaterals until an account was stated, and general relief.

The answer alleged that the defendant, who was a note and bill broker, had negotiated for the plaintiff's intestate loans of large sums of money upon notes secured by collaterals of whisky and shares of the Hannisville Distilling Company, which were either delivered to the defendant's principals or to the defendant himself for his principal's security; that the defendant upon instruction of the plaintiff had sold 179 barrels of whisky to pay loans which had matured, of which he had rendered the plaintiff an account, which was approved by the plaintiff, and that he held no other notes or collaterals.

The plaintiff filed a general replication, and the case was referred to an Examiner and Master (Dallas Sanders, Esq.). The material facts found by him were as follows:—

General John P. Bankson, on September 6 and 9, 1876, borrowed through James & Co., bill brokers, from Charles W. Poultney, the sum of $14,000, for which he gave two promissory notes, one for $10,500, and the other for $3500, payable in four months, assigning as collateral security therefor 200 barrels of whisky. The notes provided that in case they were not paid by the maker at maturity the payee might sell the collateral for such price and on such terms as he might think proper, without notice to the maker, and after deducting all charges, apply the proceeds of sale to the payment of the notes, returning the balance to the maker. On November 2, 1876, 21 barrels of the whisky were withdrawn, reducing the amount of the first note to $9030, and the number of barrels of whisky to 179, which were stored in the Hannisville Distilling Company's warehouse, the storage receipts as well as the collateral notes being held by James & Co. Bankson borrowed from James & Co. $600, on December 8, 1876, for which he gave his due bill, and $1200 on December 26, 1876, for which he gave his check. For these loans no specific collateral was pledged. General Bankson died insolvent on December 27, 1876, and the plaintiff was appointed administrator. Upon the maturity of the notes it was agreed between James & Co. and the plaintiff that the whisky pledged as collateral should be sold to pay the notes. James & Co. accordingly rendered the plaintiff, on January 20, 1877, an account of sales of the 179 barrels of whisky, wherein they deducted from the proceeds of sale the amount of the notes, their advances of January 9 and 12, 1877, and also a charge of 2½ per cent. for commission, and 2½ per cent. for brokerage.

The administrator objected to the deduction made for the advances, and the charge of 2½ per cent. for commission.

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The Master found as a fact that there was no agreement between the parties to sell the collateral for any general account, but that plaintiff was willing that defendant should sell the collaterals and apply the proceeds to the payment of the sum of money due and secured by the same.

The collateral notes or bills of sale stated specifically what the proceeds sold under this power should be applied to. Neither the due bill nor check was included as the indebtedness to be paid as set forth in the collateral notes or bills of sales.

The Master was, therefore, of opinion that the defendant had no right to retain and keep out of the proceeds of the sale of the collateral the amount of the due bills and the check.

The Master also found as a fact that there was not sufficient testimony to establish a custom authorizing a note and bill broker to retain out of the sales of collaterals, held as security for notes discounted by him, a commission for himself of 2½ per cent.

The Master therefore reported that the defendant had no authority to retain the amount charged by him as commissions.

To this report the defendant filed exceptions, which the Court dismissed, confirming the Master's report. (No opinion filed.)

The defendant took this appeal, assigning for error the decree of the Court.

Samuel Gustine Thompson, for the appellant.

A new debt or loan will not be deemed to attach to a pledge, unless from all the circumstances there is just ground of presumption that the new debt or loan was made upon the credit of the pledge, and was so understood by the parties at the time.

Story on Bailment, § 304.

Here the circumstances under which the advances were made by James & Co., establish beyond possibility of doubt that the money was loaned upon the credit of the whisky, for they held the collateral notes and the warehouse receipts for the whisky which they had authority to sell for the debts of the decedent, and knew there would be sufficient margin after satisfaction of the first loan. The presumption then is strong that the advances were made upon the whisky and not upon the pledgor's individual credit.

In the case of a mortgage or pledge of chattels, the equitable doctrine is, that without any distinct proof of any contract for that purpose, the pledge may be held until the subsequent debt or advance is paid, as well as the original debt.

Story's Equity Jurisprudence, § 1034.

This case is almost identical with that of—

Demainbray *v.* Metcalfe, 2 Vernon, 690.

The defendant acted in the double capacity of commission man and a broker, and was therefore entitled to compensation in both capacities.

John R. Read and Silas W. Pettit, contra.

The proposition that where one lends money specifically on a certain pledge, and afterwards advances further sums, the presumption is that the latter advances are made on the faith of the pledge given for the former loans, and that equity will not enforce the return of the pledge for the payment of the first loan until the pledgor do equity by paying the other loans, is inapplicable to this case, because the loans were not made by the same persons, the first loan having been made by Poultney, James & Co. acting only as brokers.

There is no evidence of a distinct agreement to pledge the collateral for the defendant's loan, which is essential to support his claim.

The case is governed by Baldwin *v.* Bradley (69 Ill. 32).

James & Co. are not entitled to charge a commission, for they stand in Poultney's shoes, who could not under the agreement charge for selling.

March 3, 1879. THE COURT. Whether a person holding personal property in pledge for money loaned can retain such property as security for advances subsequently made, must depend upon the understanding and agreement of the parties at the time such subsequent advances were made. It is said in Story on Bailments, section 304, "The mere existence of a former debt due to the pledgee does not authorize him to detain the pledge for that debt, when it has been put into his hands for another debt or contract, unless there is some just presumption that such was the intention of the parties. The like rule applies to a subsequent debt or loan contracted by the pledgor, for in such a case the new debt or loan will not be deemed attached to the pledge, so that the pledgee may retain the same therefor, unless from all the circumstances there is just ground of presumption that the new debt or loan was made upon the credit of the pledge, and was so understood by the parties. The rule in all these cases strictly applies that the particular contract is to govern the rights of the parties, *modus et conventio vincunt legem.*" The learned author cites numerous authorities in support of his text. In Buckley *v.* Garrett (10 P. F. S. 333), it was held that if a debtor at or immediately after the execution of a mortgage on his property to a creditor, transfer to him a policy of insurance against fire on the mortgaged premises, though nothing be expressed at the time, or it be transferred as collateral security generally, it is a conclusion of law from the very nature of the transaction, that the policy is to be held by the creditor as a collateral security for the mortgage. Says SHARSWOOD, J., "It would require evidence of an express agreement or understanding to authorize the assignee

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to apply the amount of the insurance received in the event of a loss, to any other debt or liability." The appellant, while conceding that the rule at law is as above stated, contends that in equity it is not so in the case of a pledge of chattels, and that in such case without any distinct proof of a contract for that purpose, the pledge may be held until the subsequent debt or advance is paid as well as the original debt. Such a rule is undoubtedly recognized in Story on Equity, at section 1034. The ground of the distinction is that he who seeks equity must do equity, and the plaintiff seeking the assistance of the Court ought to pay all the moneys due to the creditor to entitle him to equitable relief. Conceding all that can be claimed for this pirnciple, it does not apply to this case. The moneys for which the whisky was pledged was borrowed by Bankson from Charles W. Poultney. The latter held the notes, together with the transfer of the whisky and power to sell the same upon the non-payment of said notes. The appellant was a mere broker, and negotiated the transaction. That Poultney permitted him to retain the papers and control the whisky can make no difference. The right of possession and the legal title were in Poultney. Had Bankson paid the notes he could have been compelled to return the whisky under the express terms of the bill of sale. Had Poultney made further advances, and this bill had been filed against him, the equitable rule referred to might possibly have been enforced. It has no application to the appellant, as the whisky was pledged to other parties for money loaned by them at the time he made the advances to Bankson of the respective sums of $1200 and $600.

The Master finds as a fact that there was no agreement between the appellant and the administrator of Bankson that the former should sell the whisky on general account, but that on the contrary the administrator was willing that the collaterals should be sold, and the proceeds applied to the payment of the notes for which they were specifically held.

We do not think this is important, as it is clear the administrator of an insolvent estate cannot by his mere agreement bind the estate in such manner as to take the assets out of the course of distribution provided by law.

We need not discuss the questions of brokerage and commissions. While no opinion was filed by the Court below, the learned Master has given sufficient reasons to justify his conclusions upon these points.

The decree is affirmed, and the appeal dismissed at the costs of the appellant.

Opinion by PAXSON, J.

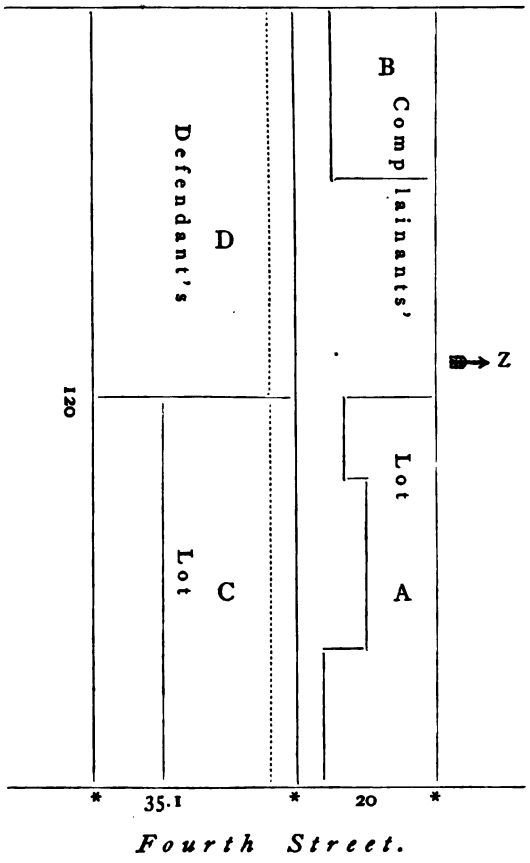
MERCUR and GORDON, JJ., dissent.

Common Pleas—Equity.

C. P. No. 3. Dec. 28, 1878

Meyer et al. v. Young.

Right of way—Effect of a grant of an alley-way forty years ago, recited in subsequent conveyance to defendant five years ago, but unaccompanied by user—Grant of an alley on which buildings are erected and continue to be used—Construction of deed—Injunction.



A. Complainants' house.
B. " tenant's house.
C. Defendant's old factory.
D. " building being erected.
Dotted line shows location of three-feet alley-way claimed by complainants.

Motion to dissolve preliminary injunction.

The injunction was originally granted, after notice and argument, with leave to the defendant to move to dissolve the same.

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Bill in equity, filed by Anna Meyer and her minor children by their next friend, etc., against Charles Young, praying for an injunction to restrain him from building on ground over which complainants claim a right of way.

The bill set forth a conveyance in 1837 to defendant's predecessor in title of the southernmost of two lots, reserving a yearly ground rent, the intermediate conveyances, and a deed to the defendant of 16 April, 1873, in all of which the lot was described as "containing in front 35 feet 1 inch, and in depth 120 feet, including on the north side thereof an alley 3 feet wide in the clear left open for the common use and privilege of the above described premises and the adjoining premises on the north . . . . together with the right and privilege of building over the whole of the said alley, leaving at least 10 feet headway in the clear." Also a conveyance in 1839, from the same grantor, of the northernmost lot to another grantee, reserving a yearly ground rent, and describing the lot as containing in front 20 feet and in depth 120 feet, "together with the free use and privilege of a certain 3 feet wide alley left open for the common use and privilege of the hereby granted premises and the adjoining premises on the south." Also a sheriff's sale to the complainants' testator of the last-mentioned lot under proceedings against the original covenantor for arrears of the said yearly ground rent reserved in 1839. That for the convenience of the owners of the northern lot, and for affording sufficient light and air, the two buildings which had been erected on either end of the complainants' premises had been built, receding from 2 feet 10 inches to 4 feet 7 inches from the south line thereof; that the defendant was about erecting a brick factory over the entire breadth of the rear end of his lot, whereby the complainants' right to the said passage-way would be permanently obstructed; that the proposed factory was to have many windows overlooking and immediately contiguous to the complainants' premises, and would constitute a nuisance to the occupants thereof, who were principally females, and would greatly endanger the said premises in case of fire; and that the defendant had been duly notified to desist from continuing his proposed building.

The defendant's answer set forth that, at the time of the purchase in 1837 by his predecessor, there had existed for about 100 years on the rear end of his lot a brick building, the north wall of which extended to a point 35 feet 1 inch north of his present south line; that, subsequently to 1837, the brick building on the Fourth Street front of his lot was built up to the same line, the north wall being 35 feet 1 inch north of his south line; that the alley "left open" was the space between the complainants' buildings and defendant's north wall; that a predecessor in title of defendant had used the said space as an alley; that, in 1875, he had been ordered by the building inspectors to tear down the ancient building on the rear end of his lot; that the western part of the present building was being erected upon the foundation wall thereof.

Affidavits were read on behalf of both complainants and defendant. Those of the former supported the bill, and set forth the damage that would result from the conduct of the defendant; those on behalf of the latter substantiated the answer, denied the existence of any alley-way where the same was claimed, and averred an adverse user of the soil inconsistent with any such supposed right.

A. Lewis Smith, for the motion.

The answer and the affidavits show clearly that the only alley-way which has existed on the land in question at any time since the original conveyance in 1837 is the vacant space along the south line of complainants' own land. They show that this passage-way existed at the time of that conveyance; that a right to its use was claimed under the original conveyance of the lot by defendant's predecessors in title; that it was the only alley "left open" at the date of the original conveyance; and that it was actually used by those under whom defendant claims title.

The words in the original deed and the subsequent deeds must, therefore, refer to this passage-way only.

A. T. Freedley and *Wm. Brooke Rawle*, contra.

The right claimed is an easement created by express grant—by deed—and where an easement is granted or reserved in express terms by deed, the only question ordinarily open for consideration concerns the proper construction of the language of the deed.

Washburn on Easements, *28.

The rights of the parties are determined by reference to the grant, and not by the use of the property or by the intentions or declarations of the parties.

Pickering *v.* Stapler, 5 Serg. & Rawle, 107.
Kirkham *v.* Sharp, 1 Wharton, 323, 332 (where the point was conceded at bar).
Devlin *v.* Welsh, 1 WEEKLY NOTES, 509.
Perry *v.* Binney, 103 Mass. 156.
Voorhees *v.* Burchard, 55 New York, 98, 104.

The defendant having, in 1873, purchased his property expressly subject to the right of way, and with direct notice of its existence, is estopped from denying its existence. The easement was originally created by deed in 1837. Every subsequent conveyance of the servient tenement has recognized and conveyed the property subject to the right of way, and every grant of the dominant tenement has likewise granted the right to use the passage-way.

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In 1873 the deed to the defendant recites it at length, and the defendant is bound by the grant.

Hall *v.* McCaughey, 1 P. F. Smith, 43.
Pickering *v.* Stapler, 5 Serg. & Rawle, 107.
Overdeer *v.* Updegraff, 19 P. F. Smith, 118.
Connery *v.* Brooke, 23 Id. 80.
Carlin *v.* Paul, 11 Missouri, 32.
Gardner *v.* Boston, 106 Mass. 549.
Goss *v.* Calhane, 113 Id. 423.
Farrington *v.* Bundy, 5 Hun, 617.

The complainants' rights still exist. The easement, being created by deed, can obviously only be extinguished by a sealed instrument, or by an adverse possession for twenty-one years. Mere non-user can never divest an easement created by deed.

Erb *v.* Brown, 19 P. F. Smith, 216.
McKee *v.* Perchment, Id. 343.
Butz *v.* Ihrie, 1 Rawle, 218.
Barnes *v.* Lloyd, 112 Mass. 224.

Nor anything short of the statute of limitations:—

Dyer *v.* Depui, 5 Wharton, 584.
Yeakle *v.* Nace, 2 Id. 123.
Wheatley *v.* Baugh, 1 Casey, 528.
Angell on Water-courses, Section 252.
Chestnut Hill Company *v.* Piper, 27 P. F. Smith, 432.

So an easement created by grant does not cease, although the necessity for it ceases.

Atlantic Mills *v.* Mason, 120 Mass. 244.

Here the easement, so far from being abandoned, was expressly recognized, revived, and continued in full force by the conveyance to the defendant in 1873, being the last deed in the line of the title.

McKee *v.* Perchment, 19 P. F. Smith, 342.

Moreover, the complainants claim under a sheriff's sale in 1875 against the original covenantor for arrears of ground rent. Hence the effect of the sale was to invest the purchaser with the title as of the date it was originally conveyed upon ground rent. For the lien of the judgment for arrears of ground rent relates back to the reservation and creation of the easement in 1839, and extinguishes all intermediate rights.

Bantleon *v.* Smith, 2 Binney, 151.
McCall *v.* Lenox, 9 Serg. & Rawle, 302.
Brown *v.* Johnson, 4 Rawle, 146.

The jurisdiction is undoubted, and has been frequently exercised.

Clark *v.* Martin, 13 Wright, 289.
Kay *v.* Stallman, 2 WEEKLY NOTES, 643.
Appelgate *v.* Morse, 7 Lansing, 59.
Earl *v.* DeHart, 1 Beasley, 280, 287.

A court of equity will enforce that mode or use of enjoyment which the grantor has seen fit to impress upon property.

Schwoerer *v.* Boylston Association, 99 Mass. 297.

THE COURT. Motion denied.

The complainants subsequently amended their bill by averring that the entire north walls both of the defendant's present building upon Fourth Street, as well as the building in course of erection on McGrath Street, were built upon a stone foundation, which extended from three to five inches upon the ground of the complainants; that any wall erected upon such a foundation was a party wall; that the defendant could not deprive it of this character by erecting the said wall entirely within his own line; and that any such wall must be made solid without openings or windows therein; and prayed that the defendant be restrained from using the said entire north wall other than as a party wall, without openings therein.

The defendant demurred for multifariousness.

A. L. Smith, for demurrer.

Freedley and *Wm. Brooke Rawle*, contra.

Demurrer overruled.

Common Pleas—Law.

C. P. No. 1. March 11, April 5, 1879.

Commonwealth, to use, etc., v. Wilson, Surviving Administrator, et al.

Administrators and executors—Pleading—Demurrer—To maintain a suit against a surety on an administration bond, it is not necessary that the administrator should be pursued to insolvency—When a statute makes a writing necessary that was not so at common law, in pleading it must be alleged to be in writing—A plea in abatement after a plea in bar, not verified by affidavit, will be stricken off on motion.

Demurrer to plea.

Debt, against the surety on an administration bond in the ordinary form.

The declaration alleged, *inter alia*, an award, by decree of the Orphans' Court of Philadelphia, to the plaintiffs of their respective shares upon settlement of the administration account, and the non-compliance with said decree by the administrator.

The plea by the surety set forth that the action against him was prematurely brought, in that the plaintiffs had not pursued the administrator to a devastavit, although requested and notified so to proceed.

The plaintiffs demurred on the ground that it was not necessary to pursue the administrator to

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insolvency before bringing suit against the surety on the bond; and that the pleas did not allege a request in writing, signed by the defendant, to proceed and levy from the administrator, accompanied by a declaration that defendant would consider himself discharged if the plaintiffs did not so proceed.

Thomas Hart, Jr., for the demurrer.

It is not necessary that any previous proceedings should be had against the administrators themselves. An executor need not be pushed to insolvency. A decree of the Orphans' Court, ascertaining the amounts due to the distributees, is all that is necessary to fix the liability.

Commonwealth *v.* Stub, 1 Jones, 150.
Boyd *v.* Commonwealth, 12 Casey, 355, 359.
Commonwealth *v.* Dill, 1 Phila. 556.
Commonwealth *v.* Raser, 12 Sm. 436.

The Act of May 14, 1874, requires notice from the surety to be in writing, and signed by the party giving the same.

Purd. Dig. 1881, pl. 1.

Where a statute makes a writing necessary, when it was not so at common law, if the defendant plead such matter, he must show it to be in writing.

1 Wms. Saunders, 276 e, end of note 2.
Id. 211 b, note (i).
Case *v.* Barber, Sir T. Ray'd, 450.
Foquet *v.* Moore, 7 Exch. *870.
Dock Co. *v.* Brymer, 5 Exch. 696.
Adams *v.* Wordley, 1 M. & W. 374.

The notice to proceed should be accompanied by a declaration that, in default thereof, the surety would consider himself discharged.

Cope *v.* Smith, 8 S. & R. 110.
Geddis *v.* Hawk, 10 S. & R. 33.
Bank *v.* Gibson, 1 Watts, 143.
Barge *v.* Commonwealth, 3 Penrose & Watts, 262.

McMurtrie, contra, cited—

Commonwealth *v.* Evans, 1 Watts, 437.
Myers *v.* Fretz, 4 Barr, 344.
McClintock's Appeal, 5 Casey, 360.
Stephen on Pleading, 312, 373.

On March 12 the defendant filed an additional plea, alleging that a refunding bond had not been made or tendered, as required by the Act of Assembly, before the action was commenced.

On April 5 a rule to show cause why the said plea should not be stricken off, was argued.

Thomas Hart, Jr., for the rule, cited—

1 Chitty, 453.
Wood *v.* Davidson, 2 Rawle, 52.
R. R. Co. *v.* R. R. Co., 26 Sm. 481.
Stecher *v.* Commonwealth, 6 Wharton, 60.

April 12, 1879. THE COURT. We think the weight of authority supports the proposition that an executor or administrator need not be pushed to insolvency before suit may be brought against the security. It is necessary that the liability of the principal should be fixed by a decree establishing the amounts due to the distributees, but this done we think suit may be maintained against the surety. The case of the Commonwealth *v.* Stub (1 Jones, 150), is strongly in point; and Boyd *v.* The Commonwealth (12 Casey, 355), is to the same effect; so also Commonwealth *v.* Dill (1 Phila. Rep. 556).

The strongest case on the other side of the question is Commonwealth *v.* Wenrick (8 Watts, 159; and Commonwealth *v.* Evans (1 Watts, 437), looks in the same direction. In the first of these cases the executor had absconded, and in the second there was no decree of the Orphans' Court establishing the creditor's right to distribution.

As to the ground of demurrer, the Act of May 14, 1874, requires notice from sureties to be in writing, and signed by the parties giving the same. This is not alleged in the plea. The authorities cited seem to hold the doctrine contended for, that where a statute makes a writing necessary when it was not so at the common law, if the defendant pleads such matter he must show it to be in writing. The two cases of Cope *v.* Smith (8 S. & R. 110), and Bank *v.* Gibson (1 W. 143), hold that notice given by surety to the creditors to proceed against the debtor should be accompanied with a declaration that, in default thereof, the surety would consider himself discharged. This is not set up in the plea.

We think the demurrer should be sustained, and judgment is therefore entered for the plaintiff.

The plea in abatement of March 12th not being filed until after the pleas in bar, *nor verified* by affidavit, the rule to strike it off is made absolute.

Opinion by ALLISON, P. J.

C. P. No. 2. March 3, 1879.

Silk Company v. Disston.

Assignments in bankruptcy—Suits begun before assignment may be continued in assignee's name.

Rule to admit assignee in bankruptcy to prosecute in his own name.

On January 5, 1878, a suit had been begun by the Philadelphia Silk Company against Henry Disston & Sons. After service of the summons upon the defendants nothing more was done. It appeared that since then, on May 24, 1878, the United States District Court had appointed an assignee in bankruptcy of the Philadelphia Silk Company which appointment had been accepted by the assignee and a deed of assignment to him filed May 27, 1878.

Ledyard for the rule.

Rule absolute.

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C. P. No. 3. Wm. M. M. March 22, 1879.

Bancroft v. Freeman.

Practice—Costs—Commissions to take testimony—The winning party having taken the testimony of a witness in another State on commission, and also having produced the witness on the trial, may recover the costs of the commission as well as the mileage and attendance fees.

Sur appeal from prothonotary's taxation of costs.

Debt on bond. The writ issued in 1862.

The plaintiff being non-suited on Oct. 17, 1878, the defendant filed a bill of costs containing a charge of $53 for commissions sent to San Francisco in 1868, to obtain the testimony of one E. W. Haines, and another charge of $22 for the mileage and attendance at Court of the same witness at the trial. The prothonotary refused to allow both charges, and struck out that for the commissions to San Francisco, because of the witness's presence at the trial. From this action of the prothonotary, defendant appealed.

N. D. Miller (with him, *George W. Biddle*), for the appellant.

The commission was sent in good faith ten years before the trial, when we had no means of knowing whether the witness would be present at the trial or not. The fact that we were afterwards able to obtain his presence in court, cannot prevent our right to costs for the commission, for it was only a reasonable and proper precaution to send for his testimony, considering the distance and the impossibility of obtaining it on a sudden emergency.

Duke of Beaufort *v.* Lord Ashburnham, 13 C. B., N. S., 598.

S. W. Pennypacker (with him, *L. Stover*), contra.

This bill includes the expenses of two commissions, one Feb. 10, 1868, and the other Aug. 6, 1868, for substantially the same testimony of the same witness, and the defendant is now endeavoring to make us pay for his evidence taken in three different ways. To compel us to pay for abandoned experiments in taking testimony, would be oppressive. There is no case in Pennsylvania, but in England it has been held that the winning party, who had taken the testimony of a foreign witness, and afterward produced him on the trial, must pay the costs of cross-examination to the other side.

Patterson *v.* Evans, 18 E. C. L. R. 36.
Curling *v.* Robertson, 7 Manning & Granger, 525.

C. A. V.

April 12, 1879. THE COURT. We think we must sustain this appeal. Where parties are justified in thinking that a witness may not be present—as for instance where the witness, as in this case, resides on the western slope of the continent—they are justified in sending a commission to get his testimony; and the fact that the witness is afterwards present at the trial, cannot make any difference as to the costs of the commission.

Appeal sustained.

Oral opinion by LUDLOW, P. J.

C. P. No. 3. Wm. M. M. March, 1879.

Fredericks v. Royal.

Pleading—Avowry—The plea of de injuria is not pleadable to an avowry.

Sur demurrer to plea.

Narr. in replevin; avowry and cognizance in the usual form, claiming $96 rent due. The plaintiff then pleaded *de injuria absque tali causa.* Demurrer thereto, for the cause that *de injuria* is not pleadable to an avowry.

Brightly, for the demurrer.

The improper use of replication *de injuria* can only be reached by a special demurrer.

Lincoln *v.* Souder, 2 Clark, 319.

The replication *de injuria* to an avowry is bad on special demurrer.

Hopkins *v.* Hopkins, 10 Johns. 369.
Lytle *v.* Lee, 5 Johns. 112.

The rule is that the general replication *de injuria* is bad when the defendant insists on a *right*, and is good only when he pleads matter of *excuse.*

Crogate's Case, 8 Co. 66.
Cooper *v.* Monke, Willes's Rep. 54.
Jones *v.* Kitchin, 1 Bos. & Pull. 76.
Duppa *v.* Mayo, 1 Saunders, 284.
1 Chitty's Pl. 161, 560.
Wallace *v.* Hibbs, 4 Phila. 154.

Ford, contra.

March 13, 1879. THE COURT. Demurrer sustained, with leave, etc.

C. P. No. 4. [redacted] Mar. 18, 1879.

Conway v. Lowry.

Replevin—Distress—Following goods removed before rent due, for rent which afterwards fell due within thirty days—Extent of landlord's lien.

Rule for a new trial.

Replevin. From the evidence it appeared that the rent of the demised premises was due upon the 1st of each month; that on November 2, 1878, the month's rent due on the 1st still remaining unpaid, the defendant distrained upon certain goods which had been removed from the premises about ten days previously.

The plaintiff replevied them, and the defendant justified the taking in his avowry of rent in

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arrear under the lease and specially under the following clause: "All personal property upon the premises shall be liable to distress, and also all property removed therefrom *shall for thirty days after such removal be liable to distress and sale for rent in arrear.*"

There was no evidence of any attempt at a fraudulent removal, and the jury found for the defendant.

A. S. L. Shields, for the rule.

The point is whether a landlord can follow goods unless there is rent in arrear? Under the Act of March 21, 1772, he can follow goods fraudulently removed by the tenant for thirty days. This lease gives him the broader power to follow also in the absence of fraud. But he can follow only when a legal distress can be made, an essential requisite of which is that there should be rent in arrear. Therefore, there having been no rent in arrear on October 24, 1878, the landlord's lien fell with the removal of these goods from the demised premises and the verdict should have been for the plaintiff.

Wencel Hartman, showed cause.

The period of thirty days given by the lease to the landlord to follow goods removed by his tenant had not expired at the time the distress was made, therefore the levy was perfectly justifiable.

Grace *v.* Shively, 12 S. & R. 217.

C. A. V.

March 24, 1879. Rule absolute.

Orphans' Court.

Feb. 24, 1879.

Stevenson's Estate.

Attachment for not complying with order of Court —Nature and character of—Jurisdiction of Orphans' Court to discharge prisoner committed under such attachment—Under what circumstances discharge will be ordered.

Sur petition by administrator for leave to purge himself of contempt.

In April, 1868, Jesse A. T. Laws, the petitioner, was appointed administrator of the estate of Mary C. Stevenson, deceased. His account was not filed until August, 1878. It was duly adjudicated, and a decree of distribution made. There having been no exceptions to the adjudication, it was subsequently confirmed.

On November 30, 1878, a peremptory order was granted directing the administrator to pay over the balance due the estate in his hands, amounting to $2440.36, to the guardian and attorney representing the distributees. No answer was filed, and subsequently an attachment issued. The administrator was taken into custody on the attachment, and security having been entered for one week, a stay of proceedings was allowed. At the expiration of that time, the administrator was brought into Court, and failing to obey the order of the Court or to assign any reason therefor, he was committed to the county jail.

He thereupon presented a petition, setting forth substantially the above facts; alleging his inability to comply with the order entered, and praying that he be permitted to come personally into Court, submit to an examination under oath, and purge himself of his contempt, which petition was granted, and subsequently he was brought before the Court.

From his statement then made, the following facts appeared: In 1875 he received, as administrator, $2300. At the time of receiving this money he believed that he gave an additional bond with two sureties; that he was pecuniarily embarrassed at the time, and, therefore, deposited the money with one of his sureties on the alleged bond, for safe keeping; that he took a receipt from the surety for the same, which stated the character of the fund; that this surety, who was at that time collector of delinquent taxes, defaulted to the city to a large amount, and was compelled to flee the jurisdiction to escape arrest; that he had never recovered any of the money from the surety; that at the time of taking out letters of administration, he was solvent; that he had lost his property since in real estate operations, and was without any means; and that he had never intentionally misused the funds of the estate.

Ernst, for the rule.

The commitment is until the petitioner shall comply with the order of the Court. He can never comply, therefore his sentence is for life. Surely the Court does not intend this. Contempt consists in refusing to do what one is able to do. That is not the case here. The petitioner simply does not do something that he cannot do. Inability is not contempt.

J. L. Jones (*T. J. Ashton*, with him), contra.

It may be questioned if the Court has power to dissolve the attachment, and discharge this administrator. The attachment here issued upon the application of an injured party. His only mode of redress, other than a criminal proceeding, was by attachment, and that is in the nature

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of a civil remedy to enforce obedience to a decree, not merely to punish for a contempt.

Chew's Appeal, 8 Wright, 247.
Tome's Appeal, 14 Id. 285.

The Act of July 12, 1842 (P. L. 339), abolishing imprisonment for debt, expressly excepts "proceedings as for contempt to *enforce civil remedies*." This exception is clearly a remedy given by the law to be invoked under certain circumstances, and the Court should no more deprive an aggrieved person of it as a mode of redress, than they should deny him any other right secured by the law.

The administrator here committed no contempt in *open* court, which by the Act of June 16, 1836 (P. L. 793), is the only case where the Court can *summarily punish by imprisonment*. Tome's Appeal (*supra*). This administrator violated an obligation imposed on him by law. The contempt of Court is implied rather than real, but the wrong done and maintained is positive. The delinquent may therefore purge himself of the element of contempt on the ground of inability to perform the decree, but that is no reason for his discharge from imprisonment. He cannot purge himself, in this manner, of fraud or carelessness, and consequently should not be discharged.

The argument that the imprisonment may be unlimited as to time cannot be sustained.

The very point is decided in Tome's Appeal (*supra*), where AGNEW, J., reviewing the powers of the Courts to punish for contempts under the Act of June 16, 1836, says: "Attachments to enforce civil remedies are plainly not within the enactment, for the reason they are not used as punishment, but as the means of remedy." And the Insolvent Act of 16 June, 1836, fixes the limitation of imprisonment in such a case as the one now before the Court. It provides: "In the case of a person arrested or detained for the non-performance of any decree or sentence for the payment of money, an application may be made to the Court of Common Pleas after three months' imprisonment, and a discharge from imprisonment obtained."

Ex parte Maag, 1 Ash. 97.

This Court does not sit to determine upon the petitioner's guilt or innocence. The purgation for the non-performance of duty must take place before another tribunal. The petitioner should only be discharged by proceedings under the insolvent laws. The contempt not being in open Court, the jurisdiction of the Common Pleas is complete.

In re Blumer, 35 Leg. Int. 262.
Williamson's Case, 2 Casey, 23.

Feb. 24, 1879. THE COURT. The petitioner is in custody as for a contempt of Court in not obeying an order directing him to pay over moneys found to be in his hands, as an administrator. He has purged himself of the apparent wilful disobedience of the decree of the Court, and from his uncontradicted testimony shown the absence of any individual misappropriation of the funds of the estate, or conversion thereof to his personal benefit. Under these circumstances, notwithstanding the argument that the Court is bound to commit the petitioner to await proceedings under the insolvent laws, we believe it advisable to follow the usual practice in cases of this nature. The process of attachment is not to be used for the mere purpose of collecting a debt; its object is to enforce the decree of the Court, and where it appears that the defendant, by reason of an error of judgment, or confidence misplaced in others, accident, or misfortune, has lost the funds committed to him, and becomes unable to comply with the decree, we see no good reason for imposing a fruitless imprisonment. The petitioner, we think, has fully shown his actual inability to comply with the order of the Court, and not arising from his own peculation or fraud. We must therefore remit the parties interested to other civil or criminal remedies, and direct his discharge.

Opinion by HANNA, P. J.

[See Hamilton's Estate, 4 WEEKLY NOTES, 204; Peter's Estate, 1 Id. 526.]

March 17, 1879.

Gheen's Estate.

Statute of frauds—Promise to assume the debt of another—What words requisite—Domestic attachment—Practice.

Sur exceptions to adjudication.

Jacob Gheen died February 28, 1876. At the audit of the account of Martha E. Gheen, administratrix, a claim was made against the estate of the decedent by Robert McBurney & Co., arising from the following circumstances: McBurney & Co. sold certain articles of merchandise to Charles Gheen, a nephew of the deceased, for which they were not paid. Shortly afterwards Charles Gheen left the city, without informing any one as to his intended stay or place of destination. McBurney hearing of this, issued an attachment against him under the Act of 1869, and the sheriff took possession of his goods, including a wagon, two horses, and some grain. Upon hearing of this the decedent went to McBurney's store and said to him, "I want to settle that matter of Charlie's. I propose, if you will release the goods and team, I will pay Charlie's debt in two or three days." This McBurney assented to, and gave him a memorandum of the amount due. The next day the decedent sent a note to McBurney, saying,

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"Give the bearer an order to get the horses and wagon of mine, locked up across the way; the man will not release them unless by an order from the Sheriff, or you." The order was given, the goods released, and the execution marked "stayed." In a day or two Charles Gheen returned to the city, having been absent less than a week. It was clearly shown he had never relinquished the ownership of his business, or of any of the goods seized, and immediately upon his return to Philadelphia resumed control of his affairs.

After argument, the auditing Judge (ASHMAN, J.), disallowed the claim in the following opinion: "Assuming the facts to have been as sworn to by the first witness, and that, in response to the decedent's verbal promise to settle the debt of Charles Gheen, the property seized was delivered to the decedent, and the attachment stayed, the claim, nevertheless, of McBurney & Co. against the estate cannot be allowed. The doctrine laid down by Chancellor KENT, in Leonard *v.* Vredenburg (8 Johns. 39), that cases are not within the Statute of Frauds, when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the new contracting parties, is not tenable in Pennsylvania. The true test, as established by Maule *v.* Bucknell (14 Wr. 39), and Townsend *v.* Long (27 P. F. Sm. 143), depends upon the question whether any liability on the part of the promissor exists independent of his express promise, or whether he has become the actual debtor, so that, as between him and the original debtor, the superior liability is his. This test, applied to the present case, is decisive. In surrendering the attached property to the decedent, McBurney & Co. conveyed no property therein; they made no assignment to him of their claim against Charles Gheen, nor did they subrogate him to their rights in the attachment, and the original liability of Charles Gheen continued in full force. At the time of the transfer they had, at the most, a qualified property in the goods, the extent of which remained to be determined by process of law; and when they stayed the attachment they divested themselves of every attribute of ownership. They certainly conferred none upon Jacob Gheen, who could not, by virtue of their transfer to him, have held the property for a moment as against Charles Gheen. The moralities of the transaction are not in review; on legal grounds the claim must be rejected."

Subsequently, a reargument having been ordered, the auditing Judge filed a second opinion, confirming the first, in the following language: "The present case may be taken as fairly illustrative of the danger against which the Statute of Frauds was intended to provide. The attachment was founded upon the supposed intent of the debtor to remove his property in fraud of his creditors. The testimony at the audit, however, conclusively showed that he had formed no such design; and, if submitted at the time of the seizure, would have been sufficient to justify the Court in dissolving the attachment. It is a natural presumption that Jacob Gheen, knowing that Charles had not removed from the city, should have insisted upon a return of the goods which had been improvidently seized, and should even have promised to pay the debt of his nephew, if it should afterwards appear that the attachment was well founded. The ease with which, in the absence of any writing, a promise of this character could be confounded with such a promise as was set up by the claimants, and the gross injustice which might result from such misconception, are equally apparent. The note of Jacob Gheen to the claimants, asking for an order upon the sheriff for the return of the articles seized, was very imperative in its terms, and would seem to favor the theory that the goods were surrendered as much because the attachment was defective as because there was a promise to pay. It is true that the decisions under the statute do not harmonize, and the reason is obvious. The hardship of particular cases induced a resort to any expedient to take them out of the operation of the law. It is the vice of all remedial legislation, that in the effort to banish one set of evils, it opens a way for the entrance of a new class. This reproach applies with as much force to the Statute of Limitations as to that of Frauds and Perjuries. It is unconscionable that a man who has deliberately promised to pay the debt of another should be allowed to violate that promise with impunity; and it is, if possible, even more unconscionable that he should be permitted to escape from the payment of his own debts, because during six years he has been able to elude the vigilance, or to secure the indulgence of his creditors. Yet it is hardly open to doubt that the benefits conferred by these statutes more than counterbalance the injuries which they have inflicted. Acting upon this consideration, the Courts in Pennsylvania have, of late, striven to give to the Statute of Frauds, as years ago they gave to the Statute of Limitations, the effect which was intended by the Legislature. It is useless to resort to the decisions of other States, or even to the earlier cases of our own, when the recent and well-considered opinions in Maule *v.* Bucknell and Townsend *v.* Long, referred to in the adjudication, furnish the principles upon which all similar questions are to be determined. Those cases decide that a new consideration passing from the promisee to the promissor is not of itself sufficient to sustain a promise to pay the debt of a third party. Every promise requires a

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consideration. Where the creditor substantially transfers his claim to the promissor, or conveys to him a fund or other property, out of which the debt can be made, then the consideration is of moment as sustaining, not a promise to pay the debt of another, but a promise to pay what in reality is the promissor's own debt. In these cases, the debt of the third person may be regarded as the measure of the purchase by the promissor. One test may be found in the question, Is the promise collateral to the continued liability of the original debtor? Judge STRONG (in Maule *v.* Bucknell) says: 'The rule may be safely stated that, while the old debt remains, the new must be regarded as not an original undertaking, and, therefore, within the statute. . . . And it will be found after examination that, in nearly all the decisions in which it has been held that such a promise is not within the statute, there was some liability of the promissor or his property independent of his express promise, or that he had become the actual debtor, so that between him and the original debtor the superior liability was his.'

"It is not pretended that in the case in hand, the original liability of Charles Gheen did not continue. On the part of Jacob Gheen, was there any liability to pay this debt outside of his express promise? There certainly was not, unless the delivery to him of the horses and wagon, was a transfer of property out of which the debt could have been realized. But this cannot be conceded, because the custody of this property, originally acquired as it was by virtue of a process erroneously issued, conferred upon him no rights as against the owner, from whom, indeed, he had no authority to withhold it for a moment. It follows, therefore, that, inasmuch as Jacob Gheen received no property from which the debt could have been made, and became, in no sense, a purchaser of the debt, while Charles Gheen, the original debtor, remained answerable to the creditor, the only responsibility of Jacob Gheen arose out of his promise to pay his nephew's debt, and his undertaking is, therefore, within the statute. It was suggested, on the argument, that decedents' request for an order upon the sheriff for the delivery of the seized property, constituted such a writing as was within the meaning of the Act. This, however, was not seriously pressed, and could not well be. The note contained no intimation of a promise. But assuming that it covered an express pledge to pay the debt of Charles Gheen, it is doubtful whether it would have justified a recovery, for the reason that the creditors' possession of the chattels was illegal, and their assignee could hold by no higher title than their own."

To these opinions an exception was filed by McBurney & Co., assigning the disallowance of their claim to be error.

William H. Browne, for exceptants.

The promise is not within the Statute of Frauds. The statute applies only to collateral engagements of warranty.

Story on Contracts, §§ 861, 867.

Part performance will take the case out of the statute.

Browne on Statute of Frauds, § 117.

Credit given to a promissor will render him liable, even though the undertaking was for the benefit of a third person.

Browne on Statute of Frauds, § 157.

A promise made in consideration of the release of a security, which a creditor may hold for the debt of a third person, is not within the statute.

Browne on Statute of Frauds, § 201.
Randle *v.* Harris, 6 Yerg. (Tenn.), 508.
Adkinson *v.* Barfield, 1 McCord (S. C.), 575.
Tindal *v.* Touchberry, 3 Strobh. (S. C.), 177.
Siau *v.* Pigott, 1 Nott & McC. (S. C), 124.
Houlditch *v.* Milne, 3 Esp. 86.
Mercein *v.* Mack (?), 10 Wend. 461.
Johnson *v.* Gilbert, 4 Hill, 178.

Wherever the object of the promissor is to subserve some purpose of his own, even though in form it is to pay the debt of another, it is not within the statute.

Arnold *v.* Stedman, 9 Wr. 186.
Giltinan *v.* Strong, 14 Sm. 242.
Landis *v.* Royer, 9 Ib. 95.
Patton *v.* Hassinger, 19 Ib. 311.
Townsend *v.* Long, 27 Ib. 143.
Taylor *v.* Preston, 29 Ib. 436.
Rupp *v.* Teihl, 29 Leg. Int. 245.
Merriman *v.* Liggett, 1 WEEKLY NOTES, 379.
Lefevre *v.* The Bank, 2 Ib. 174.

The contract made with McBurney & Co. by the decedent was an original undertaking on his part to pay money to the claimant, the amount of which was to be ascertained by reference to some extrinsic but fixed standard; such standard happening to be the amount owed to the promisee by a third person does not bring the case within the Statute of Frauds.

Story on Contracts, § 861.
Browne on Statute of Frauds, § 179.
Johnson *v.* Gilbert, *supra.*
Tindal *v.* Touchberry, *supra.*

George Tucker Bispham, contra, relied upon

Maule *v.* Bucknell, 14 Wr. 39.
Townsend *v.* Long, 27 Sm. 143.

March 29, 1879. THE COURT. Exceptions dismissed and adjudication confirmed. (No opinion filed.)

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, MAY 29, 1879.* [No. 5.

Supreme Court.

Jan., '78, 213. January 17, 1879.

Girard Life Ins. Co. v. City of Philadelphia.

Municipal corporations—Water rents, how collectable—Mortgage—Purchaser at sheriff's sale—Laches.

A mortgagee, purchasing the mortgaged premises at a sheriff's sale under a foreclosure, has no equity to restrain the city of Philadelphia from detaching the ferules of the water pipes to enforce payment of arrears of water-rent due before the sheriff's sale.

The failure of the municipal authorities to detach the ferules, when, by ordinance, they first were entitled to do so, is not such laches as the water-tenant, or one claiming under him, can take advantage of.

Appeal from the Common Pleas No. 2, of Philadelphia County.

The material facts, as stated in the opinion of the Supreme Court, were as follows:—

"This was a bill in equity filed by the Girard Life Insurance, Annuity and Trust Company against the city of Philadelphia and the Chief Engineer of its Water Department, praying for an injunction to restrain the defendant from cutting off the water-supply to certain premises which said company had purchased at sheriff's sale in the year 1876. The bill sets forth that the complainants had tendered the water-rent for one year upon each of said premises respectively, which was declined, and they were informed by the water department that water-rent for three years was due on each, together with a penalty of fifteen per centum, and that unless said arrears with the penalty were paid the water-supply would be stopped under the authority given by the ordinance of March 22, 1862. The complainants refused to pay and filed this bill for the purpose of preventing the city from stopping off the water. The defendant demurred to the bill, but subsequently withdrew the first and sixth causes of demurrer, whereupon it was agreed that the bill and demurrer should stand as a case stated."

After argument, the Court below dismissed the bill with costs. The complainants appealed, assigning for error the dismissing of the bill.

John J. Ridgway, Jr., for the appellants.

The ordinance of March 22, 1862, prescribes an imperative duty upon the officials of the water department in case of non-payment of water for any year before the first day of September to detach immediately the ferules from the delinquent premises. If this duty had been performed the present arrears would not have accumulated, and an innocent purchaser at sheriff's sale cannot be compelled to pay these arrears which would have had no existence if the city officials had done their duty.

C. E. Morgan, Jr., and *W. N. West*, City Solicitor, *contra.*

If the servants of the city fail precisely to obey this ordinance, and delay compliance with its commands, in order to indulge delinquent tenants, it affords tenants no ground of complaint. In the language of the learned Judge who decided the cause in the Court below: "It is a harsh penalty, and if the chief of the department in his discretion gives tenants further indulgence his superior municipal authorities may call him to account for not carrying out the provisions of the ordinance strictly; but the complainant has no such privilege."

The city is not thereby estopped from subsequently enforcing said penalty, and of thus availing herself of the only practicable method of compelling payment of rent due for water furnished.

May 7, 1879. THE COURT (after stating the facts, *ut supra*). This is a very inartificial mode of stating a case, and is not to be commended. A case stated should consist of a clear statement of the facts upon which the Court is asked to pronounce judgment. The forms of equity pleading are not appropriate, and were not intended for such purposes as this.

The complainants concede the complete powers of the city to make any conditions precedent to supplying the citizens with water. The supplying of water and gas to a city is not a municipal duty; hence, when the city undertakes to do so, it acts not by virtue of any rights of sovereignty, but exercises merely the functions of a private corporation. (Western Saving Fund Society *v.* The City, 7 Casey, 175; Wheeler *v.* The City, 27 P. F. S. 338.) The introduction of water by the city into private houses is not on the footing of a contract, but of a license which is paid for. (Smith *v.* The City, 31 P. F. Smith, 38.) It may very well be that when a license has been given by the city to the owner of a house to use the water, such license may not be withdrawn arbitrarily, or from mere caprice. But it is equally clear that the city may adopt such rules in regard to the use of the water and the payment therefor, as the municipal authorities shall deem expedient. All this is admitted by the complainants. Their contention is that

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while Councils may so legislate they have not done so, and that the ordinance of March 22, 1862, does not authorize the water department to demand from them more than the water-rent for one year as a condition of supplying their premises with water. The ordinance referred to is as follows: "That all water-rents shall be payable to the register of water rents, at his office annually in advance on the second Monday of January, and upon all water rents unpaid upon the first day of May in any year there shall be charged the sum of five per centum, and upon all rents unpaid on the first day of July in any year, there shall be charged an additional sum of ten per centum, and if such rent with the said additional charges shall remain unpaid on the first day of September in any year, the said register shall notify the Chief Engineer of the Water Works of the names of such delinquents, who shall cause the ferules of all such delinquent water tenants to be detached from the pipe of conduit, and suit be instituted for the recovery of such rent, and after such ferules shall have been detached the water shall not again be supplied or furnished to the said premises, except upon payment of all arrears of water rent, and the sum of two dollars for expenses incurred; and a printed notice containing the first section hereof shall be left upon the premises."

There is of course no personal liability on the part of complainants to pay these arrears of water rents. They concede the right of the city to turn off the water for the non-payment of one year's rent immediately preceding the sheriff's sale, but that as to the prior years the city having neglected to enforce the ordinance according to its terms, and allowed the rent to accumulate, cannot now cut off the supply of water for its non-payment. It has been gravely argued that, because the city indulged some of its water tenants, and did not turn off the water when it might have done so, it has lost the right to do so, as a means of enforcing the payment of the arrears, thus allowed to accumulate. This is an extraordinary proposition, and unless it is supported by the terms of the ordinance referred to cannot be sustained. I find nothing in the ordinance to justify such a conclusion.

It provides that the names of all water-tenants who shall be delinquent on the first day of September shall be furnished to the Chief Engineer, whereupon that officer shall cause the ferules in all such cases to be detached, and that thereafter the water shall not be again supplied to said premises except upon the payment of *all* arrears of water rent. What is meant by "all arrears of water rent?" The complainants contend that it refers to the rent of one year only. There is nothing in the ordinance to warrant such a conclusion. It clearly means all arrears up to the time of detaching the ferules. The case was argued upon the theory that the ferules are to be detached upon the first day of September. The ordinance does not say so. It does not designate the time when the names of delinquents are to be furnished to the Chief Engineer, nor when the latter shall cut off the ferules. Undoubtedly it was intended to be done within a reasonable time after the first of September, yet the provisions of the ordinance are merely directory and may be waived by the municipal authorities. The water tenant has no right to complain that he has been indulged, and additional time given to pay his rent before the city resorted to the harsh measure of stopping off the water from his premises. As well might a mortgagor refuse to pay his arrears of interest because his easy creditor had allowed them to accumulate. Conceding this to be so, it is alleged that the complainants occupy a better position as purchasers at a sheriff's sale; that as to them there can be no such arrears of water rents because the city "forbids them to exist." I am unable to see that the rights of the complainants rise any higher than those of the water tenants to whom they have succeeded.

They have no standing to complain that the city did not enforce its ordinance strictly. The city owed no duty to protect the mortgages of the complainants, and hence as to them could be guilty of no neglect, nor were complainants misled. The water department is open to all, and any purchaser at a judicial or other sale can readily ascertain if the water rent is in arrear. But it is said the complainants were, in one sense, involuntary purchasers, that they were compelled to buy to save their mortgages.

This, if true, gives them no equity; at most it proves that they have made a bad investment, a misfortune they share in common with many other corporations and individuals, the result of great and unexpected shrinkage in values. With equal reason might a mortgagee complain of arrears of taxes which are sometimes allowed to accumulate on the property mortgaged. For the last few years this has been a more serious peril to mortgagees than the accumulation of water rents. The analogy between the cases is believed to be complete, for while, in the latter instance, there is the ordinance referred to for detaching the ferules, yet, as before stated, that provision was intended solely for the benefit of the city, and not for the water tenants or their mortgagees. Both evils may be avoided in my opinion by a provision in the mortgage that at stated periods in each year the mortgagor shall produce to the mortgagee the evidence of the payment of taxes and water rents, and that default in such payment shall make the mortgage debt become due and payable, with a scire facias

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clause; as in the case of non-payment of interest on the mortgage. Indeed, I am informed that this is now done in many instances.

It is not true, in point of fact, that the city has limited the amount of arrears of water rent necessary to be paid by a purchaser at sheriff's sale to one year. No such limitation is to be found in the ordinance of March 22, 1862, or elsewhere. In the absence of any such restriction the right of the city to detach the ferules for the non-payment of all arrears cannot be successfully questioned.

As before said the ordinance fixes no precise time when the ferules shall be detached. The water rent is payable annually in advance, and the water may be cut off at any time after the first of September. The neglect of the Chief Engineer to enforce the ordinance may make him personally liable to the city for any loss in consequence of such omission. The water tenant, however, who receives the benefit of the indulgence cannot complain, nor can a purchaser of his title at a judicial sale. For the reasons already given—

Judgment affirmed.

Opinion by PAXSON, J. SHARSWOOD, C. J., and GORDON, J., dissent.

Jan. '76, 253. Feb. 12, 1879.

Fegley et al. v. McDonald.

Principal and surety—When surety is discharged from liability by delay of a third party in presenting a check of the principal.

Where property of the principal debtor sufficient for the payment of the debt is so within the control of the creditor that, by the exercise of reasonable diligence he may realize the sum due him, and he voluntarily and by supine negligence relinquishes it, the surety is discharged.

A. and B. were joint obligors in a bond conditioned for the faithful performance by A. of his duties as treasurer of a masonic lodge. A. was directed by the lodge to pay from moneys in his hands $920 due the Grand Lodge for rent and dues. He gave the G. and Lodge his personal check, dated May 27, for this amount, having in bank on the day it should have been presented a sum sufficient to meet it; but the officers of the Grand Lodge did not present the check until June 4, and the bank having on that day appropriated the money for a debt due itself, there were no funds in the bank to A.'s credit. A. never accounted to the lodge for the $920, and the lodge paid subsequently, under threat of expulsion, from other funds, the sum due the Grand Lodge:

Held (affirming the judgment of the Court below) that B. as surety was discharged from liability on his bond by the delay in the presentation of the check.

Per MERCUR, J. "A check is generally designed for immediate payment, and not for general circulation. It is the duty of the holder to present it for payment as soon as he reasonably may, and if he does not, he keeps it at his own risk."

Error to the Common Pleas No. 3, of Philadelphia County.

Judgment had been entered June 25, 1874, in favor of Fegley *et al.*, officers of "Stephen Girard Lodge, No. 450, A. Y. M.," against W. T. Rose and Joseph McDonald, the principal and surety, respectively, on a bond and warrant of attorney for $1000, conditioned for the faithful performance by Rose of his duties as treasurer of the said lodge. Subsequently the Court made absolute a rule to show cause why the judgment should not be opened as to the surety, McDonald, and he be let into a defence.

At the trial, before FINLETTER, J., it appeared that on Jan. 28, 1874, Rose was directed by the lodge to pay the Grand Lodge F. & A. M. $920, rent and dues for the year 1873. On May 27, four months later, after bank hours, he sent to the secretary of the Grand Lodge his personal check for $920, drawn on the Union Banking Company of Philadelphia. This check was not presented until June 4, when it was dishonored. On the afternoon the check was given, Rose had no funds in bank to meet it, but the next morning, May 28, he deposited an amount sufficient to pay it. The money so deposited, however, was appropriated by the bank on June 4, before the check was presented, to pay a note due on that date, which was endorsed by Rose, and which the bank had discounted for his benefit. Rose never accounted for the $920, or paid any part thereof; and the lodge was subsequently, under threat of expulsion, compelled to pay out of other funds the sum due the Grand Lodge with accrued interest.

The Judge directed the jury to find for the plaintiffs, reserving the question of law, whether McDonald, as surety, was discharged from liability on his bond by the delay of the Grand Lodge in presenting the check.

The jury accordingly rendered a verdict for the plaintiffs, and subsequently judgment was entered for the defendant on the point reserved *non obstante veredicto*. The plaintiffs thereupon took this writ of error, assigning for error the judgment of the Court.

The case was argued in the Supreme Court on Feb. 27, 1878 (WOODWARD, J. being absent), and the judgment of the Court below was affirmed by an equally divided Court. Subsequently a motion for a reargument was made and granted by the Court.

W. D. Wetherill, for the plaintiffs in error.

McDonald was not an endorser on a note, to be discharged by delay in its presentment, but a joint obligor on a bond with the liability the same as that of Rose, his co-obligor. He was not, therefore, discharged by the delay of the Grand Lodge in presenting the check.

Hutchinson *v.* Commonwealth, 6 Barr, 124.
Wayne *v.* Bank, 2 Sm. 343.

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Thomas J. Diehl, contra.

McDonald was discharged by the delay in presenting the check.

Richards *v.* Commonwealth, 4 Wr. 146.
Hopkins *v.* Ware, 4 Exchequer, L. R., 268.

It must be remembered that the bond was conditioned for the faithful performance by Rose of his duties as treasurer. He did all he could by having funds sufficient to meet his check. The fact that the bank, in the exercise of its rights, appropriated this money for a debt not due until one week after he might have supposed that the lodge had been paid, cannot fairly be construed into any fault of his.

The subordinate lodge, too, had a right, under the circumstances, to insist upon the check being received by the Grand Lodge as payment; and if, under threat of expulsion, they chose to pay it again, it is difficult to see how this can affect McDonald's liability.

May 5, 1879. THE COURT. The plaintiffs represent the Stephen Girard, a subordinate lodge of A. Y. M. The defendant was surety for one Rose, as treasurer of the lodge. The claim is against the surety for the alleged default of the treasurer. It appears that the Girard Lodge was indebted to the Grand Lodge for rent and dues in the sum of $920. Rose was, by resolution of his lodge, ordered to pay that sum to the Grand Lodge. After banking hours, on the 27th May, 1874, he drew his private check for that amount on the Union Banking Company, sent it to the Secretary of the Grand Lodge, and received from him a receipted bill for the amount. It would appear that this sum of the plaintiff's money was either actually or constructively in the hands of the treasurer when he drew the check. The Grand Lodge omitted to present the check for payment until the 4th of June, 1874, although the bank and all the parties were located in the city of Philadelphia. When presented, payment thereof was refused by the bank, Rose having no funds there to meet it. The Grand Lodge retained the check for more than a year thereafter, when the Girard Lodge, without suit, voluntarily paid it. The latter now seeks to recover the amount thus paid from the defendant as surety. There is no dispute about the facts. It appears that when Rose drew the check, he had no funds in bank to meet it, but the next day he deposited the amount of the check to his individual account in bank. The money thus deposited remained there subject to his check until the 4th of June. On this day, but before the check was presented, the money was appropriated by the bank to pay another obligation of Rose, which matured on that day. The Court directed the jury to find for the plaintiffs, reserving the question of law as to whether the defendant's surety was discharged from liability on his bond to Stephen Girard Lodge by the delay of the Grand Lodge in presenting the check. Afterwards the Court entered judgment in favor of the defendant on the point reserved. This is assigned for error.

The rule is well settled that when a creditor has in his hands the means of paying his debt out of the property of his principal debtor, and does not use it up, the surety is discharged. It need not be actually in the hands of the creditor, if it be within his control, so that by the exercise of reasonable diligence he might have realized his pay out of it, yet voluntarily and by supine negligence relinquished it, the surety is discharged. (Commonwealth *v.* Vanderslice, 8 S. & R. 452; Ramsey *v.* Westmoreland Bank, 2 Penna. R. 203; Everly *v.* Rice, 8 Harris, 297; Boschert *v.* Brown, 22 P. F. Smith, 372.)

The question now before us is not in regard to the liability of Rose, on the check, nor the validity of the claim against him. It is the right of the surety only with which we are now dealing. In contemplation of law the check was received by the Girard Lodge and paid to the Grand Lodge. On the first day after its receipt the money was in bank to meet it, and so remained there for one full week. If the check had been presented on any business day of the seven, it would have been paid, and the surety would have been discharged from all liability. It was given by Rose to discharge his liability to the Girard Lodge. If presented at bank in due time it would have paid the demand against him. Then the responsibility of the surety would unquestionably have been discharged. If not discharged it is solely through delay in the presentation of the check. Whether that delay was the immediate act of Girard Lodge which received it, or the act of the Grand Lodge to which it was transferred, makes no substantial difference to the surety. The creditor had the means of payment in its own hands.

A check is generally designed for immediate payment, and not for circulation. It is the duty of the holder to present it for payment as soon as he reasonably may, and if he does not, he keeps it at his own risk. The Girard Lodge accepted it as a payment from Rose. In like manner the Grand Lodge accepted it from the subordinate lodge. In order to charge the surety by reason of the non-payment, it should have been presented for payment within a reasonable time. Had it been so presented, it would have been paid. A delay of seven days was an unreasonable time. While so holding the check unpresented, the Grand Lodge had no legal claim against the Girard, nor the latter against the surety of Rose. When it was presented and dishonored it was too late for the Grand Lodge to cast the loss

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which it had sustained through its own default on the Girard, and for the latter, by voluntarily paying it, to impose a legal liability therefor on the defendant. The learned Judge was right in entering judgment in favor of the defendant on the question reserved. Judgment affirmed.

Opinion by MERCUR, J.

Jan., '78, 250. February 5, 1879.

Philadelphia & Reading Railroad Company v. Ervin.

Negligence—Wharves—Cap-logs, failure to supply—Municipal ordinances, effect of—Pleading.

Failure to comply with the requirements of a municipal ordinance is not, *per se*, such negligence as will entitle one suffering damage from such failure to maintain a common law action based thereupon.

Although witnesses may be asked whether, in their opinion, a certain wharf was so constructed as to be dangerous to those whose business brought them upon it, the owner may show that, if it had been constructed in any other way, his business would have been materially obstructed.

Per GORDON, J. Although the National or State Legislatures may make that immoral which before was indifferent, and that neglect which before was prudence, and can grant new, or take away old civil remedies, municipal corporations have no such power. Their ordinances are but police regulations imposing public duties. enforceable by penalties recoverable only by action instituted by the municipality or its representative.

Under what circumstances a municipal ordinance may be introduced in evidence to fasten negligence upon one failing to comply with its requirements, discussed by GORDON, J.

Although a count is demurrable, if the defendant plead the general issue, the plaintiff is entitled to introduce in evidence the matters set forth in the count, even though it would have been the duty of the Court, if asked, to have charged that the plaintiff could not recover on the evidence, and though the evidence was not admissible under the other counts.

Error to the Common Pleas No. 1, of Philadelphia County.

Case, by Ervin against the Philadelphia and Reading R. R. Co. to recover damages for the loss of a horse drowned through the alleged negligence of the defendants in failing to place cap-logs along their piers in the River Delaware.

The narr., besides containing the usual counts charging the defendants with negligence, contained a special count charging liability for failing to comply with a municipal ordinance requiring cap-logs along the edge of piers. Plea, "Not guilty."

Upon the trial, before PEIRCE, J., it appeared that the plaintiff, a driver of a coal-cart, for purposes connected with his business, drove upon the coal-piers of the defendant at Port Richmond. These piers are and always have been without cap-logs. While on the piers, the plaintiff's horse, for some unexplained reason, began to back, and, despite the plaintiff's efforts to restrain him, went over into the dock and was drowned. The plaintiff, having been called as a witness on his own behalf, was asked whether, from his knowledge of the locality, he could say whether or not it was a dangerous one to persons with horses and carts engaged in hauling. Objection by the defendant overruled. Exception. The question was answered that it was.

The plaintiff also offered in evidence, under exception, an ordinance of Councils of April 16, 1857, providing as follows:—

"That it shall be the duty of every owner or agent of such owner of any wharf upon the river Delaware or the river Schuylkill, within the city of Philadelphia, to place or caused to be placed, on every side of such wharf which shall be next the river or dock, a cap-log, which shall be at least eight inches in height from the level of such wharf, and scalloped or pierced on the lower side thereof so as to allow the water to run off from the wharf."

SECTION 2. "That if any owner or agent shall refuse or neglect to place such log as aforesaid, or after its being placed there, shall allow an opening to be made, or if therein, to be continued for the loading and unloading of vessels, or for any other purpose, after notice shall be given to such owner or agent, he or they shall forfeit and pay the sum of fifty dollars, to be recovered as debts of like amount are by law recoverable."

The defendants offered to prove the nature of the business carried on upon these piers, and that placing cap-logs upon the piers would materially interfere with the loading of vessels. Objection by the plaintiff sustained. Exception.

The Court charged the jury, *inter alia*, as follows: "It is a question for you, under all the circumstances, whether the plaintiff in any manner contributed by his own negligence to this accident. [It is for you also to consider, if the place where he took the horse was dangerous, whether it was negligence to take it there.]

There was a verdict for the plaintiff for $300, and judgment thereon.

The defendants took this writ, and assigned for error, *inter alia*, the rulings of the Court upon the evidence as above stated, and that part of the charge in brackets.

Thomas Hart, Jr., for the plaintiff in error.

The ordinance of April 16, 1857, was improperly admitted. In the first place, it does not apply to private wharves or enclosed property; and secondly, an action for damages cannot be sustained for a breach of this ordinance. One of the counts in the narr. was on the ordinance, and claimed damages for breach of it. The ordinance, however, provides in § 2 that for a breach of its provisions, after notice, the owner of the wharf shall forfeit and pay the sum of fifty dollars, to be recovered as other penalties are recov-

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erable. This language gives no right of action for a breach of the ordinance, and no action for damages will lie against a person, on whom a statutory duty is imposed, merely because it is shown that damages are sustained from its non-performance. The right of action depends on the object and language of the Act.

Atkinson *v.* New Castle Water-Works Co., L. R., 2 Exch. Div., 441.
Couch *v.* Steel, 3 E. & B. 402.
Stevens *v.* Jeacocke, 11 A. & E., N. S., 731.
Nav. Co. *v.* Morrison, 13 C. B. 581.
Kirby *v.* Boylston Market Ass., 14 Gray, 249.
Flynn *v.* Canton Co., 40 Md. 312.
Vandyke *v.* Cincinnati, 1 Disney, 532.
Chambers *v.* Ohio Life Ins. Co., 1 Id. 327.

A statute differs further from an ordinance in that there is no power to annex a civil remedy to the violation of the latter.

Heeney *v.* Sprague, 11 R. I. 456.
Flynn *v.* Canton Co., *supra.*
Phillips *v.* Allen, 5 Wr. 481.
Butler's Appeal, 23 Sm. 448.

The Court erred in not admitting defendants' offer to prove the nature of their business. They claimed the cap-logs would have interfered with their business. This was then pertinent; for the defendants were not bound to put their property into a condition that would prevent the use to which it was devoted.

The obligation of the defendants to protect their wharves was matter of law for the Court, and opinions of witnesses as to the character of the place should not have been admitted.

Henry Reed (with him *Wiltbank*).

The ordinance of April 16, 1857, applies to private as well as public property. But this is immaterial, as plaintiff was there by invitation of the defendants. The defendants were, therefore, guilty of negligence in not having cap-logs on their wharves.

Brown *v.* Lynn, 7 Casey, 510.
Swords *v.* Edgar, 59 N. Y. 31.
Holmes *v.* R. R. Co., L. R., 4 Ex., 257.
White *v.* France, L. R., 2 C. P. D., 310.
Tobin *v.* Portland R. R. Co., 59 Me. 183.
Freer *v.* Cameron, 4 Rich, 229.
Wendell *v.* Baxter, 12 Gray, 496.
Collett *v.* R. R. Co., 16 A. & E. 984.

Defendants' cases are readily distinguishable. One of the counts of the declaration is on the ordinance, and the action is a common law action to recover damages for defendants' negligence, and not for the penalty given by the ordinance; and where a statute gives a right, not theretofore existing, the remedy given by the statute is exclusive: but where a statute commands or prohibits what the common law had already commanded or prohibited, the statutory remedy is an additional one.

Wheaton *v.* Hibbard, 20 John. 292.
Lane *v.* Salter, 51 N. 47.
Richardson *v.* McDougall, 11 Wend. 47.
Porter *v.* Mount, 41 Barb. 564.
Lichfield *v.* Simpson, 8 Q. B. 74.
Couch *v.* Steel, 3 El. & Bl. 410.
Browning *v.* Goodchild, 2 W. Bl. 906.
Owings *v.* Jones, 9 Md. 117.

The ordinance was properly admitted, and, so far as relied on in the narr., is evidence. The question, by plaintiff's counsel, as to the character of the place, was properly admitted. A witness may give his opinion as a matter depending upon his special practical knowledge, though not an expert, if he states the facts on which he bases his opinion.

Beatty *v.* Gilmore, 16 Pa. 466.
Dunham's Appeal, 27 Conn. 192.

March 10, 1879. THE COURT. In the determination of this case it is of no kind of consequence whether the wharf of the defendant below was a public or private one, since the plaintiff was there not as a trespasser nor by mere license, but upon, not only his own business, but also that of the Company. It was engaged in the transportation and sale of coal, and he was engaged in delivering it to the Company's customers; so that, while he was not employed directly by the defendant, yet it profited by his employment. The Company then, in this manner, inviting and making it necessary for carters to come upon its premises, was bound to provide ways for horses and vehicles which were reasonably safe. It was, however, not bound to do more than this; if such ways were reasonably safe, if an ordinarily prudent man could drive along them without danger, the obligation of the defendant was fully discharged; it was not liable for extraordinary accidents, neither was it liable for results arising from a want of judgment or prudence on the part of the plaintiff. Was the place where the plaintiff's cart stood unsafe? Then the question at once arises, Why did he stand them there? He himself says he stopped where he did in order to ascertain whether the coal he wanted was or was not on Pier No. 11. For a purpose of this kind it is clear, if there was a safer place in the yard, he might have taken it; nay, for that matter, he need not have entered the yard at all until he had discovered just where his coal was. If there was a safer place, which was reasonably convenient, where he might have stationed his horses and carts, he ought to have selected such place; for he cannot call upon the Company to protect him from accidents from which he might have protected himself by a proper exercise of his own judgment.

He knew the wharves were unprotected by cap-logs; he knew the nature of horses, certainly the nature of his own horses, quite as well or better than the Company; and if, under such circumstances, he was not bound to select a place safe beyond peradventure for his own property,

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neither was the Company bound to cap their wharves in anticipation of the mulishness of his horses, or of his own want of judgment.

Substantially the charge of the learned Judge of the Common Pleas on this part of the case was correct, but as the determination of this question of negligence must depend largely upon circumstances, we think the evidence offered to prove the nature and character of the Company's business ought to have been received.

If cap-logs would have been an obstruction to that business, it would show, at least, that they had not been omitted from mere carelessness, or from a niggardly spirit of economy, and so the defendant would have a better standing with the jury on the question of damages. On the other hand, it was proper to prove by persons acquainted with the place that it was dangerous; for, if it was obviously dangerous, an inference of the Company's knowledge of that fact must be presumed. We turn now to the second specification, and we are induced to consider it more because of our desire to relieve the case from doubt upon the trial than because of any error in the ruling. That assignment embraces the defendant's objection to the introduction in evidence of the City ordinance requiring the owners of wharves on the Schuylkill and Delaware Rivers to put and maintain cap-logs upon them of a height not less than eight inches. The plaintiff, in one of the counts of his narr., declared upon the ordinance as raising a duty which the defendant was bound to observe, and laid the damages resulting from the loss of his horse and cart, as a consequence of the neglect of such duty. This count could not have stood the test of a demurrer, or, had the Court been asked to charge that upon this count the plaintiff could not recover, and also that upon the remaining counts the ordinance could not be regarded as evidence, it would have been bound so to charge. For let us suppose that these wharves were so constructed that *extra* the ordinance no charge of negligence could arise, and hence no common law action would lie; would disobedience to this regulation, of itself, subject the Company to such charge and action? This question would seem almost to answer itself, for, if it be affirmed, then may civil remedies be given or taken away by ordinances; a power as yet quite beyond the reach of municipal legislation.

The National or State Legislature may do this, for it is the supreme power, and as such, can make that immoral which was before indifferent, and that neglect which was before prudence, but the City of Philadelphia has no such power. Its ordinances are but police regulations enforceable by penalties, recoverable by actions of debt or otherwise, as may be prescribed; but, if not so enforced, they come to nothing. An ordinance may forbid the maintenance by my neighbor of a cesspool upon his premises, and it may by penalty compel him to abate it, but whether it does so or not I may, if I am damaged thereby, have my common law action against him; but, if I am not damaged, I am without remedy; in this the ordinance neither helps nor hinders. This matter is well stated by SPENCER J. in the case of Vandyke *v.* City of Cincinnati (Disney's Rep. 532), thus: "I conclude, then, that the ordinance imposed upon Harrison a public duty alone, which can only be enforced by the penalty prescribed, and non-performance of which does not subject him to a civil action at the suit of a person injured." In arriving at this conclusion the learned justice uses the argument I have thought proper to adopt, that is, an ordinance cannot create a civil duty enforceable at common law. For if a City Council has power so to do, if it has the power to create such obligation, it must also have the power to restrict it, in other words, to prescribe the sole consequences arising therefrom, but it will, we apprehend, be conceded that a power, like the one here indicated, is wholly beyond the province of such a body.

There are, indeed, cases where such ordinances have been received in common law actions for negligence, but they are generally such as enter into the case itself, or enforce a common law duty. Such are ordinances regulating the speed of railroad trains when passing through towns or cities. Here the ordinance may, and usually does, enter into the question of negligence, for the rate of speed to be anticipated has much to do with the care to be exercised by those crossing the tracks; so, on the other hand, those in charge of trains are not only subject to the common law duty of passing through towns slowly and cautiously, but they must know that persons depending upon the observance of the municipal regulations will not take all that care which would be required in the open country.

The case in hand, however, involved no such duties. Whether the defendant should or should not have had cap-logs upon its wharves was a matter which addressed itself to the judgment of those having its affairs in hand. The omission of these caps did not, *per se*, involve the Company in any responsibility beyond the penalty of the ordinance. Neither could the plaintiff have placed any dependence upon the observance of such ordinance, for he knew that, if it applied at all to the defendants' wharves, it had not been observed, he knew that he must depend for the preservation of his property upon his own care and skill, and these failing, he then had his common law remedy for compensation.

Under the pleadings, however, the ordinance was properly admitted; for the plaintiff having declared upon it, and the defendant having per-

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mitted the case to go to trial without demurrer, or any other traverse than that involved in the plea of not guilty, he, the plaintiff, had a right to introduce this evidence in order to have the judgment of the Court thereon. It follows that this case can be reversed only for the error, already adverted to, which was committed in overruling the defendant's offer of evidence as embraced in the third specification.

Judgment reversed, and a new *venire* ordered.

Opinion by GORDON, J.

July '76, 84. Feb. 20, 1879.

Esling's Appeal.

In re confirmation of Plan No. 272.

Roads and highways—Errors and appeals—Certiorari—What errors will be reviewed on certiorari—City ordinance—Title of ordinance, when sufficient.

On a certiorari the Court will review only what actually appears on the record.

It is sufficient if the title of an ordinance fairly gives notice of its subject matter.

Blood *v.* Mercelliott, 3 Sm. 391, followed.

Certiorari to the Quarter Sessions of Philadelphia County.

This was, in the Court below, an appeal by Mary A. Esling and Amanda F. Hollahan to the Quarter Sessions of Philadelphia County, from the confirmation by the Board of Surveyors of Plan No. 272, of lines and grades between Ritner, Geary, and Twenty-fifth Streets, and the Schuylkill River, Twenty-sixth Ward.

Under a joint resolution of the City Councils, passed June 29, 1874, viz:—

"Resolution directing lines and grades over a portion of the Twenty-sixth Ward.

"Resolved, by the Select and Common Councils of the City of Philadelphia, That the Department of Surveys be and is hereby authorized and directed to prepare plans in duplicate of the lines and grades of so much of the Twenty-sixth Ward as is embraced between Twenty-fifth Street and the river Schuylkill, and Ritner and Geary Streets."

Plan No. 272, was made by the Board of Surveyors, and confirmed by them on September 7, 1874. From the confirmation of this plan, an appeal was taken on December 5, 1874, to the Quarter Sessions under the Act of June 6, 1871. The affidavit of the appellants, filed in their appeal, alleged that they were "freeholders, within the boundaries of said plan and along the line of the new street laid in the same and along the line of Passyunk Road as vacated in the same," and contained the following exceptions to the plan:—

(1) The joint resolution of Councils under which said plan is made gives no authority to lay out a new street. (2) The said resolution only authorizes a plan to be made of lines and grades. (3) The said resolution gives no authority to straighten and widen streets. (4) The said resolution gives no authority to vacate a street. (5) The said plan makes two Passyunk Avenues from Thirtieth Street to river Schuylkill without authority. (6) The new street is unnecessary. (7) The new street entails considerable loss and expense upon appellants without authority of law. (8) The new street entails serious loss and expense upon appellants, and renders useless a portion of their property without corresponding advantage to the public or to them. (9) The appellants are instructed that they were not allowed a proper opportunity to present their objections to said plan before the Board of Surveyors according to law. (10) The said joint resolution is not a sufficient authority for the changes made by said plan. (11) The said joint resolution is defective under the Act of Assembly of May 23, 1874, section 3, and is, therefore, void. (12) The said new plan is unauthorized by law.

The appeal was dismissed on June 2, 1876. The record consisting of the docket entries, the above affidavit and the action of the Court below in dismissing the appeal, was then removed by certiorari to the Supreme Court, and the case was heard at January Term, 1878.

On the argument, appellants produced as exhibits the resolution of Jan. 29, 1874, and the Plan No. 272, and alleged that the plan without authority laid down an entirely new street from Twenty-fifth Street to the river Schuylkill, one hundred and twenty-five feet wide, by continuing and widening Passyunk Road, thereby cutting off a long strip of appellants' land; and that a portion of the road, which had been in use over a hundred years, and which formed one boundary of appellants' tract, was vacated, thereby greatly injuring them.

THE COURT, after consideration, gave the following interlocutory opinion:

"As this record stands, we have nothing before us which we can hear and determine. The plan exhibited we have no doubt is a proper exhibit, but it is not attached to, or certified with the record. It exhibited a change in the Passyunk Road or Avenue, one of the oldest thoroughfares in the city of Philadelphia, whereby a new route is laid down, of the width of one hundred and twenty feet, and a part of the old route vacated, very materially affecting the interests of the appellants to the Quarter Sessions. It is not our province to review the action of the Board of Surveyors, or of the Court of Quarter Sessions, excepting so far as their action involves a question of power appearing in the case. Now, it is alleged that the Board acted upon an ordinance

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of the city, containing no authority to lay out new streets and vacate old ones but merely a power to regulate the lines and the grades of streets, already surveyed on the general plan and to report their work in a plan. The plan reported, it is alleged, exhibits an unauthorized action of the Board, in vacating an old, and locating a new, street, and hence the appeal. On the other hand, it is said, the form of the ordinance is the same as that always used and implies an authority to alter, not only lines, but routes. As the rights of the appellants depend on this question of authority, we are disposed to hear an argument upon the character, use, and effect of the ordinance or resolution, as it is termed, of June 29, 1874.

"To this end, leave is given to withdraw the record on file, for the purpose of amendment, and a new return to the writ of certiorari, as if upon a certiorari sur diminution of the record. The appellant can then move the Court below, to enter in full *nunc pro tunc* the decree involved in the entry of appeal dismissed June 29, 1876, and forthwith to certify to us a copy of the resolution of June 29, 1874, and the map, or a true copy thereof, brought into the Court of Quarter Sessions by the appeal of the plaintiffs in error. Ordered, February 4, 1878."

"PER CURIAM."

In accordance with this opinion, leave was granted by the Court below to file a certified copy of plan No. 272, and of the resolution of Councils of June 29, 1874, which was done, and a decree entered *nunc pro tunc* dismissing the appeal, and confirming said plan. The record, thus amended, was returned to the Supreme Court. Ten specifications of error were filed, the most important of which denied generally the power of the Board of Surveyors under the above resolution to open new, or vacate or widen old streets.*

McLaughlin and *B. H. Brewster*, for the appellants. Two questions are involved in the case. First, the extent of the authority given by the resolution of June 29, 1874. All the legislative authority ever given to the Board to make plans is under the Acts of Assembly of April 21, 1855 (Purd. Dig. 1288), and June 6, 1871 (P. L. 1353). The language of the former is, "It shall be the duty of Councils under the supervision of the President of said Board to cause to be completed . . . . plans and surveys." That of the latter, "The Board of Surveyors . . . shall have full authority to examine and finally confirm or reject all plans of surveys, . . . made by the direction of the Select and Common Councils." Now under these Acts it is evident the Board must only act in obedience to the mandate of Councils. What, then, was this mandate. The resolution, in this instance, only directed plans to be prepared "of the lines and grades," etc. Under this authority, however, a new street was made and an old one vacated. This was clearly *ultra vires*. See—

Paynter *v.* Young, 4 Phila. 154.
Ferree *v.* Board of Surveyors, 9 Phila. 518.
During's Appeal, 30 Leg. Int. 153.

Secondly. The title to this resolution is defective under the Act of Assembly of May 23, 1874, § 3. The wording of the Act is "no ordinance shall be passed through Councils except by bill, . . . and no bill shall be passed containing more than one subject, '*which shall be clearly expressed in its title.*'" If the language of the resolution gives such broad powers as have been exercised, its title is certainly not clear. If it does not, the Board has acted *ultra vires*.

Gendell (with whom was *W. N. West*, City Solicitor), contra.

The appellants have no *status* in Court, for it is a well settled rule that no private person is a proper party to an action involving public interests, unless he can show that his interest differs in kind and degree from that of the rest of the public.

Flanagan *v.* City, 8 Phila. 110.
Heffner *v.* Com., 4 Casey, 108.

Now it nowhere appears that the appellants are affected at all, for though they allege they are freeholders within the bounds of the plan, and have been injured, this is not sustained by the record. And further it does not appear by the plan that any new streets have been made or old ones vacated. The appellants' allegations to this effect are *dehors* the record, and the Court can only review the *record* on a *certiorari*.

Lastly, the subject of the resolution is sufficiently expressed in its title. The rule is that the title should fairly give notice of the subject of the act so as to reasonably lead to inquiry into its body; and this has clearly been done.

Blood *v.* Mercelliott, 3 Sm. 391.
Dorsey's Appeal, 22 Sm. 192.
Alle. Co. Home's Case, 27 Sm. 77.
State Line *et al.'s* Appeal, 27 Id. 429.
Mauch Chunk *v.* McGee, 31 Sm. 433.

March 3, 1879. THE COURT. This was a certiorari to the Court of Quarter Sessions of the City and County of Philadelphia, to bring up for review the record of said Court dismissing the appeal of Mary A. Esling and Amanda F. Hollahan from the confirmation of Plan No. 272 by the Board of Surveyors of said city.

The case was before us last year, when it was found that there was nothing upon the record to enable us to form an intelligent judgment upon the points in controversy. In order, however,

* Plan No. 272, contained only the lines and grades of certain streets marked on it, and also the vacated portion of Passyunk Road; but did not show when, or by what authority, the said streets were opened or vacated.

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that no injustice might be done the plaintiffs the following order was made:—

"Leave is given to withdraw the record on file, for the purpose of amendment and a return to the writ of certiorari as if upon a certiorari sur diminution of record. The appellant can then move the Court below to enter in full *nunc pro tunc* the decree involved in the entry of appeal dismissed June 29, 1876, and forthwith to certify us a copy of the resolution of June 29, 1874, and the map, or a true copy thereof, brought into the Court of Quarter Sessions, by the appeal of the plaintiffs in error."

We have now certified to us, by a further return to the certiorari, the decree of the Court below made *nunc pro tunc*, a copy of Plan No. 272, and a copy of the resolution of Councils of June 29, 1874.

The plaintiffs have filed ten specifications of error, the most important of which are those which deny the power of the Board of Surveys, under the resolution of Councils, to lay out new streets, and to straighten, widen, or vacate old ones.

The interest of the plaintiffs appears nowhere except in their affidavit filed in the Court below upon their appeal. In it they state that they are "freeholders within the boundaries of said plan," and that said plan will entail considerable loss and expense upon them without authority of law.

A great deal that was pressed upon us at the argument was outside this record. Too much stress must not be laid upon the fact that we permitted the resolution of Councils and the plan to be certified to us upon the certiorari. They were not legitimately any part of the record of the Court below, nor did our order or permission to certify them make them so. In the view which we take of the case any further comment on the effect of bringing up the papers referred to becomes unnecessary, and it is referred to merely to prevent misapprehension hereafter.

The Act of 6 June, 1871 (P. L. 1353) confers upon the Board of Surveyors authority to confirm or reject all plans of surveys or revisions of plans of the city of Philadelphia when the same shall have been made by direction of the Select and Common Councils of the said city. The plan in controversy, No. 272, was made under this Act. The City Councils, by their joint resolution of June 29, 1874, ordered "that the Department of Surveys be, and is hereby authorized and directed to prepare plans in duplicate of the lines and grades of so much of the Twenty-sixth Ward as is embraced between Twenty-fifth Street and the river Schuylkill, and Ritner and Geary Streets."

In order to ascertain whether the Board of Surveyors exceeded the authority contained in this resolution we must look at what they have done as we find it in the record. And for the purposes of this case, giving the plan all its effect as though a part of the record, we find nothing in it but the lines and grades of the streets in the territory referred to. This is precisely what the resolutions of Councils directed. But it is said new streets have been laid out, and old ones vacated. All this is *dehors* the record and the plan. The latter furnishes no information as to what are old streets and what new. It is true a street is marked vacated. But vacated when, and by what authority? For aught that appears it may have been vacated years ago by order of the Court of Quarter Sessions upon proceedings properly had for that purpose.

The difficulty in the way of the plaintiffs is, that they cannot, upon a certiorari, have the case heard as upon an appeal. Where an appeal is given by Act of Assembly the parties are entitled to be heard upon the merits. The certiorari brings up nothing but the record, and we are confined strictly to questions affecting its regularity.

One question only remains: the Act of 23 May, 1874 (P. L. 230), regulating the passage of ordinances by Councils, provides that "no bill shall be passed containing more than one subject, which shall be clearly expressed in its title." This clause is identical in language with the clause in the Constitution relating to Acts of Assembly. The rule, as settled by numerous decisions under the constitutional provision, is, that it is sufficient if the title fairly gives notice of the subject-matter of the act, so as reasonably to lead to an inquiry into its body. (Blood *v.* Mercelliott, 3 P. F. S. 391; Church St., 4 Id. 353; Dorsey's Appeal, 22 Id. 192; Allegheny County Home's Case, 27 Id. 77; State Line and Juniata R. R. Co.'s Appeal, Id. 429; Mauch Chunk *v.* McGee, 31 Id. 433.) The resolution in question is entitled "Resolution directing lines and grades over a portion of the Twenty-sixth Ward." If the title is not entirely beyond criticism, it certainly comes within the rule laid down in the cases above cited. Proceedings affirmed.

Opinion by PAXSON, J.

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Common Pleas—Law.

C. P. No. 2. April 19, 1879.

Reed v. Church; Fox v. Same; Bingham v. Same; Baker v. Same.

Practice—Bill of particulars of matters averred in a special plea, is demandable where the plea is really a cross-action against the plaintiff.

Rule on defendants to furnish a bill of particulars under special pleas.

Assumpsit. The plaintiffs declared against the defendant as makers of certain promissory notes. The pleas were payment with leave, and several special pleas alleging a number of items of set-off, but without particularizing dates of payment or amounts. The plaintiffs then took this rule on the defendants, to show cause why they should not furnish a bill of particulars of the matters alleged in the special pleas filed.

A. Sydney Biddle and *A. B. Shearer*, for the rule.

The special pleas of set-off are really a cross-action by the defendants, which, to save circuit, has been consolidated, by the statute of defalcation, with the trial of the plaintiff's case. This is for the defendant's benefit, but is not to deprive the plaintiff of any of the rights he would have had if the cases had been tried separately. Thus, in South Carolina, it has been held that to a plea of set-off several replications may be pleaded, inasmuch as the plea is but a cross-action; and if the common law rule of one replication were to hold, the plaintiff might lose a legal defence (as the statute of limitations, required to be specially pleaded) which he would have had if the defendant had brought his separate action against him.

Worth *v.* Fentress, 1 Dev. 419.
Watts *v.* Greenlee, 2 Dev. 87.
Holding *v.* Smith, 1 Murph. 154.

These cases were cited with approval by the District Court in Coulter *v.* Repplier (3 Harris, 208), affirmed in the Supreme Court. That case directly decided the plaintiff's right to avail himself of two distinct defences (one the statute of limitations) to a plea of set-off, though no replication was actually filed.

C. S. Patterson and *W. A. Porter*, contra.

The rule here is without precedent. No case can be found in which a bill of particulars has been required upon a plea. It is the defendant's gain if he can plead in such a way as to limit the number of the plaintiff's defences. The hardship is not peculiar to this class of action, but is incidental to our system of pleading. Many cases may be imagined where the plea, though not by way of a cross-action, states matters to which two replies would be applicable; but that is not allowed, otherwise there would be no end to pleading, and the issues would so increase as to render a simultaneous trial extremely difficult. But in the absence of authority the application should be refused. If the practice had been proper, we should have adjudicated cases favoring it.

April 21, 1879. Rule absolute.

C. P. No. 3. March 15, 1879.

Flaherty v. Lindsay.

Practice—Capias—Abatement of writ—Insufficiency of affidavit—Venue—Name of defendant—Freeholder.

Rule to show cause why writ of *capias* in the above cause should not be abated.

The affidavit of Michael Flaherty, plaintiff, upon which the *capias* was issued, was as follows:—

Michael Flaherty *v.* Thomas Lindsay, C. P., March T., 1879, No. —.

Michael Flaherty, the plaintiff above named, being duly sworn according to law, deposes and says, that on the fifteenth day of February, A. D. 1879, at 9 o'clock in the morning, the defendant, in the county aforesaid, to wit, at 3006 Chestnut Street, with force and arms made an assault upon the plaintiff with a club or some other heavy instrument, and struck deponent so violently as to seriously wound deponent and tear open his upper lip, whereby deponent was obliged to have the same sewed up by a surgeon, and suffered great pain, and was hindered from attending to his occupation as a coal heaver, and deponent has been damaged to the amount of five hundred dollars.

Sworn and subscribed this 3d day of March, 1879 } MICHAEL his × mark. FLAHERTY.

W. R. McAdam, for rule.

The affidavit is insufficient, because—

(1) No venue is laid in it.

Marquis *v.* Goldstein, 2 WEEKLY NOTES, 112.

(2) The name of defendant is not mentioned in the body of the affidavit.

Smith *v.* Bible, 1 Philada. 91.
T. & H. Practice, vol. i. part 1, p. 304 (note).

The writ should be abated, because the defendant is a freeholder; and he should be allowed thirty shillings costs.

Purd. Dig., 48, pl. 46.

James R. Booth, contra.

In Smith *v.* Bible (1 Phila. 91) no Christian name at all is used; and the Court says our practice is not so strict as the English practice, but defendant must be named, meaning that *Bible* is no name.

See A. B. and C. B. his wife *v.* R., 4 WEEKLY NOTES, 185.

The caption of the case is part of the affidavit by our practice. Defendant has made no affi-

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davit that he is a freeholder. In Jack *v.* Shoemaker (3 Binn. 280) it is held that a *capias* can issue against a freeholder if he fails to put in special bail on notice. C. A. V.

March 22, 1879. Rule absolute.

C. P. No. 3. Feb. 1, 1879.

Wittman v. Building Association.

Building Association—Suit by withdrawing stockholder—Losses of the association incurred before notice.

Rule for judgment for want of a sufficient affidavit of defence.

The "copy of instrument" filed by the plaintiff was an averment, "that, having been a stockholder of the corporation defendant, organized under the Act of Assembly for the Incorporation of Building and Loan Associations, and having given thirty days' notice of his intention to withdraw from said corporation, he received from the said defendant a writing, of which the following is a true and correct copy:—

Philada., Aug. 15, 1878.

Paid in on 25 sh. 20 mo.,	$500 00
" " subscription,	6 25
Interest, six per cent.,	25 30
	$531 55
Deduct 40 cts. per share,	10 00
Due to C. Wittman,	$521 55

P. HAUSMANN, Sect."

The affidavit of defence set forth substantially that certain loans were made by the association defendant in 1876 and 1877, as stated in a schedule thereto annexed, and a loss occurred thereon to the extent of $14,140.92. That this loss was all sustained at the time of notice of withdrawal received from plaintiff in April, 1878; that this loss divided equally among the shareholders would be $10.47 per share, which, under the constitution and by-laws of the association, must be deducted from moneys paid in on each share of stock; that the board of directors, by resolution, have directed that a charge of $10 per share should be made on each share of stock, in order to cover the loss sustained by the association prior to the notice of withdrawal received from plaintiff, and that the amount due to plaintiff is but $281.55, which amount defendants are willing to pay. And further, that the statement, a copy of which is filed by plaintiff, was not given plaintiff to show the amount due to him as a withdrawing stockholder, but was simply given at plaintiff's request, to show the amount paid in by him, with interest at six per cent., in order to serve plaintiff's own uses.

P. K. Erdman, for rule, cited—

Building Ass. *v.* Silverman, 4 WEEKLY NOTES, 546.

C. A. V.

Feb. 8, 1879. THE COURT. This case does not fall within the terms of the decision in Building Ass. *v.* Silverman (*supra*). The affidavit not only declares that the losses were sustained at the time the notice of withdrawal was given, but also that the amount claimed by plaintiff was not the true amount due him at the time notice of withdrawal was given.

Rule discharged.

Opinion by LUDLOW, P. J.

C. P. No. 3. April 25, 1879.

Commonwealth, to use, v. Laws et al.

Affidavit of defence law—Instrument within the Act—Administration bond—Loss of bond—Averment—Adjudication of the Orphans' Court finding proceeds of real estate in the hands of the administrator.

Rule for judgment for want of a sufficient affidavit of defence.

Debt on an administration bond. The plaintiff filed a copy of a bond in the customary form similar in all respects with that required by the Act of Assembly of March 15, 1832 (Purd. Dig. 408, pl. 20), signed by the defendants, Laws, Fullaway, and Young, in the sum of $6000, and an averment that the administration book in the Register's office contains the entry of the aforesaid bond, and that the said entry was made at the time the bond was given; that the bond cannot be found in the Register's office; that the form is, however, prescribed by the Act of Assembly relating thereto, and that the above is a copy; that the said Laws has never paid any portion of the fund found in his hands as administrator by adjudication of the Orphans' Court thereto annexed, nor has the said Fullaway or Young paid any portion of the amount for which they are liable. He also filed a certificate from the Register of Wills that letters of administration were granted April 11, 1868, to Laws, and that Fullaway and Young were his sureties in the sum of six thousand dollars. A copy of the account of Laws and an adjudication of the Orphans' Court, showing a balance in his hands for distribution of $2426.88, the fund being decedent's "share of the proceeds of real estate of her father sold in 1866, and remaining unpaid until the death of his widow, which occurred about 1872."

The affidavits of Fullaway and Young set forth (1) That they were unable to state, and unwilling to admit, that the bond filed by the plaintiffs was a true copy of the bond which they signed.

(2) That the amount sought to be recovered represented the proceeds of real estate which were alleged to have come into the hands of the

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administrator, but which were in no wise covered by the bond which they had given; and lastly the affidavits suggested that the bond filed was not such an instrument as would entitle plaintiffs to judgment for want of an affidavit of defence.

J. L. Jones (with him *Thos. J. Ashton*), for the rule.

It is admitted, as well as shown by the Register's certificate, that a bond was filed as alleged. It is presumed that it was in the statutory form, and therefore that the alleged copy filed is a true copy.

In a suit on a lost bond, it would be necessary merely to show its loss, or account satisfactorily for its non-production, then its contents could be proved.

Rank *v.* Shewey, 4 W. 218.

The bond filed is within the affidavit of defence law.

Baker *v.* Olwyne, 2 Miles, 404.

If not within the affidavit of defence law it is a contract of suretyship, and therefore the plaintiffs are entitled to judgment.

Audibert *v.* Young, 1 WEEKLY NOTES, 276.
Montayne *v.* Carey, 1 Id. 311.
Slocum *v.* Slocum, 8 W. 367.
Comly *v.* Bryan, 5 Wh. 261.

Nathan H. Sharpless (with him *Francis S. Cantrell*), contra.

THE COURT. Rule discharged.

C. P. No. 4. Feb. 15, 1879.

Kirk v. Ruckholdt.

Practice—Contending judgment creditors—When money arising from sheriff's sale of personalty will not be ordered into Court.

Rule to show cause why money arising from a sheriff's sale of personalty should not be paid into Court.

An affidavit by the second execution creditor, in support of the rule, set forth that the judgment, upon which the property was sold, was fraudulent and collusive, in that the note upon which it was obtained was without consideration, and was given for the sole purpose of selling the goods levied upon in order to defraud the deponent; that the defendant and the first execution creditor, who is his stepson, collusively attempted to have the sale made without the knowledge of the deponent; and that the latter stated to the deputy in charge of the writs, who said that he feared matters were not exactly straight, that he was not going to see his mother and sisters turned out of house and home without money.

R. P. White showed cause.

The Courts have always adhered to a strict rule in ordering the proceeds of personal property into Court.

Marble Co. *v.* Burk, 5 WEEKLY NOTES, 124.
Dunn *v.* Megarge, 6 Id. 204.

W. Horace Hepburn, for the rule.

In Dunn *v.* Megarge (*supra*), it is expressly stated that in a case like the present one the funds should be distributed by an auditor. We will furnish security for costs.

THE COURT. (THAYER, P. J.) The rule is for the sheriff to assume the responsibility of distribution. When a state of facts is shown to exist, by proper proofs, which renders it unsafe for him to do so, the Court will order the money into Court, not otherwise.

Rule discharged.

[See following cases.]

C. P. No. 4. March 29, 1879.

Mathiews v. Webster.

Practice—Fund arising from sheriff's sale of personalty—When it will be ordered into Court for distribution.

Rule to show cause why the fund should not be paid into Court.

The sheriff's sale of personal property which produced the fund in question, $310.46, was made on two writs: (1) Webster *v.* Webster, for $864; and (2) Mathiews *v.* Webster, for $2186. A landlord's claim was filed with the sheriff for $350, rent due.

Mathiews filed an affidavit, alleging that the first writ was issued under a judgment confessed by the defendant to his brother; that execution was issued in violation of an agreement to the contrary; and that the judgment was in other respects irregular and void.

G. C. Purves showed cause.

The landlord's claim is more than the fund realized. Neither of the execution creditors will get anything after it is paid.

R. C. Winship, for the sheriff.

This rule was taken by the sheriff at the instance of the second execution creditor, because both the other claims were attacked.

THE COURT (THAYER, P. J.). It is not the usual practice to order into Court a fund arising from the sale of personal property; but where the sheriff is notified of facts which render it unsafe for him to take the responsibility of distribution upon himself, and he asks to pay the money into Court, it is usual to make such an order.

Rule absolute.

[See preceding and following cases; also Dunn *v.* Megarge, 6 WEEKLY NOTES, 204.]

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C. P. No. 4. March 29, 1879.

Geisel et al. v. Jones.

Practice—Fund arising from sheriff's sale of personalty—Will be ordered into Court for distribution on application of sheriff if prima facie case of risk to him be shown.

Rule to show cause why the fund should not be paid into Court.

The following executions against the defendant were placed in the sheriff's hands: (1) The Grandom Institution, $400; (2) Beckhause, $1188.83; (3) Geisel *et al.*, $793.66; (4) Watson, $895.41. The sheriff's sale of personal property produced $1346.05. Claims were filed with the sheriff for rent, wages, and horse keep, aggregating $372.

Geisel filed an affidavit alleging, that prior to the date of the Grandom Institution writ, Beckhause caused a levy to be made upon the horses and carriages at the livery stable of the defendant; that afterwards, in consideration of the reeceipt from the defendant of his promissory notes indorsed by a third party, Beckhause agreed to stay his writ and release the property from the levy; that the writ was accordingly marked stayed, but before it was returned to the Prothonotary's office, Beckhause issued an *alias fi. fa.*, and levied upon the same property, by virtue of which levy he now claims, as second execution creditor, the balance in the hands of the sheriff.

E. L. Dixon, for Geisel.

F. C. Brewster, Jr., for Beckhause.

Tull, for the rule (with him *Winship*, for the sheriff).

THE COURT. (THAYER, P. J.) We do not, as a rule, order a fund arising from the sale of personalty into Court where the sheriff is willing to assume the responsibility of distribution. Where he is notified that a prior judgment and execution are attached, and he desires to be relieved from risk, it is usual to make such an order.

Rule absolute, and it is ordered that the sheriff have leave to pay into Court the residue of the fund remaining after satisfying the writ of the Grandom Institution.

[See preceding and following cases.]

C. P. No. 4. March 29, 1878.

Barnum's Universal Exposition Co. v. O'Brien.

Practice—Fund arising from sale of personalty—When fund will be ordered into Court for distribution—Claimant who cannot give security does not lose his rights by failure to interplead.

Rule to show cause why the fund should not be paid into Court.

The execution, issued for the sum of $13,738.39, realized $278.50.

Adam Forepaugh filed with the sheriff an affidavit alleging that the goods levied upon belonged solely to him, having been bought by him at sheriff's sale with his own money, and claimed that the fund should be ordered into Court to await the result of an interpleader.

Carpenter showed cause.

The claimant should have proceeded under the sheriff's interpleader act.

Winship, for the sheriff, desired the money to be paid into Court.

THE COURT. (THAYER, P. J.) The claimant is not to lose his interpleader because he cannot give security; this is the settled practice.

Rule absolute.

[See preceding cases.]

Orphans' Court.

December, 1878.

Williamson's Estate.

Executors and trustees — Responsibility of—When liable for depreciation of illegal investments of testator, when not converted by them—Commingling of trust and individual funds—Where no loss has accrued from such action, and it has merely arisen from an error of bookkeeping, commissions will not be disallowed.

Sur exceptions to auditor's report.

From the report of Thomas J. Worrell, auditor of the accounts of the executor of Thomas Williamson, deceased, the following facts appeared.

The testator devised and bequeathed to his son Passmore Williamson his residuary estate in trust during the life of his widow, to pay the income in equal fifth parts to the said widow and his four children, and after the widow's death to divide the income between his said four children. In 1873 the first account of the executor was filed and referred to the auditor. The counsel for two of the daughters of the decedent urged the auditor to direct the sale of certain securities belonging to the estate so that they might be converted into legal investments. This the auditor refused to do. To this ruling exceptions were filed. The report was filed in 1878, and upon argument the exceptions were dismissed.

Before the auditing Judge of the second and third accounts of the executor it was urged, on behalf of the *cestuis que trustent* that he should be surcharged with the market value of the securities at the date of the demand for their sale.

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It was also contended that the executor had constantly commingled the funds of the decedent's estate with his own, and in consequence as well as for other acts of alleged negligence he should be disallowed all commissions, which were fixed by the will at five per cent., as well as a counsel fee paid by him.

All of which requests the auditing Judge refused, and exceptions were accordingly filed in behalf of the legatees and *cestuis que trustent.*

E. Spencer Miller, for Mrs. Coggins.

Thomas H. Speakman, contra.

December 28, 1878. THE COURT (after stating the facts). In the absence of any notice to the accountant to sell and reconvert, the case would be comparatively free from difficulty. The discretion of an executor or trustee is necessarily large, and when honestly exercised is viewed by the Courts, as the cases rather emphatically phrase it, with tenderness. His first duty, unless otherwise instructed, ordinarily is to sell the personal property of his decedent. But in the varying circumstances peculiar to the estate or to the time, a high sense of duty may compel him to disregard a rule which was really meant for his protection, and to assume a responsibility from which it would have freed him, in order to save the estate from possible disaster. There is nothing new in this principle. Judge KING said, "Although in general it is an act both of duty and prudence for an administrator to turn the testator's goods and chattels promptly into available funds, yet cases may be readily imagined in which too sudden a sale would be a manifest breach of trust. (Bosio's Estate, 2 Ash. 437.) In Neff's Appeal (7 Smith, 91) Judge SHARSWOOD vindicated the delay of an executor by saying that if he had at once proceeded to judgment and execution, the whole debt would have been probably lost; and he added he should have been discharged with a just encomium on his wise forethought and successful fidelity instead of being condemned for supine negligence or wilful neglect. It would be affectation to collect authorities upon a point which appeals so directly to common sense. In the present case it is difficult to divide the twofold function conferred upon the accountant. As executor, he was bound, in the absence of controlling reasons to the contrary, to convert the unemployed assets into legal securities; as trustee, he was directed to "manage the estate carefully so as to preserve and keep the same productive of income." There is no necessary conflict between the two characters, or the two sets of duties, but it is very evident that the one permitted a larger exercise of discretion than the other. Properly to weigh the conduct of the accountant it must be noted that he had been jointly engaged in business for many years with his father the testator; that the latter had invested largely in certain favorite and profitable securities, and that the securities at his death had come in bulk into the hands of the accountant. His predilection for these investments was fairly the result of his intimate association with the testator, and the honesty of his motives in declining to substitute for them legal securities which would be more secure but less profitable may be gathered from the fact that the right administration of the estate was as essential to his interests as to those of the exceptants. But it cannot be doubted for a moment that the latter had a right to insist upon a literal compliance with the terms of the statutes defining legal investments, and it would be a most dangerous policy to uphold a life-tenant in the enjoyment of high dividends to the peril of those in remainder. Even to so plain a doctrine as this, however, there may be some exceptions. In the present case, for example, two of the co-legatees demanded a sale and conversion of the securities left by the testator, but the auditor refused to consider the motion, and, acting under the advice of counsel, the executor chose to disregard it. If they believed that the interests of the estate were seriously imperilled by this refusal, the parties in interest had an open door for relief through this Court. But they quietly allowed five years to pass during which time the report of the auditor lay unnoticed, and at the end of that interval when asked if they still insisted upon a sale, declined to apply for it. This delay has robbed their demand of all its original force, and may almost be regarded as a silent approval of the course pursued by the accountant. At all events in determining the measure of his responsibility we cannot consider a demand which was never seriously pressed. The single test to be applied to his conduct is, was it characterized by good faith and common prudence? Apart from the fact that the accountant placed himself under the direction of counsel, which according to Vey *v.* Emery (5 Ves. 140) would of itself have saved him from liability, the facts found by the auditing Judge go far to vindicate his action on both grounds.

The estate of the testator, although large, was not entirely free from complications, owing to the fact that included in its funds were those of various trusts which had been committed to the testator, and of which the accounts kept were perhaps not as clear as they should have been. It was therefore long uncertain how large a portion of the assets would be available for permanent investment, and the securities, in which the bulk of the estate was invested, were nearly all of them among the best known and most trusted in the market. No one could have foreseen in 1873, the decline which afterwards took place in some of the stocks, and after the decline had

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fairly set in, the accountant might have been justly chargeable with folly or worse if he had sold more than he could help at what would have been a ruinous sacrifice. It must be remembered also that the question of *mala fides* is agitated not by creditors, but by legatees, and only by some of them, and as to them a more liberal view of an accountant's discretion will be taken than as against creditors. (McNair's App., 4 R. 148; Bruner's App., 7 S. 46.)

One other point may be adverted to as bearing upon the question of good faith. In refraining from a sale and reconversion of the securities, the accountant was depriving himself of a rate of compensation which would otherwise have been awarded to him, and in this regard his sense of duty even if a mistaken one, was paramount to his sense of personal interest. Without further elaboration or reference to authorities, which are abundant and clear upon the positions here assumed, the exceptions upon this point are dismissed.

With the failure to establish the charge of gross negligence or bad faith must fall the demand for a disallowance of commissions to the accountant. The rate of his commissions was fixed by the will at five per cent. and was properly allowed at that figure in the adjudication. For the reason stated by the auditing Judge the counsel fee paid by the accountant was a reasonable charge, and the exception to its allowance must be dismissed.

The mingling by the accountant of the funds of the estate with his own was also the subject of exception. Nothing can be said in defence of this practice, and it is usually so indicative of negligence or fraud as to call for the infliction of a penalty. Interest upon the funds so perverted or the profit which they would have earned for the accountant would be at once awarded to the estate if either the amount used or the profit were shown. In this case, however, the commingling of funds arose from the fact that the accountant frequently paid claims against the estate with his own moneys, and repaid himself with the first moneys of the estate thereafter received by him, but his record of those transactions was so kept that it was almost impossible to ascertain whether at any given time the balance of cash in hand belonged to himself or the estate. It was not denied that when his account was finally made up, every item of credit was satisfactorily vouched, and it was not pretended that he has failed to charge himself with every asset that had come into his hands. Moreover it was not shown that any loss to the estate or profit to himself had accrued.

The error of the accountant, and it was a serious one, resolves itself into an error of bookkeeping; but it was free from a suspicion of fraud, or, as we have seen, from proof of injury. It would be a harsh measure to visit upon such a transaction the punishment which is due only to a case of gross disregard of duty.

The exception is disallowed.

Exceptions dismissed and adjudication confirmed.

Opinion by ASHMAN, J.

April 10, 1879.

Woods's Estate.

Orphans' Court practice—Execution against an administrator—Exemption of $300 in case of levy—Act of April 9, 1849—Administrator who has converted funds of the estate to his own use, not entitled to such exemption.

Sur petition to set aside sheriff's appraisement.

The petition of Jane Woods set forth that upon the adjudication of the account of Wm. J. Gallagher, administrator of the estate of the husband of petitioner, the balance in the hands of the administrator, amounting to $638.57 less the sum of $50 already paid by him, was awarded to the petitioner, but that he had made default in the payment thereof. That on April 2d, 1879, a writ of execution in the nature of a fieri facias was issued out of the Orphans' Court, by virtue of which the sheriff levied upon the goods and chattels of Gallagher at No. 621 South Ninth St., and advertised the same to be sold, whereupon Gallagher claimed the exemption of $300 under the Act of April 9, 1849. That the sheriff accordingly made an appraisement, and was about to deliver the appraised goods to Gallagher's agent. That the petitioner was advised that Gallagher had no legal claim to such appraisement, as he had fraudulently appropriated the trust funds to his own use, and had fled the jurisdiction of the Court for the purpose of evading the process of the Court, and defrauding his creditors.

The prayer of the petitioner was that the appraisement should be set aside.

C. Davis, for the petitioner.

The Act of 1849 extends only to actions upon contract. The defendant was a wrong-doer, and was not therefore entitled to the benefit of the Act.

Act of 9 April, 1849, Purd. Dig. 636, § 20.
Lauck's Appeal, 12 H. 428.
Gangwere's Appeal, 12 C. 469.
Carl *v.* Smith, 8 Phila. 569.
Emerson *v.* Smith, 1 Sm. 90.
McCarthy's Appeal, 18 Sm. 217, 219.
Lorenz *v.* Wright, 6 WEEKLY NOTES, 539.

Winship, for the sheriff, cited no authorities, but submitted the matter to the Court.

April 12, 1879. THE COURT granted the prayer of the petitioner, and set aside the appraisement.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, JUNE 5, 1879.* [No. 6.

Supreme Court.

Jan. 77, 153. February 18, 1879.

Simpson v. Neill.

Rivers—Water fronts—Riparian owners, rights of to use of water of river Delaware—Act of 8 April, 1851—Constitutional law.

The water of the Delaware at Philadelphia between low water-mark and the Port Warden's line is held merely by license from the Commonwealth, and under such laws as the Legislature may see fit to enact.

The Act of 8 April, 1851, conferring on the Board of Port Wardens jurisdiction of controversies as to wharfage between owners of adjoining wharves, dealing as it does with statutory rights, is not in derogation of the right of trial by jury.

A. owned a portion of the wharf with a pier extending into the river. B. owned the remaining portion of the wharf with a pier extending parallel with, and at the distance of 64 feet from A.'s pier. Between the piers was a water-dock:

Held, that these piers were adjoining wharves within the meaning of the above Act of Assembly.

Error to the Common Pleas No. 2, of Philadelphia County.

Debt, by Neill against A. M. Simpson, upon an award of the Board of Port Wardens determining the wharfage due the plaintiff from the defendant. Pleas, Nil debet, payment, with leave, etc., and set off.

At the trial, before MITCHELL, J., the following facts appeared: In 1867 James Simpson and Neill were tenants in common of certain land extending from Swanson Street to the line fixed by the Board of Port Wardens in the Delaware River, including a wharf with two piers running into the river in parallel lines, and at the distance of 64 feet from each other, and separated by a water-dock or slip. In that year Neill conveyed to A. S. and A. M. Simpson a portion of this land, including a portion of the wharf and the southernmost pier, "together also with all and singular the machinery fixtures, etc., and together also with all and singular other the buildings and improvements, ways, streets, alleys, passages, waters, water-courses, wharves, docks, landings, landing-places, rights, liberties, privileges, hereditaments, and appurtenances." On the same day, in consideration of this grant, Simpson conveyed to Neill the remaining portion of the land previously held in common, including the rest of the wharf and the northernmost of the two piers. The deed contained a conveyance of appurtenances in the terms of the other deed. The line between the properties when protracted into the river, fell either on or a few inches northward of the north line of the Simpsons' pier, thus giving Neill nearly if not quite the whole of that portion of the dock lying between the two piers. A difficulty between Neill and the Simpsons having arisen respecting the use of the water-dock between the piers, the former applied to the Board of Port Wardens to determine what proportion of wharfage collected from vessels moored to the Simpsons' pier in the dock, the latter should pay him. The Board having decided that Neill was entitled to one-third of the money so collected, he brought this suit therefor, and proved that the wharfage between certain dates amounted to $579.25. The defendant testified that his pier could be conveniently used only on the side next to the dock. The Court directed a verdict for the plaintiff for one-third of $579.25, and judgment was entered accordingly, whereupon the defendant took this writ, assigning that instruction for error.

E. Spencer Miller, for the plaintiff in error.

The proceeding before the Board of Port Wardens was under the Act of April 8, 1851 (P. L. 354) "to apportion the rent of wharves and docks in the port of Philadelphia." It provides that when the owners—

"of adjoining wharves, docks, landings, or river fronts shall disagree as to the apportionment of the wharfage or dockage payable to them in accordance with their titles by persons making use of the same, or by vessels lying in front thereof, it shall be the duty of the Master Warden and Board of Wardens of said port . . . in accordance with the established custom and usages of the port . . . to determine the relative proportions of such wharfage and dockage belonging to the several properties of such adjoining wharves. . . . *Provided*, That nothing herein contained shall be construed to authorize the said wardens to take cognizance of any questions involving the title to such property; but such jurisdiction and the power to enforce the rights of the owners of said wharves, docks . . . shall exist and remain in the proper courts of law."

This Act applies to the owners of adjoining wharves, not of piers separated from each other by 64 feet of water.

It might well be that vessels could not lie at short wharves without obstructing the property of more than one owner. No obstruction is possible in the case of widely separated piers, and the reason of the law fails; but if the law was intended for such a case as this it is unconstitutional. The common law right of access to the water enjoyed by riparian owners cannot be taken away by statute. The use of the water in the dock was such a right or easement in the Simpsons, confirmed by the express provisions of Neill's deed. The Act forbids the wardens to

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take "cognizance of any questions involving the title to said property;" and they could not consider the force of the words in the deed without disregarding this provision.

The Act is also unconstitutional in providing for the ascertainment of common law rights and a measure of damages without a trial by jury.

H. Flanders and *D. W. Sellers*, contra.

The Act of April 8, 1868 (P. L. 755), settles the question of the extent of Simpson's water-front: "the breadth of water-front appertaining to each owner on the river bank shall be determined by protracting the lines of the land to the line established as the limit to which wharves may be built." The line of Simpson's property protracted falling on, or a few inches north of, Simpson's pier, it is not pretended that vessels could be moored on the north side of that pier without being in front of the portion of the wharf owned by Neill.

If Simpson was dissatisfied with the apportionment of the wardens he should have appealed, under the Act of April, 1851 (P. L. 722). The case is clearly within the jurisdiction of the wardens, and not within the exception in the proviso of the Act.

March 17, 1879. THE COURT. We think there is nothing in the points made on the conveyances so much relied on by the learned and zealous counsel for the plaintiff in error. If the deed Neill to Simpson contained the general words "waters, docks," etc., so did the deed Simpson to Neill of the same date, and the one was a fair set-off against the other. But in truth neither party had any right to convey the waters and docks, being, as they were, part of the river Delaware. These words could have no more effect on the rights of the respective parties than would a conveyance of a lot on a public street "with all the streets and highways thereunto appertaining."

All the property on the river front of the city below low water-mark of the river Delaware is held merely by license from the Commonwealth, under and subject to such laws and resolutions as the Legislature has seen fit to enact. It cannot, we think, be doubted that these wharves were adjoining within the letter and spirit of the Act of 1851, and would be so though the piers were one hundred feet apart, provided there was no intervening wharf or pier. That the claim of the defendant below was derived from and altogether dependent upon statutory enactment is a sufficient answer to the argument that the Act of Assembly vesting jurisdiction in the wardens is unconstitutional, as depriving the defendant of his right to a trial by jury.

Judgment affirmed.

PER CURIAM.

July, '78, 119. January 29, 1879.

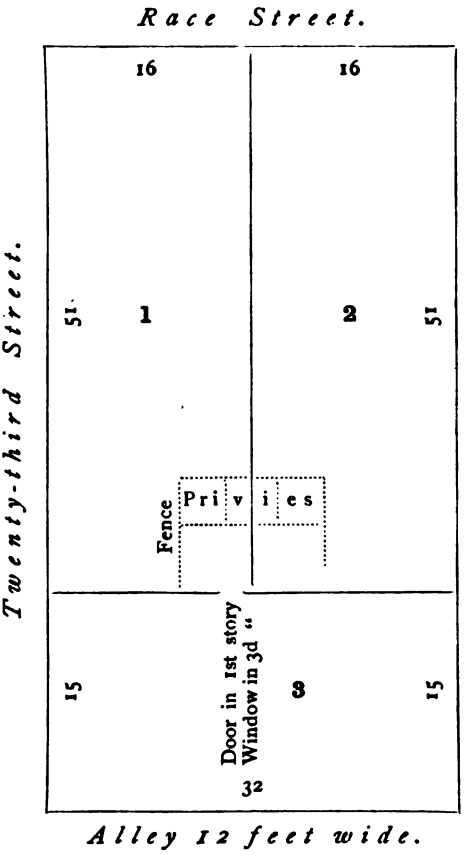
Adams's Appeal.

Easement—Dominant and servient tenement—Sheriff's sale—When purchaser takes servient property discharged from the easement.

A privilege or servitude annexed to a property in favor of an adjoining property, must be palpable and manifest, and notoriously permanent in its nature. Where an examination of the premises would show nothing more than a mere temporary arrangement for the convenience of tenants, a sheriff's vendee will take the property freed from the burden of such an arrangement.

Appeal from the Common Pleas No. 4, of Philadelphia County.

This bill, filed by Frederick Adams against Patrick Bradley, set forth: that one Jane O. James, being the owner of the property shown in the following plan, mortgaged it as one piece.



Subsequently, the said mortgage was sued out, and the property sold under judgment thereon, on November 5, 1877. For said sale the premises were divided by the sheriff's description into three properties, according to the lines of the

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plan, and the same were sold and deeds executed therefor according to the appropriate descriptions. At the sale the plaintiff purchased the properties Nos. 2 and 3, and the defendant purchased No. 1. A way had always existed, leading from the door in house No. 3, to the privy appropriated to that house, which was the centre one of the three on the plan. The said way was enclosed by a fence. Over the said way a flat was erected for the use of the occupiers of house No. 3, and accessible to them by a window in the third story. These conveniences had been used and enjoyed by the occupiers of said house from the time of its erection.

The defendant threatened and commenced to tear down the superstructure of the said centre privy so far as it extended over the said sheriff's line, and to shift the said fence to the same line, thereby closing the said door in house No. 3, and also to tear down the said flat so far as it projected over the said line. The bill prayed an injunction.

The answer admitted the material allegations of the bill, but set up that the privy and flat, as the plaintiff claimed to enjoy them, were encroachments upon the defendant's rights; and claimed the right to enjoy the property according to the metes and bounds as described in the sheriff's deed.

The Court, after argument, dismissed the bill; whereupon complainant appealed, assigning for error the action of the Court.

Henry C. Titus, for appellant.

The conveniences annexed to property No. 3, by the owners of the whole, were open and notorious, and hence passed to the sheriff's vendee, after the division of the property.

Cannon *v.* Boyd, 23 Sm. 179.
Seibert *v.* Levan, 8 Barr, 383.
Overdeer *v.* Updegraff, 19 Sm. 110.
Kieffer *v.* Imhoff, 2 Casey, 438.

A. P. Douglass, for appellee.

An easement can only exist by prescription or necessity. Here there is no pretence of such a necessity as the law requires. An examination of the authorities cited by the complainant will show this.

March 3, 1879. THE COURT. What was claimed by the plaintiff as a permanent easement, was evidently a mere temporary arrangement for the accommodation of tenants. Admitting that the bidders at sheriff's sale could have gained admittance so as to have known of it, they could not have regarded it as of a permanent character, as it must be to fasten it upon a purchaser without an express reservation. Cannon *v.* Boyd (23 P. F. Smith, 179), following in the line of all the previous adjudications, holds that "if the condition of the properties at the sheriff's sale was such as to indicate that the occupants of the one property used the alley in question, and had a right to do so, the verdict should be for the plaintiff." In Kieffer *v.* Imhoff (2 Casey, 438), it is said that the pretended privilege or servitude must be palpable and manifest, and obviously permanent in its nature. We think the Court below were entirely right upon the case as presented on bill and answer, in dismissing the bill.

Decree affirmed and appeal dismissed, at the costs of the appellant.

PER CURIAM.

July, '78, 61 & 62. Jan. 22, 1879.

Junction Railroad Company v. The City of Philadelphia, to use, etc.

Municipal lien—Non-liability of road-bed of railroad company for paving claim—Estate or easement held by railroad company.

A municipal claim for paving does not lie against the road-bed of a railroad company. It is immaterial to such purpose whether the railroad company own the fee in, or merely the easement over, the land sought to be liened.

The right of way acquired by a railroad company is exclusive at all times and for all purposes.

The liability of real estate of a railroad company other than the road-bed, for a municipal claim for paving, *not decided.*

City of Philadelphia *v.* Phila. Wilm. and Balt. R. R. Co., 9 Casey, 41, followed.

Error to the Common Pleas No. 3, of Philadelphia County.

A claim for paving was filed by the city of Philadelphia to the use of Holgate, against a lot of ground of the Junction Railroad Company, situate on the south side of Girard Avenue, 140 feet east of Thirty-eighth Street in the city of Philadelphia, 60 feet front and 250 feet deep.

The affidavit of defence filed to the *sci. fa.* averred: "That the railroad of said company is a public highway for the transportation of passengers and freight; that the premises described in the claim filed in the above entitled case, constitute a section of the roadway of this company, being a strip of ground sixty feet in width, extending northwardly from Girard Avenue, and used exclusively for railroad purposes; that the paving for the cost of which said claim was filed was done exclusively upon Girard Avenue, a public highway of the city of Philadelphia, which crosses the railroad of the said company by means of a bridge at a point considerably above the grade of the said railroad, and almost at a right angle thereto. The grade of the said street was fixed by the city of Philadelphia, and the said paving was done exclusively upon the said bridge (about thirty-six feet in length), and the ap-

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proaches thereto, which rest upon the roadway of this company; but in no other sense was any portion of said paving done upon any property owned by the company, or upon premises adjoining the property of this company. The said company has not, does not, and cannot derive the slightest benefit from the said paving; and this deponent is advised by counsel that the said company is not liable for the cost thereof."

A rule for judgment for want of a sufficient affidavit of defence was made absolute, the COURT (per YERKES, J.) delivering the following oral opinion: "The case of City *v.* Railroad Company (9 Casey, 41) must govern wherever it is applicable; but in that case the railroad company only possessed an easement and were not the owners of land. In the case before us the defendant company owns the land. The acts relative to paving make the owners of land liable for paving. We cannot find authority to apply a rule to railroad companies owning land different from that applicable to private persons. It may be that any proceedings to enforce the lieh would vest a title subject to the easement or the franchises of the company; but that does not seem any reason why whatever interest the company may have in the land in excess of the necessities of the easement should not be subject to lien and levy and sale. The claim is against a lot sixty feet in width. There is no averment that so much land is necessary for the enjoyment of the franchises vested in the defendant, and the fact is that much of the land is not so used, and it was so admitted on the argument. If the land against which the lien is filed is not used for corporate purposes, why should it not be subject to lien, etc?

"We do not see why an interest in land in excess of the easement, and why land owned by a railroad company, and not used for the purpose of its corporate franchises, should not be subject to a paving lien. To this extent we hold that defendants are liable. Nor can the fact that the ground is below grade affect the question. If it was so held, there would be no reason why private owners of land above and below grade should not be exempted."

The defendant took a writ of error, assigning for error the entering of judgment for want of a sufficient affidavit of defence.

Thomas Hart, Jr., for the plaintiff in error.

It was not admitted upon the argument in the Court below that much of the land against which these claims were filed, was not used for the necessary enjoyment of the company's franchises. It is expressly stated in the affidavit that the strip of ground in question is a section of the roadway used exclusively for railroad purposes. Legislation upon the subject of the collection of municipal claims was not intended to authorize the soil of one public road to be taxed in order to raise funds to make or improve a neighboring one.

City of Phila. *v.* Phila. Wilm. and Balt. R. R. Co. 9 Casey, 41.

City of Phila. *v.* Eastwick, 11 Id. 75.

The occupation of land by a railroad company is necessarily so exclusive that there is practically no difference between the fee-simple value of the land, and the damages for the easement of the way. No one pretends that other property owned by a railroad company, used for offices, shops and the like, would be exempt from claims of the character of the present one. The liability would not, however, depend upon the fact of an absolute ownership, though that would exist, but upon this, that the offices and shops of a railroad company are not necessary constituent parts of the railroad. It is the use and purpose to which the property of a railway company is put which determines its liability to taxation. It is the public works held by corporations, with their necessary appurtenances, which are exempt from taxation.

Carbon Iron Co. *v.* Carbon Co., 3 Wr. 251.

In R. R. Co. *v.* Berks Co. (6 Barr, 70), the water stations and depots of a railroad company were held to be exempt from taxation. No distinction has ever been made or attempted between the fee and the easement.

Lehigh Coal and Nav. Co. *v.* Northampton Co., 8 W. & S. 334.

Navigation Co. *v.* The Commissioners, 1 Jones, 202.

Del. and Hud. Canal Co. *v.* The Commissioners, 3 Harris, 351.

Plymouth R. R. Co. *v.* Colwell, 3 Wr. 337.

Northampton Co. *v.* Lehigh Coal and Nav. Co., 25 Sm. 461.

Lodge *v.* The Phila. Wilm. and Balt. R. R. Co., 8 Phila. 345.

As for execution, the Act of April 7, 1870 (Purd. Dig. 291), provides for a sale of a railroad as an entirety only; the intent of the Act is to avoid the sale of fractional parts. The depth of the lots sought to be liened is arbitrarily fixed in the claims, being actually several miles.

Thomas J. Ashton, for the defendants in error.

The general legislation on the subject of municipal claims for paving, especially the Act of April 21, 1851* (P. L. 385), fixes the liability of the road-bed of a railroad company, unless it be exempted by some Act of Assembly, ordinance, or rule of law of equal authority.

The case of City of Phila. *v.* Phila. Wilm. and Balt. R. R. Co. (9 C. 41) was decided upon the ground that the railroad company was not the owner of the fee. But it will be further observed that the learned Judge who decided that case in

* This Act provides: "§ 1. That the offices, depots, carhouses, and other real property of railroad corporations situate in said city, the superstructure and water stations of the road only excepted, are and hereafter shall be subject to taxation by ordinance for city purposes."

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the Court below, based his decision principally upon the fact, that, as the law then stood, the property of the company and its franchises could not be transferred by the company itself or sold under adverse process. This reason no longer exists, for by the Act of 1870 all the property, franchises, etc., of a railroad corporation may be sold under the appropriate writ, issued on a judgment obtained against the corporation.

The case of the City of Philadelphia *v.* Eastwick (11 Casey, 75), was expressly so decided, because Eastwick was not the owner of adjoining ground and his lot did not *front* on the street. Whatever else was said in the opinion of the learned Judge was *dehors* the question before the Court.

Claims for paving are not strictly taxes.

Northern Liberties *v.* St. John's Church, 1 Harris, 104.

Hammett *v.* City of Phila. 15 Sm. 146.

The Act of April 7, 1870 (Purd. Dig. 291), provides for execution against a corporation by writ of *fieri facias*, or other appropriate writ.

[SHARSWOOD, C. J. If the judgment were affirmed, and execution were to issue, what would a sale bring ?]

If the sale brought little, that would be the plaintiff's misfortune; and I apprehend is hardly to be used as an argument against him.

March 3, 1879. THE COURT. This case is ruled by the City of Philadelphia *v.* The Philadelphia, Wilmington and Baltimore Railroad Company (9 Casey, 41). It was there held that the city cannot support a claim for paving against the road-bed of a railroad. An attempt was made to distinguish the cases upon the ground that the plaintiff in error owned the road-bed in fee, whilst in the case cited the company had only a right of way over it. We are unable to see any substantial distinction. The right of way acquired by a railroad company is exclusive at all times and for all purposes. (Railroad Co. *v.* Norton, 12 Harris, 465; Delaware, Lackawanna and Western Railroad Co. *v.* Mulherin, 1 P. F. S. 366.) Moreover, it is perpetual. For the purpose, therefore, of filing municipal claims for paving against the road-bed of a railroad company, the distinction between the right of way and the fee is a shadowy one. While the fact that the company did not own the fee was referred to in the case in 9 Casey, it was not the only or the main reason for affirming the judgment. It was there held that the claim had "no foundation either in the letter of the law or in its spirit, or in the form of the remedy;" that the paving laws are means of compulsory contribution among the common sharers in a common benefit, and as a railroad cannot, from its very nature, derive any benefit from the paving, while all the rest of the neighborhood may, it is not to be presumed that the compulsion was intended to be applied to such companies. A scire facias upon a claim of this kind is a proceeding *in rem*. It is averred in the affidavit of defence "that the premises described in the claim filed in the above entitled case constitute a section of the roadway of this company, being a strip of ground sixty feet in width, extending northwardly from Girard Avenue, and used exclusively for railroad purposes." Upon a judgment recovered upon this claim it is plain that no portion of the ground could be sold other than that above described. Nor is it claimed that the city could do more than sell the fee in the sixty feet subject to the easement or right of way of the company. The contention is that the company being the owners of the fee, the fee may be sold subject to the easement. But *cui bono?* Such proceeding would be a vain thing. The fee is absolutely worthless subject to the easement. But, as before observed, it is entirely immaterial whether or not the company is the owner of the fee. In the City of Philadelphia *v.* Eastwick (11 Casey, 75), the city filed two liens, one against the railroad company for the paving done along its track, and the other against the owner of the fee. Having failed, as we have seen (City of Philadelphia *v.* The Philad., W. & Balt. R. R. Co., *supra*) to sustain its claim against the company, the city attempted to enforce it against the owner of the fee, in which it was also unsuccessful. The attempt to lien the road-bed failed, both as to the company holding the mere right of way, and the owner of the fee. The Junction Railroad is a connecting link between three of our leading lines of railroads. It is a public highway of more than ordinary importance. "It would be strange legislation," says LOWRIE, J., in the City *v.* The Railroad Company (*supra*), "that would authorize the soil of one public road to be taxed in order to raise funds to make or improve a neighboring one."

The learned Judge of the Court below placed his decision partly upon the ground that a portion of the land was in excess of the amount required for the easement. We find no such statement or admission in the affidavit of defence, and we cannot go outside of it. On the contrary, it is expressly averred that the ground in controversy is a section of the roadway of the company, and is used exclusively for railroad purposes.

I have confined the discussion of this case to the matter of the road-bed. The question of the liability of other real estate of such corporations, such as depots, offices, shops, and the like, to taxation and municipal assessments, is not raised by this record.

Judgment reversed, and a *procedendo* awarded.

Opinion by PAXSON, J.

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March 4, 1879.

Wagner's Appeal.

Conversion—Sale by the Orphans' Court—Acts of March 29, 1832; April 3, 1851; April 18, 1853.

The mere fact that a petition to the Orphans' Court for the sale of lands, which otherwise comes properly within the purview of the Act of March 29, 1832, recites that the petitioners are "desirous that the land be sold so as to bar any estate or remainder therein, ... so that the purchaser will take an indefeasible title thereto" will not of itself be sufficient to bring the case within the fifth section of the Act of April 18, 1853, so as to cause the proceeds of the sale to retain their character as realty; if there be no contingent remainders or entails (such as are contemplated by the latter Act), these words are mere surplusage, and a conversion takes place.

Appeal from the Orphans' Court of Berks County.

This was a citation sur petition of George F. Barr, administrator *d. b. n. c. t. a.* of Henry M. Albright, deceased, to Harriet Wagner and Henry Brobst, administrators of Franklin V. Wagner, deceased, to show cause why they should not be required to pay the petitioner one-half of two certain sums ($2,433.33 and $9,598.50 respectively), the proceeds of real estate sold under two separate decrees of the Orphans' Court.

The petition set forth that on September 17, 1853, Maria Catharine Wagner died intestate, leaving to survive her her mother, Mrs. Catharine Wagner; a brother, Franklin V. Wagner; and a niece (the issue of a deceased sister), Valeria C. Albright. That at the time of her death she was seized of an undivided third part in and to a house and lot in the city of Reading, and also of an undivided third part in and to a house and tract of land in Upper Bern Township, Berks County, which descended to the said Catharine Wagner for life, with remainder to Franklin V. Wagner and Valeria C. Albright in fee. That on April 25th, 1856, Mrs. Wagner presented her petition to the Orphans' Court, setting forth her title and the title of the remainder-men to the premises in the town of Reading, and that it would be to their interest that the property be sold, and praying the appointment of a trustee to sell under the Act of April 3d, 1851.* The Court granted the prayer; the trustee was appointed, and the sale made. That on September 21st, 1865, Franklin V. Wagner, as guardian for Valeria C. Albright, and on behalf of himself and his mother, the other parties in interest, presented his petition, setting forth their title to the premises in Upper Bern Township, and "that the rents, issues, and profits of said real estate are insufficient to keep the same in repair, and be productive of revenue to the said parties interested, that the buildings are in a state of dilapidation, that it would be much to the interest of the parties interested in said real estate and to their advantage that the same should be sold and the proceeds reinvested for the use and benefit of the parties interested in the land; that your petitioner is desirous that it should be sold for himself and his ward, so as to bar any estate or remainder of any of the parties interested therein, and give to the purchaser a clear and indefeasible title and thereby insure a better price for the same." That the Court granted the prayer, and the sale was made accordingly.

The petition further set forth that Valeria C. Albright died May 10th, 1866, leaving her surviving, her father, Henry M. Albright, as her sole heir. The said Henry M. Albright died March 7th, 1868, and George F. Barr, the petitioner, was appointed his administrator. Mrs. Wagner, the life tenant, died February 7th, 1875. Franklin V. Wagner also died, and Harriet Wagner and Henry Brobst, the respondents in the Court below, were appointed his administrators. The prayer of the petition was that the respondents be decreed to pay over one-half of the two sums (as above) arising from these sales.

The answer admitted the facts, but averred that the proceedings to sell the real estate were for a specific purpose, and not to work a conversion; that there was no conversion during the life of the life tenant, and that as she survived Valeria C. Albright, the property at her (Valeria's) death was still real estate, and that the petitioner's intestate (Henry M. Albright) not being of the blood of the first purchaser, was not entitled to the funds.

The Court (SASSAMAN, J.) granted the prayer of the petition, and decreed that the respondents pay over the amount claimed, in the following opinion: "There is no doubt that the property in Reading was sold under the provisions of the Act of April 3d, 1851. . . . . The trustee sold the premises and held the proceeds in trust for the life tenant and for himself and his co-tenant in remainder. . . . . Under the decision in Large's Appeal (4 Sm. 383), this sale converted the land into personalty."

As to the property in Upper Bern Township, he held: "Under the decisions in Pennell's Appeal (8 H. 515), Grider *v.* McClay (11 S. & R. 224), Biggert *v.* Biggert (7 W. 563), and Dyer *v.* Cornell (4 Barr, 359), we are constrained to hold that money arising from the sale of land by order of the Orphans' Court, whether it belong to an infant, a feme covert, or a male of

* The Act of April 3d, 1851 (P. L. 305), which is declared in its title to be a supplement to the Act of March 29, 1832 (P. L. 198), provides that the Court shall have power to direct a sale whenever an interest in possession or expectancy is owned by a minor, and it appears to be to the benefit of the minor's estate.

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full age, is to be considered simply as money and nothing else. It cannot retain its original character forever. It has no ear-mark by which it can be traced and distinguished from other personal estate. The necessity for a perfect conversion at some time must be apparent, and the proper time for that is when the money has vested in the party entitled to it. This view has the support of common sense, and is absolutely sustained by authority, and it matters not whether the money of a minor have been in the hands of a guardian or any other legally constituted trustee.

"The proceeds, for the purposes of Catharine Wagner, may have been treated as lands, so far as her income therefrom was affected, but as the estate of Valeria C. Albright they would be distributed as money. The petitioner is therefore entitled to one-half of $9,598.50, with interest from said 7th of February, 1875.

"The Act of 18th April, 1853, especially provides that nothing in that Act contained shall be taken to repeal or impair the authority of any Act of Assembly authorizing the sale of real estate, so that decisions under that Act do not interfere with the views above expressed."

The respondents appealed, assigning for error the action of the Court.

G. B. Stevens and *A. G. Green*, for appellants.

Under the petition in 1856, for the sale of the Reading property, only so much of the proceeds as were required for the objects set forth in the petition was converted; the balance remained realty.

Pennell's Appeal, 8 Harris, 515.

The words in the petition for the sale of the Upper Bern property, "to bar any estate or remainder," bring the case within the Price Act, and no conversion took place.

Holmes's Appeal, 3 Sm. 339.

Jefferson Snyder (*Barr* with him), for appellees.

As to the first sale, there can be no doubt that there was a conversion.

Large's Appeal, 4 Sm. 383.

As to the second. The object of the fifth section of the Price Act is to bar *contingent* remainders, etc. The rights of parties who are not in Court are, therefore, adjudicated, and it would be a hardship upon them if, at a time when they would enjoy the estate but for the order of the Court, they cannot, because a conversion has taken place. Hence the rule. In the case at bar, however, a deed from the parties before the Court would have given a good title; they all asked for the sale, and the reason of the Act does not apply. The words in the petition were conflicting.

March 17, 1879. THE COURT. About the property embraced in the petition of Mrs. Catharine Wagner, of the 25th of April, 1856, there is no controversy. That petition, in its terms, was within the Act of the 3d of April, 1851, hence the sale under it operated to convert the realty into personalty for all purposes, and it must be so distributed. The contest is therefore confined to the sale, by order of the Orphans' Court, of the land in Upper Bern Township, on the application of Franklin V. Wagner, guardian of Valeria C. Albright. The only question is whether the proceedings by which this sale was brought about were under the Act of 29th of March, 1832, or under that of 18th of April, 1853. If under the former, there was not only a conversion, but the proceeds must be distributed as personalty; if under the latter, they must be treated for the purposes of distribution as realty. The determination of this question must depend upon the interpretation of the petition itself, for there is nothing else by which to be directed. That petition sets out the ownership of the land therein described as having been vested in fee in Maria Catharine Wagner. It then sets forth her death, leaving as her sole heirs her mother, Catharine Wagner, Valeria C. Albright, a minor child of a deceased sister, and the petitioner, Frank V. Wagner, a brother; there is thus set forth a life estate in Mrs. Wagner, with a vested remainder in fee in Miss Albright and Frank V. Wagner, and as all these parties join in the proceedings, the entire estate is represented. This petition further represents "that the rents, issues, and profits of the said real estate are insufficient to keep the same in repair and be productive to said parties interested; that the buildings are in a state of dilapidation; that it would be much to the interest of the parties interested in said real estate, and to their advantage, that the same should be sold." This puts the case plainly within the Act of 1832, and had the petition stopped at this point there would have been no difficulty; but the person who drafted it, for some mysterious reason of his own, saw fit to add the following, viz: "That your petitioner is desirous that it should be sold for himself and ward, so as to bar any estate or remainder of any of the parties therein, and give the purchaser a clear and indefeasible title, and thereby insure a better price for the same." This clause would, at first sight, bring the proceeding within the purview of the Act of 1853. Connected, however, as it is with the preceding clause, and with the recitation of title it becomes obvious that the Court below properly treated it as mere surplusage. The Act last above mentioned was designed to operate upon certain estates and conditions not found in this petition. It alleges a desire to "bar remainders," but the statute is operative only on "*contingent remainders*." The 5th section requires "that the petition shall set forth an explanation of the

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title and of the purpose to bar the entail, defeat the contingent remainder," etc. It cannot be doubted but that the design in requiring an explanation of the title to be set forth, was in order that the Court might judge *extra* the prayer of the petitioner whether the case was really and properly within the Act. If, however, this be the true rendering of the statute, then the present case is not within the Act above mentioned, for the estate mentioned in the petition is unencumbered by entailments, contingent remainders, or executory devises. It cannot be doubted but that the joint deed of the parties would vest in their vendee a fee simple absolute. Such being the case, there is nothing requiring the intervention of the Act of 1853, it is, therefore, out of the question, since no decree could properly have been made under it.

Decree affirmed, appellant to pay costs.

Opinion by GORDON, J. PAXSON, J., absent.

Jan. '79, 56. March 26, 1879.

Fairlamb v. Hempshire.

Trustees ex maleficio—Voluntary undertaking of one to serve another, when enforced—Statute of frauds.

Though one who voluntarily assumes to do something without consideration be not liable for non-feasance, yet if he does anything, he is bound to do it rightly according to his agreement.

A. being informed that a judgment debtor (who was his brother) was in failing circumstances, and that he had better issue an execution to protect himself, and learning at the same time that the debtor was largely indebted to B., his housekeeper, procured a judgment-note in her favor for the amount of her claim, and voluntarily agreed to look after it for her. He afterward caused the judgment note to be entered up, and executions to be issued upon it and his own judgment at the same time. In an action by B. against A. to recover her *pro rata* share of the amount realized from the sale of the debtor's property:

Held, that she could recover.

Held further, that the promise was not within the statute of frauds.

Error to the Common Pleas of Delaware County.

Assumpsit, by Theresa Hempshire, against Frederick Fairlamb. Pleas non-assumpsit, payment with leave, etc., set-off. On the trial the following facts appeared:—

Charles Fairlamb was a member of a firm engaged in the manufacture of bricks, and was indebted to Frederick Fairlamb, his brother, in the sum of $3000, for which his brother had obtained a judgment. In the early part of 1876, Charles, finding himself embarrassed, and believing failure to be inevitable, notified his brother Frederick, in order that he might protect himself. It further appeared that Charles was indebted to Theresa Hempshire, his housekeeper, in the sum of $1650, for which she had no security. Frederick therefore procured a judgment-note for that sum to be signed by Charles, and took it into his possession, promising to take care of it, and do what he could to protect Miss Hempshire. The testimony upon this point was very conflicting, Miss Hempshire swearing that Frederick agreed to protect her equally with himself; Frederick swearing that his agreement was to do what he could for her, subject to his own rights; and Charles, who was called by the plaintiff, corroborating her in the main. Frederick caused a judgment to be entered on the judgment-note in favor of Miss Hempshire, and ordered executions to be issued upon it and his own judgment, which were placed in the sheriff's hands at the same time, by the same counsel. Under the direction of the counsel, the Fairlamb judgment was levied upon Charles's interest in the brick manufactory, and the Hempshire judgment, upon a piece of real estate, from which, by reason of prior liens, nothing was realized. The former was bought in by Frederick for $3300, and was afterward resold by him for $2500.

The suit was brought to recover the plaintiff's *pro rata* share of this sum.

The plaintiff requested the Court to charge (*inter alia*): "If the jury believe that Frederick Fairlamb undertook voluntarily to take care of the plaintiff's claim against Charles Fairlamb to her, and had execution issued on it, and placed said execution, together with an execution issued on his own judgment, in the hands of the sheriff at the same time, the plaintiff is entitled to recover from the defendant her share of the proceeds of the said execution." *Affirmed.*

The defendant requested the Court to charge that the alleged promise was within the statute of frauds, and that under the evidence the plaintiff could not recover. *Refused.*

In the general charge the Court said, *inter alia:* "If, however, you adopt the plaintiff's testimony as a true history of the arrangement, and conclude from the evidence that, in pursuance of an agreement made by the defendant with the plaintiff, he was to protect her claim, and that the placing of these writs in the sheriff's hands together was but a carrying out of the agreement, then I instruct you that she is entitled to her share of the money raised by the executions. But it appeared that no money was received, yet, if he has since converted what he did receive into cash, she is entitled to her share—that is to say, if the agreement spoken of by her, but denied by him, existed, and the writs were placed in the sheriff's hands together in pursuance of that agreement.

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"The principal question is, Was there such an agreement by which she was induced to give up any rights she then had, or to repose any confidence in him by which he acquired any advantage over her? If there was such an agreement, and under it he acquired any advantage, and he has failed to fulfil or carry out his undertaking, it is a principle of law that the one who obtains such advantage by reason of confidence reposed, and fails to keep his promise, becomes a *trustee ex maleficio* for the one who suffers by his wrongful act, and as such must account; you will, of course, remember that the defendant denies that any such agreement was made; you should, in the first place, endeavor to harmonize the testimony, see if his story is consistent with his interest to a reasonable degree."

Verdict and judgment for the plaintiff, $823.34. Defendant took this writ, assigning as error the answers to plaintiff's and defendant's points.

Edward A. Price and *H. C. Howard*, for plaintiff in error.

The unqualified affirmation of the plaintiff's first point was calculated to mislead the jury. The effect was to permit them to find a verdict based on fraudulent acts of which there was no evidence.

Burk *v.* Serrill, 30 Sm. 413.

The contention of the plaintiff below was somewhat peculiar. She contended that Fairlamb was bound by the act of his counsel, in placing the writs in the sheriff's hands at the same time. It would seem to be a corollary from this that she would be bound by the act of her counsel in appropriating the lien of the writs.

Lynch *v.* Commonwealth, 16 S. & R. 368.
Patterson *v.* Cummin, 2 P. & W. 520.
Wilson *v.* Young, 9 B. 101.
Cyphert *v.* McClune, 10 H. 195.

The alleged promise was a promise to answer for the debt or default of another, and therefore within the Statute of Frauds.

Shoemaker *v.* King, 4 Wr. 107.
Eshleman *v.* Hamish, 26 Sm. 97.
Townsend *v.* Long, 27 Id. 143.

W. B. Broomall, for defendant in error.

It is an undoubted rule of law that one who makes a gratuitous promise, and then enters upon the execution of it, is held to a faithful performance.

1 Parsons' Contr. 447 (5th ed.).
1 Chitty's Contr. 41 (11th Am. ed.).

The statute of frauds had manifestly no application. Under the theory of the testimony upon which the plaintiff's case rested, and which the jury found to be the true one, the money claimed was simply money had and received by the defendant to the plaintiff's use.

May 5, 1879. THE COURT. This case was fairly submitted to the jury by the learned Judge, and there was no error in the answers to the points which are complained of by the plaintiff in error. The whole case was embraced in the first point presented by the plaintiff below, which the Court rightly affirmed. If a man voluntarily assumes to do something without consideration, it is true he is not liable for non-feasance; but if he does anything, he is bound to do it rightly according to his agreement. It was not, and could not be pretended to be, a promise to pay the debt of another, and so within the statute of frauds. The fact that it was not in writing was, therefore, totally immaterial.

Judgment affirmed.

PER CURIAM.

Jan. '79, 20. Wm. M. M. March 14, 1879.

Schoonover v. Pierce's Administratrix.

Judgment—Scire facias to revive—Defence thereto—Insufficiency of—Averment that other lands bound by the judgment had been sold at sheriff's sale and that the judgment-creditor neglected to present his claim.

An affidavit of defence to a *sci. fa.* to revive a judgment was filed by a terre-tenant, setting forth that other lands bound by the judgment had been sold at sheriff's sale for a sum sufficient to pay the judgment, and that the judgment-creditor had neglected to present his claim; and further that the judgment-creditor had allowed his judgment to expire as to other lands:

Held, to be insufficient.

Error to the Common Pleas of Bradford County.

Scire facias to revive a judgment issued by F. A. Cash to the use of W. S. Pierce (for whom his administratrix was substituted) against W. Bramhall, J. Schoonover *et al.*, terre-tenants.

An affidavit of defence was filed by J. Schoonover setting forth that on January 7, 1870, W. Bramhall purchased eight lots in the borough of Towanda, Bradford County, of F. A. Cash, and gave his judgment note for $2200 for the purchase-money thereof; that the note was duly entered up, and was subsequently purchased of Cash by W. S. Pierce; and that Bramhall conveyed subsequently one of these lots to J. O. Frost who reconveyed to Bramhall, from whom Schoonover purchased it on February 27, 1872, immediately took possession and made valuable improvements thereon, and still remains in possession. On October 26, 1870, Bramhall reconveyed to Cash four of these lots which were sold at sheriff's sale, and a fund thereby raised sufficient (with the value of other of said lots sold since deponent's purchase) to satisfy the plaintiff's judgment; and that the owner of said judgment well knowing of the sales of said lots, neglected or refused to ask that said fund or any part

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thereof should be applied to the payment of his judgment but suffered the same to be diverted to junior liens.

A supplemental affidavit of Schoonover set forth that at the time deponent purchased of Bramhall, Bramhall owned other land on which plaintiff's judgment was a lien, sufficient to satisfy the judgment now sought to be revived, but the plaintiff suffered Bramhall to dispose of and encumber the same to other parties, and neglected to keep his judgment a lien thereon; and further that at the time the several payments became due on the judgment, the said Pierce, instead of collecting them out of Bramhall's property as he might easily have done, extended the time of payment thereof and took interest of Bramhall until he became insolvent.

A rule for judgment against Schoonover for want of a sufficient affidavit of defence was made absolute, the Court saying, *inter alia:* "Where there are several distinct parcels of land bound by the same encumbrance, a judicial sale of one of them will not divest the encumbrance as to the others, unless there is some equity calling imperatively on the creditor to look to the fund raised by the sale, and he refuses to do so *after notice*. Such encumbrancer may rightfully forbear to make his debt from the avails of the estate first converted. . . . . It cannot be required of a judgment-creditor that he know the complications which arise from the sale of the land by the defendant—subsequent liens against the vendees—their respective rights, etc. Such vendees hold the land with notice of the judgment, and if their rights are to be affected by sale of a portion of the land, they should quicken the creditor by notice to take his judgment out of a certain fund. In the absence of *such* notice, I know of no reason why he may not *neglect* to present his judgment for allowance, and hold his lien against any of the lots remaining unsold."

Schoonover took this writ, assigning for error the entry of judgment and the portion of the opinion above given.

Counsel for the plaintiff in error, submitted the case without oral argument on his paper book from which the following argument is taken.

The plaintiff should not be allowed to collect his judgment out of Schoonover's property, after he has so neglected his rights; it is he who has been the most negligent. It is claimed that the lien-creditor under such circumstances must have notice of the fact that a portion of the property bound by his lien has been sold, but the affidavit says in words he had knowledge, and knowledge is notice.

Dewitt S. Hall, for defendant in error, also submitted the case on his paper-book, from which the following argument is taken.

"When there are several distinct parcels of land bound by the same encumbrance, a judicial sale of one of these will not necessarily divest the encumbrance as to the others, unless there is some equity calling *imperatively* on the creditor to look to the fund raised by the sale and he refuses to do so after notice."

Konigmaker *v.* Brown, 2 Harris, 274.

Schoonover had full notice from the judgment docket.

March 31, 1879. THE COURT. We see no reason for reversing this judgment. The affidavit of defence alleged no facts which either in law or in equity ought to preclude the plaintiff below from reviving his judgment. He owed no duty to the terre-tenants to prosecute his judgment against other lands, or to take his money from a fund raised by the sale of other lands. The principles stated by Mr. Justice BELL in the opinion of the Court in Konigmaker *v.* Brown (2 Harris, 274) are directly applicable and rule this case.

Judgment affirmed.

PER CURIAM.

Appeal of the Fogelsville Building and Loan Association.

(*Reported ante, p. 56. Correction.*)

The *note* appended to this case (calling attention to an obscurity of which the record, and consequently the report, afforded no explanation) may be expunged; as from information since received it appears that there were, in fact, several lien creditors *prior* to the "Gernert" judgment whose claims were not disputed; and there could be no doubt, therefore, that the mortgages referred to were discharged by the sheriff's sale. This was assumed by counsel on both sides, but the existence of the *prior* liens not being referred to in the auditor's report, the *apparent* inconsistency of the appellant's contention suggested itself, and was alluded to in the note.

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Common Pleas—Equity.

C. P. No. 4. March 13, 1879.

Rodgers v. Southwestern Mutual Saving Fund and Building Association.

Building Association—Winding up of each series of stock—A By-law compelling stockholders to bid a premium for priority of repayment after the stock is worth $200, is contrary to a provision of the charter that when the funds are sufficient to divide $200 to each share such sum shall be paid to each non-borrower.

Sur exceptions to Master's report.

The bill set forth that the plaintiff was the holder of certain shares of stock of the fourth series in the building association, defendant, that the said shares were worth $200, the value fixed to be reached for the purpose of winding up the series, and that the defendant neglected and refused to pay to the said plaintiff the sum of $200 per share, to which she was entitled; and prayed for a decree for the payment of $200 for each of complainant's shares of stock in the fourth series with interest from the date when the funds were sufficient.

The answer admitted that on April 16, 1877, the accumulations of the contributions to the fourth series and the profits thereof became sufficient to divide the sum of $200 to each certificate; but averred that complainant was bound to comply with Article XVI. of the By-Laws prescribing that when the value of the certificates of any series should amount to $200 each, and there were not funds in the treasury sufficient to pay the non-borrowers, then one-half of the entire income of the corporation should be set apart for that purpose, and when $200 of such income should come into the treasury, it should be put up for sale, "and the holders of such series only shall bid therefor, and the holder of such certificates who shall have bid the highest premium for said money shall receive from the corporation the amount of his said certificates (less the premium bid for the same) as the money shall from time to time come into the treasury," and the premiums "shall from time to time be added to the value of the remaining certificates, as compensation to the holders thereof for the deferred payment of the same."

The Master found that such By-Law was unknown to the complainant until after she became a member of the association, and there was no evidence of its being regularly passed according to law; that, moreover, it was contrary to Art. XI. of the Charter, providing that "when it shall appear by the books of the Association that the funds thereof are sufficient to divide to every certificate the sum of $200, a meeting of the members shall be convened, at which time a division shall take place, when every member for every such certificate which he or she shall hold shall receive from the corporation, upon the surrender of such certificate, the sum of $200," and to every member who had borrowed, his or her securities should be delivered up fully discharged, "and this corporation shall cease and determine." Also, that when the association availed itself of its power to issue stock in series, it had passed a By-Law declaring the meaning of Art. XI. to be that when any series "shall, by means of the accumulations of the contributions to, and the profits thereof, have become sufficient to divide the sum of $200 to each and every certificate thereof, then the division mentioned in said Article of the said Constitution shall take place among the members of the said series in the way and manner in the said Article prescribed." Under these provisions the Master found complainant was entitled to the decree prayed for.

The defendant excepted to the above conclusions.

J. Blackburn, for exceptions.

[THAYER, P. J. The question is simply whether Article XVI. of the By-Laws is not *ultra vires*. Conceding that the Article was passed, is it not in conflict with the principle of building associations that when each share has earned $200 the holder should be paid?]

The Act of Assembly requires us to put the money coming in up for sale continually.

[THAYER, P. J. That is, subject to the general idea of such associations, which you defeat by the invention of series, and the method of paying them off. Each series should be treated as an independent transaction, as much as if it were a different association.]

J. Joseph Murphy, contra.

March 25, 1879. Exceptions dismissed, and ordered that the decree of the Master stand as the decree of this Court.

Common Pleas—Law.

C. P. No. 1. March 15, 1879.

Ward v. Whitney.

Execution—Sheriff's interpleader—Goods in possession of claimant under a claim property bond cannot be levied on under a magistrate's execution.

Rule on constable to abandon levy pending decision of feigned issue under sheriff's interpleader.

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Certain goods had been seized in execution by the sheriff, claimed by a third party, and the usual rule for an interpleader made absolute. A feigned issue was formed, and awaited trial, pending which the claimant held possession of the goods under the usual forthcoming bond. A judgment was then obtained by another party against the defendant in the original execution before a magistrate, and the goods which had been levied on by the sheriff were levied upon by the constable. The claimant obtained the present rule.

Harold Goodwin, for the rule.

The lien of the first execution was not discharged, the goods continuing *in custodia legis*, under the forthcoming bond filed by the claimant, although they were not in possession of the sheriff. They were free from any subsequent execution. Such was the interpretation of an Alabama statute, similar to our Act of April 10, 1848, by the Supreme Court of the United States; which interpretation was adopted as the rule of practice in the old District Court, and approved by the Supreme Court, and is still the rule in this State.

Hagan *v.* Lucas, 10 Peters, 400.
Johnston *v.* Minor, 1 T. & H. B. 903, note.
Bain *v.* Lyle, 18 Sm. 60.
Burns *v.* Toner, 9 Phila. 37.

The jurisdiction of this Court is established by the fact that the goods were in the custody of the law (cases *supra*), by the established practice in the case of conflicting executions; and the necessity for its exercise appears in the necessity of preventing an unseemly clash of authority between the sheriff and constable.

Duncan *v.* McCumber, 10 W. 212.
Weingardner *v.* Hafer, 3 H. 144.
Matthews *v.* Warne, 6 Halst. 295.
Riddle *v.* Marshall, 1 Cr. C. Ct. 96.
Leach *v.* Pine, 41 Ill. 66.

The claimant, so far as concerns proceedings in this Court, is the bailee of the sheriff, or a *quasi* receiver, appointed by the Court under the Act of 1848, to save expenses.

Lyon *v.* Stewart, 5 J. J. Marshall, 676–9.
Fox *v.* R. R., 8 Phila. 639.

Analogous proceedings in the other States sustain this position.

Acker *v.* White, 25 Wend. 614.
Boyd *v.* Harris, 1 Md. Ch. Dec. 466.
Bouvier's Law Dict. Art. "Attachment," and cases there cited.

Had the goods been sold by the sheriff, and the proceeds paid into court to await the determination of the issue, no execution could touch them. The goods are no less in the custody of the law under the forthcoming bond, than when the proceeds are in court.

Broadhurst, contra.

The goods are not in the custody of the law, the plaintiff in the execution, defendant in the interpleader, being turned over for his remedy to the bond if he succeed in the feigned issue. The title to the goods has been settled by a trial in another Court.

[PEIRCE, J. The claimant may succeed on a trial here.]

Goodwin, in reply.

The trial in these feigned issues is in no sense a proceeding *in rem*.

King *v.* Faber, 1 Sm. 387.

C. A. V.

March 29, 1879. Rule absolute.

[See Fletcher *v.* Freeman, next case; Hastings *v.* Quigley, 2 Clark, 431.]

C. P. No. 1. March 29, 1879.

Fletcher v. Freeman.

Execution—Warrant of arrest—Goods which have been levied on, and an interpleader granted, are in possession of the law—A warrant of arrest will not be granted when the goods alleged to be fraudulently concealed are under the control of the Court on an execution.

Motion to quash warrant of arrest.

On the 27th of March plaintiff applied for a bench warrant to arrest the defendant under the Act of 12th July, 1842 (P. L. 339; Purdon's Digest, 50, pl. 52, 53), his affidavit setting forth that he had obtained a judgment, that the debt had been fraudulently contracted, and that the defendant had property which he fraudulently concealed.

The application was granted, and a hearing fixed for March 29th, 1879.

The docket entries showed an outstanding *alias fi. fa.*, and further, that the goods levied on had been claimed by others, and feigned issues were pending.

Goldbeck (with him *J. S. Gerhard*), for the motion.

A warrant of arrest, under the Act of 1842, is irregular, pending a levy under a *fi. fa.*

Commonwealth *v.* O'Hara, 3 Pittsb. 70; S. C., 6 Phila. 402.

The presumption that an execution is a *prima facie* satisfaction of the debt, is not affected by the interpleader suits.

Graham, contra.

Commonwealth *v.* O'Hara is not in point. Here there is a levy upon property in which the defendant's ownership is denied; our execution is, therefore, unproductive.

THE COURT. Although the property in goods levied upon may be a subject of contest, yet the levy remains, and they are for the time being in the custody of the law. If the plaintiff in the judgment should succeed in the interpleader cases, the sheriff will proceed to sell, and thus

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satisfy the demand upon which the present proceeding is founded.

The motion is granted.

Oral opinion by PEIRCE, J.

[*Cf.* Ward *v.* Whitney, last case; Myers *v.* Riot, 1 T. & H. Pr., 784, n. 12.]

Orphans' Court.

April 5, 1879.

Lewis's Estate.

Principal and agent—Power of married woman to charge her separate estate for repairs, etc., results from construction and implication, and not from the express words of the statute—Evidence necessary to charge such separate estate—Quære, whether "necessity" is not implied in the word "repair"—Act of April 11, 1848.

Sur exceptions to re-adjudication.

The adjudication on the account of the executors of Mary F. Lewis, the decedent, having been opened, by agreement of counsel, to allow a re-argument, a revised statement of a claim (rejected on the first audit) was presented by William M. Wright & Bro., plumbers, for work done and materials furnished by them for the separate estate of decedent, to the amount of $85.13.

It there appeared that the said expenses were incurred by Dr. Lewis, the husband of decedent, in his own name, but for the benefit of his wife's separate estate, and while acting with her consent and as her agent. Demand had been made upon the legal representatives of Dr. Lewis, now deceased, and payment of the claim to the extent of available assets had been made.

To the allowance of this claim by the auditing Judge (ASHMAN, J.), exceptions were filed by the accountants because the work was done on the credit of the husband, and not on the credit of the wife or of her separate estate, and because there was no evidence that the work was necessary.

Peter McCall, for exceptants.

The work was done on the credit of the husband of the decedent, and not on her credit nor the credit of her separate estate; therefore, her separate estate is not liable.

Berger and wife *v.* Clark, 29 Sm. 340.
Sawtelle's App., 3 Nor. 306.
Leow's Est., 6 WEEKLY NOTES, 333.

There was no evidence to show that the work done was necessary for the improvement or repair of the decedent's separate estate, and unless necessary there could be no recovery, even if done on her credit or that of her separate estate.

Kuhns and Wife *v.* Turney, 36 Leg. Int. 37.

J. de F. Junkin, contra.

There is no express statutory provision which renders the separate estate of a married woman liable for repairs. The liability is created by the line of decisions under the provision of sec. 6 of Act of April 11, 1848.

Husbands on Married Women, sec. 50, and notes.

The first exception is based upon decisions under sec. 8 of the same Act, which is in reference to family necessaries, and not repairs to wife's separate estate; such a case is Berger *v.* Clark (*supra*).

To bind the wife's separate estate for repairs thereto, it is not necessary that the credit should be given to her directly.

Lippincott *v.* Hopkins, 7 Sm. 328.
Lippincott *v.* Leeds, 27 Sm. 422.

There can be no doubt of a married woman's power to charge her estate for necessary repairs, and that she can also do it by an agent, such agent being her husband, is decided in—

Murphy *v.* Bright, 3 Gr. 296.
Forrester *v.* Preston, 2 Pitts. 298.

Dr. Lewis was the agent of an undisclosed principal, but the disclosure of the principal is not necessary in order to bind the principal by the agent's acts within the scope of his authority.

That the work was necessary, is impliedly, if not explicitly, found by the auditing Judge.

The claim was for plumbing such as is necessary in ordinary buildings, and was recognized as such by the decedent.

From the nature of the work it was presumptively necessary, and the wife's estate is liable therefor.

Barto's App., 5 Sm. 389.

April 5, 1879. THE COURT. The power of a married woman to charge her separate estate with debts for necessary repairs or improvements, results not from the words of the statute, as in the case of necessaries furnished to her family, but rather from construction and implication (Kuhns and Wife *v.* Turney, 36 Legal Intell. 37; Shannon *v.* Shultz, Id. 125). "If," says GORDON, J., in the case first cited, "she is to *enjoy* her property, it *must* be that she shall have the power to keep it in a proper condition for use or profit."

The reason thus given applies, to the extent of her interest, whether her ownership is in severalty or in common with others; nor is there anything, either in the letter or spirit of the Act, which requires that the contract for such repairs, etc., shall be made by herself individually and

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not through the agency of a third person; or which exempts her from liability where credit is given to the agent acting for an undisclosed principal.

When it is sought to charge her or her estate for repairs or improvements, it is necessary to show that she was an owner of the property in respect of which the work was done or the materials were furnished; that she, by herself or her agent, made the contract; and that the work done or materials furnished were necessary for the use and enjoyment of the property.

In the present case the claim, as amended, is for the decedent's proportion of the repairs upon property of which she was a co-owner. The fact of such ownership is found by the adjudication, as is also the fact that the work was done at the instance of decedent through the agency of her husband.

It is objected, however, that it was not shown affirmatively, nor is it so stated by the adjudication, that the repairs were necessary. This, perhaps, is explained by the fact that the amount in controversy is very small ($85), and that a letter from the accountant to claimant's counsel was exhibited, in which it was stated that the claim as amended "was just and equitable, and that no objection to its allowance would be made." Naturally after this a full statement of facts would hardly be deemed important.

But the necessity for the work is perhaps implied *ex vi termini* by the word "repair," the definition of which, as given by Webster, is a "restoration to a sound or good state after decay, waste, injury, or partial destruction."

If, however, there is any doubt on this point, as the letter alluded to may have misled, it is proper that an opportunity of proving that the repairs were necessary should be afforded, if the fact be denied. The account will, therefore, if the accountant asks for it, be referred back to the auditing Judge for this purpose. Should no such request be made within two weeks from the date of filing this opinion, we shall assume the fact to have been shown and the adjudication amended accordingly, and dismiss the exceptions.

Opinion by PENROSE, J.

U. S. District Court—Admiralty.

Nov. 5, 1878.

Schmidt v. The Steamship Pennsylvania.

Vendor and vendee—Through bills of lading—Stoppage in transitu—Liability of master to sub-vendee.

A shipper of goods has no right to stop them, after a sale by his vendee to a third party; and the master's refusal to deliver to such subsequent vendee, though under the vendor's orders, is at the master's peril, and if loss occur (*e. g.* by reason of a falling market) he is responsible to such vendee.

This was a libel filed by Schmidt, the holder of a bill of lading for goat skins, which on arrival of the vessel, the steamship *Pennsylvania*, at Philadelphia, he presented to the ship's agent, and delivery of which was refused pursuant to a cable telegram from the shippers.

The goods originally were shipped by one Bresch at Trieste, on a through bill of lading, *via* Liverpool, signed by the respondent's agent at Trieste; the goods came into the respondent's possession, and were forwarded by them from Liverpool. The bill of lading was made out in the name of Bresch as shipper, deliverable to his order. Bresch endorsed the through bill of lading to Havemann & Poleman at Paris, from whom Schmidt obtained the same, by endorsement, for value. Before the arrival of the vessel at Philadelphia Bresch's agent at Liverpool telegraphed the agents of the *Pennsylvania* to stop delivery of the goods as against the holder of the bill of lading. The vessel arrived at Philadelphia February 3, 1878, and commenced discharging cargo on the 7th. The libel was filed on the 12th of February, 1878, claiming the value of the goods. On February 19, 1878 (before the time for filing an answer had expired), the order to stop was withdrawn, and on the same day the vessel's agent notified Schmidt of the fact that they were prepared to deliver the skins. Schmidt refused to accept the same unless paid the sum of $1090.51 for the damages which he had sustained by loss of a sale to one Keene. Subsequently under an order of Court, the skins were delivered to Schmidt, he reserving his right to claim damages, for any loss which he had sustained by the refusal to deliver on arrival.

The evidence as to the sale of the goods to Keene consisted of an order for the importation

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of these skins, accepted by Keene from Schmidt, dated at Philadelphia. This order stipulated that Keene should advance part of the price in two notes for $800 each, Keene to pay insurance and banker's commission, the goods to be shipped in December. Havemann & Poleman at Paris had secured the goods in Trieste of Bresch for December shipment, and notified Schmidt of the price at which they had secured them, offering them at a smaller advance to Schmidt who accepted, and placed them with Keene; Havemann & Poleman allowing Schmidt a commission in the transaction. The goods were shipped from Trieste in December.

The answer of the steamship company set forth the facts in relation to the shipment, the notice by the shipper to stop in transit, and the subsequent withdrawal of the order, and the offer to deliver to Schmidt; and further averred as follows: "and that in acting in accordance with the same the respondents fulfilled their duties as carriers under the engagement with the shipper contained in the bill of lading, and that no liability exists on the part of the respondents for any loss which the libellant may have sustained by reason of the exercise by the vendor of the right of stoppage while in their hands as carriers."

E. G. Platt and *S. Dickson*, for Schmidt, libellant.

The whole transaction, as disclosed by the correspondence and testimony, shows that Schmidt became the purchaser of these skins from Havemann and Poleman, and subsequently sold them to Keene. He had paid for the goods, and was therefore a *bona fide* holder for value of this bill of lading. That being so, the right of stoppage in transitu did not exist. This has been settled ever since the leading case of Lickbarrow *v.* Mason. If the owner of a vessel under such circumstances takes upon himself the responsibility of refusing delivery of the goods, he does it at his peril. He runs the risk of the title of the holder being good as against the shipper, and in that case he is liable to him.

Abbott on Shipping, 337, 338.

The only safe course when the bill of lading is outstanding in the hands of a third party is to demand indemnity from the shipper when he gives notice and attempts to exercise the right of stoppage in transitu.

[CADWALADER, J. Is an instrument like the one in question a regular bill of lading, and will a transferree for value be invested with the rights of a *bona fide* holder for value of a regular bill of lading? This paper was issued in Trieste, and is signed by the agent of the steamship company. Bills of lading are signed by the master of the vessel.]

This is what is known as a *through* bill of lading. It may be true that a sailing vessel's bills of lading should be signed by the master. This is a steamship company, and the validity of these through bills of lading has become a well recognized fact in the commercial world. By them goods are shipped from California to Russia, from China *via* United States to Europe, in fact from almost any one part of the globe to another. The distinction between the two classes is well settled.

Schmidt, then, being the holder of the bill of lading, was entitled to the possession of the goods on arrival. On account of his inability to obtain possession, he lost the opportunity of carrying out the sale to Keene, and they were thrown back on his hands. The measure of damages, therefore, is the difference between what Keene would have paid him and what the goods were worth when actually delivered to him. This was not until March 4, 1878. The loss is, therefore, as appears by the testimony, about $2000.

[CADWALADER, J. I think that the market value at the time the respondents offered to return them should be taken as of February 19, 1878.]

No, because they refused at that time to give them up unless we should waive all claim to damages. There was really no absolute offer to give them up until the time when the order of the Court was made, viz., March 4. We insist that that time, therefore, is to be taken for fixing the value of the skins.

M. P. Henry, for the steamship, contended that Schmidt acted only as agent for Keene, and that there was no loss of any sale by Schmidt as the goods were Keene's. The libel should have been brought by Keene.

As to the liability of the ship for obeying the orders of the shipper. The master is not bound to decide whether the right to stop has been lost by endorsement of the bill of lading for value or otherwise.

The Tigress (Brown & Lushington, 44) denied the right of the master to demand evidence that the vendee had not parted with the bill of lading. The master had a right to compel Bresch and Schmidt to interplead, and they would have applied to the Court to take the goods in their custody, and determine the right of the respective parties to them.

Abbott on Shipping, 540.
2 Story's Equity Jurisprudence, § 518.
3 Maddox's Chancery, title "Interpleader."

This course was prevented by Bresch, the shipper, withdrawing the stoppage. It is the case of the holder of a fund claimed by two persons. The bailment of a transporter does not impose on the master the duty of determining whether the right of stoppage has been lost by the shipper. The master is the shipper's agent, and must obey his orders. Right of stoppage is not necessarily lost by endorsement to order.

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Feise *v.* Wray, 3 East, 93.
Thompson *v.* Trail, 6 Barn. & Cress. 36.
Litt *v.* Cowley, 7 Taunton, 169.

If the master had undertaken to return the goods to the shipper, he would have incurred responsibility to the holder of the bill of lading, and *vice versa*, but, while he held subject to the conflicting claims, he is not responsible.

November 23, 1878. THE COURT (CADWALADER, J.). The detention of the skins by the defendants was wrongful. There could be no rightful stoppage in transitu by reason of the former owner's insolvency. Through this wrongful detention and the consequent inability to deliver the goods to the purchaser in Philadelphia, the benefit of the sale to him was lost. He rejected the goods as he had a right to do, and the market had fallen so that a loss which is the measure of damages had been suffered.

Decree accordingly.

April 29, 1879.

The Bark Commissionsrath Dientsbach.

Advances in foreign port—Lien on freight—Construction of special agreement as to repayment.

This was a libel for advances made to the master at a foreign port (Hamburg), the amount having been expended for necessaries. The master gave to the libellant the following receipt:—

[Translation.]

"I acknowledge having received from Mr. Eugene Cellier, present, for the equipment of the *Commissionsrath Dientsbach* vessel, of which I am the captain, and to enable me to continue my intended voyage from Hamburg to Valparaiso, the sum of twenty-three thousand three hundred and twenty marks.

"I bind myself thereagainst, on arrival and discharge in Valparaiso, of the cargo which I now have, to remit the surplus of my freight to Mr. Eugene Cellier, and to make him further remittances as soon as the vessel makes further voyages, until I can pay back in full the above amount of twenty three thousand three hundred and twenty marks, adding five per cent. interest.

"I effect no insurance on the above advance, in case of any accident, which God forbid. I hereby instruct Mr. Eugene Cellier to pay himself in full out of the policy of insurance, in the amount of sixty-nine thousand marks, on the hull of the vessel, which he has on hand.

"As for the rest, the vessel is responsible at all times until the liquidation of the above advance.

"My share in the vessel amounts to $\frac{55}{64}$ parts.

"J. SCHONROGG.

"Hamburg, Sept. 16, 1876."

The libel alleged that payments on account of the debt had been made, but none since Feb. 14, 1878, although the vessel had made voyages since that time, and that there was a balance due. The libellant prayed for process of attachment, both against the vessel and the freight, at this port, which was granted and issued.

The master excepted to the libel: (1) Because there was no lien on the freight. (2) Because the lender was, by the terms of the contract, to be repaid out of the freight earned; that the transaction amounted to an equitable mortgage on the master's interest in the vessel ($\frac{55}{64}$), and that it did not appear that any surplus freight had been earned since February 14, the date of the last payment. (3) Because, by reason of the premises, the Court of Admiralty had no jurisdiction.

Henry Flanders, for the exceptions.

There is no lien created against the freight, and the libel is therefore insufficient and defective. Moreover, the fair interpretation of the agreement between the parties, negatives the idea of a maritime lien on the vessel, except to decree the remittances of freight as earned. It was in the contemplation of the parties that the vessel might meet with disasters on her voyages, and that there might not, at all times, be freight to remit. Hence, a credit was implied and time given to earn freight. What time? Not an arbitrary or fixed period, but a reasonable period, which, in this case, under the circumstances, has not arrived.

Henry Galbraith Ward, contra.

The libel is founded not upon the receipt, but upon the libellant's right to a lien under the general maritime law, for an advance, the nature and terms of which are evidenced by it. But if the libellant were confined to the receipt, its terms emphasized the facts which entitle him to a lien on the vessel. There is no provision that the master's contemplated payments should come out of surplus freight. On the contrary, he undertook to remit each voyage. The libel alleges that he has made voyages without so doing, which is not inconsistent with the right of lien.

The brig Nestor, 1 Sumner, 73.
The Jno. Walls, Jr., 1 Sprague, 178.
The Mary Ann, 4 Notes of Cases, 381.

It is a rule of construction that an intention to part with a lien will not be inferred except it be perfectly clear.

The Kimball, 3 Wall. 37.
Peyroux *v.* Howard, 7 Peters, 324.

Material men have a lien on ship and freight, and those who advance money for materials have the same privileges.

12th Admiralty Rule, S. C.
Thomas *v.* Osborn, 19 How. 28.

April 4, 1879. THE COURT (BUTLER, J.), sustained the first exception, holding that there was no lien on the freight at this port; but, holding the vessel liable for the debt, overruled the second and third exceptions.

Afterwards an answer was filed by the present master, denying all personal knowledge of the matter, and submitting the cause to the decision of the Court; and thereupon, on April 9, decree for libellant against the bark, with orders for appraisement and sale.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, JUNE 12, 1879.* [No. 7.

Supreme Court.

July, '76, 133. Feb. 24, 1879.

Workman v. Curran.

Easement—Right of way—Prescription—Adverse possession—When possession not adverse—Acquiescence—Lapse of time—Pendency of action, effect of.

The pendency of an action of trespass to determine the validity of a claim to a right of way prevents the party claiming such right from enjoying such peaceable, quiet, and adverse possession of the same as can be made the basis of title to the easement by prescription.

In 1833, W. brought an action of trespass against C. to determine the validity of C.'s claim to a right of way over the land of W. In 1850 a verdict and judgment in this action were entered for W., which judgment was affirmed by the Supreme Court on February 9, 1852, from which time, without interruption, C. exercised the right of way until January 30, 1873, when W. erected a fence:

Held, that the time from which C.'s claim of adverse possession ran, was the date of the judgment of the Supreme Court, and twenty-one years not having elapsed between that time and the erection of the fence, a title by prescription had not been shown.

Error to the Common Pleas No. 2, of Philadelphia County.

Trespass on the case, by Adele Curran against H. W. Workman, to recover damages for the wrongful obstruction of an alley over which the plaintiff claimed a right of way.

Upon the trial, before PRATT, J., it appeared that the plaintiff was the owner of premises on South Front Street in the city of Philadelphia, that immediately adjoining this property on the north is a certain court known as "Workman's Court," which, with the land adjoining the court on the north, is the property of the defendant; over this court the plaintiff claimed a right of way. On October 9, 1833, the same right of way being then in dispute, Workman had instituted in the old District Court, against Lewis Roberts, under whom Adele Curran claimed by descent, an action of trespass *quare clausum fregit*, for unlawfully entering upon this court, *locus in quo*. This action was tried in May, 1850, and resulted in a verdict for Workman, upon which judgment was entered September, 14, 1850. A writ of error to this judgment having been taken, it was affirmed by the Supreme Court on February 9, 1852. On January 30, 1873, Workman closed up the court with a fence, and on April 2, 1873, Curran brought this action.

The defendant presented the following points, all of which were refused: (1) That such adverse possession [*i. e.*, peaceable, quiet, adverse possession for a period of twenty-one years], could not exist while the case of Workman *v.* Roberts was pending, or until the judgment therein was finally affirmed by the Supreme Court. (2) That the record of said case shows that final judgment therein was rendered by the Supreme Court, February 9, 1852, and the evidence shows that the fence, the erection of which led to the institution of this action, was erected January 30, 1873, being within twenty-one years from the entry of such judgment, and therefore plaintiff cannot recover in this action. (3) That this final judgment of record, unsatisfied and capable of execution at any time, was a continuous and perpetual assertion of right exclusive in defendant, and denial of any right on the part of plaintiff by defendant to use and occupy the alley in question, and therefore plaintiff cannot recover in this action.

The Court charged, *inter alia:* "I give it to you as the law, which you are bound to take from the Court, that if you find from the commencement of this suit, the suit which was begun in 1833, the plaintiff in this case had adverse, uninterrupted, peaceable, and quiet possession of the use of this alley, as described in the declaration, and that no notice was given to him of any denial, on the part of the defendant, of the right, your verdict should be for the plaintiff."

Verdict for the plaintiff, and judgment thereon. The defendant took this writ, assigning for error, *inter alia*, the refusal of his points.

C. Stuart Patterson and *George W. Biddle*, for the plaintiff in error.

The statute of Jac. I. c. 21, limited possessory actions to twenty years, and Courts adopted that period as sufficient to raise the presumption of the existence of a right; but the Courts never gave greater effect to length of enjoyment than that of affording a presumption of prescriptive right, capable of being rebutted by proof of an origin at a time later than that of legal memory.

Mayor of Kingston *v.* Homer, 1 Cowp. 102.

Any circumstances inconsistent with the presumption of a grant, must be considered by the jury.

Livett *v.* Wilson, 3 Bing. 115.
Angus *v.* Dalton, L. R. 3 Q. B. D. 113.
Goddard's Law of Easements, p. 90.
Cooper *v.* Smith, 9 S. & R. 33.

In order to gain title by prescription, there must be an actual, adverse, continuous, uninterrupted use, under a claim of right, with the acquiescence of the owner, for twenty-one years.

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Hoy *v.* Sterrett, 2 Watts, 330.
Esling *v.* Williams, 10 Barr, 126.
Jones *v.* Crow, 8 Casey, 406.
Jessup *v.* Loucks, 5 Sm. 361.

Moreover, the right claimed by prescription must be such as may reasonably be presumed to have been granted.

Fishing Co. *v.* Carter, 11 Sm. 41.

In the maxim "*Ita quod, nec vi, nec clam, nec precario,*" the word *vi* means contention of any kind—as that the enjoyment has been during a period of litigation about the right claimed.

Goddard on the Law of Easements, p. 124.
Eaton *v.* The Swansea Co., 17 A. & E., N. S., 267.
Livett *v.* Wilson, 3 L. J., C. P. 186.
Stillman & Co. *v.* White Rock Co., 3 W. & Min. 549.
Powell *v.* Bagg, 8 Gray, 441.

Presumption of payment of debt is rebuttable by similar evidence.

McCullough *v.* Montgomery, 7 S. & R. 28.
Sommerville *v.* Holiday, 1 Watts, 518.

The sufficiency of facts to rebut a presumption of law is for the Court, not for the jury.

Delany *v.* Robinson, 2 Wh. 503.
Reed *v.* Reed, 10 Wr. 243.

The *locus in quo* being necessarily open for the use of the plaintiff in error's tenants, no user by the defendant in error could be so injurious as to attract the attention of the plaintiff in error, and no presumption of acquiescence could exist; hence no prescriptive right could arise.

Donnell *v.* Clark, 19 Maine, 174.
Thomas *v.* Marshfield, 13 Pick. 240.
Fishing Co. *v.* Carter, *supra.*
Wheatly *v.* Baugh, 1 Casey, 534.

This principle is recognized in the passage of the Act of April 25, 1850 (Purd. Dig. 1486), protecting owners of unenclosed woodland from the acquisition of rights of way.

(The defendant in error made no argument, and presented no paper-book.)

March 17, 1879. THE COURT. It is admitted that the right of way which is the subject of the present contention, is the same that was in controversy in the first action of trespass, and the cardinal question in this case is whether the pendency of that suit was sufficient to repel the presumption of a grant which otherwise would arise from the long continued use and enjoyment of the way by the defendant in error. By the verdict and judgment in that case, it was conclusively settled that those under whom she claims had no right of way in 1833, when the first suit was brought, and it is not claimed that any has been acquired since, unless it be by an uninterrupted use and enjoyment for over twenty-one years. There is no pretence of right acquired in any other manner, nor can any claim of right be substantiated on that ground even, unless at least a portion of the period during which the first action was pending be included in the computation. The present suit was brought in less than twenty-one years after the first was determined, and hence no presumption of a grant could arise from the use and enjoyment of the way during that intervening period. It therefore becomes material to determine whether the use by the defendant in error and those under whom she claims could be ripening into a right during the pendency of the first suit, from 1833 until February 9, 1852, when it was finally determined by the judgment of this Court. What, then, was the effect of the pending action on the respective rights of the parties?

In this State we have no statute on the subject of private ways, except the Act of April 25, 1850, which prohibits their acquisition through unimproved woodland; and hence it is necessary to resort to the common law, the principles of which have been recognized as cases from time to time called for their application, but the precise point now under consideration does not appear to have arisen in any of our reported cases.

In Garrett *v.* Jackson (8 Har. 331), it is said by Chief-Justice BLACK, that "where one uses an easement whenever he sees fit, without asking leave and without objection, it is adverse, and an uninterrupted adverse enjoyment for twenty-one years is a title which cannot be disputed. Such enjoyment, without evidence to explain when it began, is presumed to have been in pursuance of a grant." It will be observed that the enjoyment must be adverse as well as uninterrupted, and one of the conditions of adverse enjoyment is that it be without objection. If, therefore, it is shown that during the period of alleged acquisition of an easement by use and enjoyment, the owner of the servient tenement resisted such claim or opposed such use, it will negative the claim. (Washburne on Easements, 112). "It was accordingly held," says the same learned author, "that a prescriptive right to divert water from a stream could not be acquired by an enjoyment for the requisite period, where it appeared that the party against whom it was claimed during that time remonstrated against diversion, and consulted counsel for a prosecution therefor."

In Nicholas *v.* Aylor (7 Leigh, 546), where one flowed the lands of another for more than the requisite period, it appeared that the latter had complained and denied his right to do so. It was held that these facts rebutted the presumption of its having been enjoyed under a grant. In his opinion, TUCKER, President of the Court of Appeals, says: "The presumption of right or of a grant arises from the long *acquiescence* of the party, and does not arise where the enjoyment is contested. (Bealey *v.* Shaw, 6 East, 216.) It would be strange, indeed, if a grant was to be presumed to have been made by him though he

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was continually contesting the right; and accordingly, in Livett *v.* Wilson (3 Bing. 115; 11 Eng. C. L. Rep. 115), it is distinctly made an answer to the presumption, that the user 'had been almost always the subject of contest.' It is also observable in that case, that no action had ever been brought asserting the rights of the party, and that his repeated complaints and denial of the title of his adversary were considered as sufficiently rebutting the presumption of a grant."

Again, where an easement in an aqueduct on the land of an adjoining owner was claimed by adverse user, and it appeared that the owner of the servient tenement had forbidden his neighbor to enter, and had ordered him off the land while there for the purpose of repairing the aqueduct, it was held that such verbal orders, though unaccompanied by further acts, were admissible to show an interruption of the easement, and that it was not necessary to use actual force to eject in order to disturb and break the continuity of possession or use, and thus prevent it from ripening into title. (Powell *v.* Bagg, 8 Gray, 441.) Those, and other authorities that might be cited, recognize the principle that the presumption of a grant may be rebutted by proof of declarations, without evidence of forcible resistance.

While the presumption of a grant arising from a long continued adverse and uninterrupted use and enjoyment, operates in analogy to the statute of limitations, it differs from the case of title to land claimed by adverse possession. There the owner is disseised, and if such disseisin continues long enough, the title becomes complete. A mere verbal protest or prohibition to occupy the premises, will not be sufficient without entry. The owner in such case would still be disseised. But title to an easement by adverse user stands on a somewhat different ground. There the owner remains in possession of the premises. The title rests chiefly on his acquiescence in the adverse use; and the evidence which disproves such acquiescence, rebuts the title to the easement. (Smith *v.* Miller, 11 Gray, 145.)

In this case the evidence of non-acquiescence during the pendency of the suit, was of the most conclusive character. The record of the pending action furnishes an emphatic denial of right in those under whom the defendant in error claims, and a positive assertion, by the plaintiff in error, of exclusive right in himself, and this, too, in the appropriate forum for the determination of such questions. It would be most unreasonable, therefore, to presume a grant, in the face of such conclusive evidence of an open public denial of the right claimed, and a standing protest of record against its exercise.

The first four assignments of error are sustained. There was also error in that portion of the charge covered by the eighth assignment of error.

Judgment reversed.

Opinion by STERRETT, J.

July, '78, 2. Jan. 16, 1879.

Daly v. Maitland.

Mortgages — Attorney's commission clause — Amount fixed is in the nature of a penalty rather than of liquidated damages—Reducible by the Court if in its judgment excessive.

Although a reasonable attorney's fee for collection can be provided for in a mortgage, and recovered in a judgment on a scire facias, yet the amount fixed (usually five per cent.) is rather in the nature of a penalty than of liquidated damages, and is reducible at the discretion of the Court.

Opinion by SHARSWOOD, C. J. MERCUR, J., dissents.

Robinson *v.* Loomis (1 Sm. 78), overruled.

WOODWARD, J., filed a concurring opinion, agreeing with the majority of the Court that the amount fixed could be reduced; but holding that such reduction could be made only when circumstances of manifest oppression or injustice, or an attempt to evade the usury laws, should be disclosed, and that it was the province of a jury to determine whether such circumstances existed, and to fix the fair amount of the fee.

Error to the Common Pleas No. 2, of Philadelphia County.

Scire facias sur mortgage, by H. Maitland against H. Daly, M. Daly, and S. B. Winslow, executors of J. Daly, deceased. Pleas, *nil debent* and payment.

At the trial, before MITCHELL, J., the plaintiff put in evidence a mortgage for $14,000, dated May 6, 1871, for five years, given by J. Daly to him, Maitland. The mortgage contained the following clause:—

"And provided also that it shall and may be lawful to and for the said Henry Maitland, his heirs, executors, administrators and assigns, when and as soon as the principal sum hereby secured shall become due . . . to sue out forthwith a scire facias upon this indenture of mortgage, and to proceed therein to judgment and execution for the recovery of the whole of the said principal debt, and all interest and taxes due thereon, *together with an attorney's commission for collection, viz.: five per cent.* besides costs of suit without any stay, any law or usage to the contrary notwithstanding."

After this offer of evidence, the defendants admitted the plaintiff's claim for the principal of the mortgage and interest, but denied his right to the five per cent. commission for collection.

The defendants submitted the following points: (1) The plaintiff is entitled to recover upon the mortgage, above the amount of the mortgage and interest, a reasonable attorney's fee for the collec-

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tion of the mortgage, and what is a reasonable fee must be proved by plaintiff to recover it. *Refused.* (2) The plaintiff is entitled to recover under the mortgage sued on only a reasonable attorney's fee, in addition to the amount of the mortgage and interest. *Refused.*

MITCHELL, J., charged the jury as follows: "The plaintiff is entitled to recover the full amount of his debt covenanted in the mortgage to be paid, including the five per cent. upon the amount of the mortgage debt for collection; that being expressly stipulated for in the mortgage to be paid on a contingency which is admitted to have happened."

The jury accordingly found a verdict for the plaintiff for $14,862.40, the full amount of the mortgage debt with interest and five per cent. commission for collection. A rule for a new trial having been discharged (reported 6 WEEKLY NOTES, 31) judgment was entered on the verdict, and the defendants took this writ, assigning for error the refusal of the points offered and the charge of the Court.

C. H. Gross and *T. J. Barger*, for the plaintiffs in error.

The agreement of the mortgagor is to pay the five per cent. for a specific purpose, the compensation of counsel in the event of a suit, and no larger portion thereof should be recovered than is necessary for that purpose. In a case like this, where the principal sum is large, five per cent. would ordinarily be an unreasonable fee; therefore the amount fixed should be viewed as a penalty to secure the payment of a fair sum to be fixed by a jury. The Judge evidently regarded it as liquidated damages and charged accordingly.

Faulkner *v.* Wilson, 3 WEEKLY NOTES, 339.
Streeper *v.* Williams, 12 Wr. 450.
Woods *v.* North, 3 Nor. 407.

J. Rodman Paul (with whom was *A. Sydney Biddle*), contra.

It is already *res adjudicata* in this State that the five per cent. commission is not a penalty but in the nature of liquidated damages.

Robinson *v.* Loomis, 1 Sm. 78.

A contrary doctrine would have the result of destroying the affidavit of defence law as applied to mortgages, for it would always be in the defendant's power to insist that the jury should determine the amount of the attorney's fee for collection.

Moller *v.* Ohse, 5 WEEKLY NOTES, 510.
Schmidt's Appeal, 1 Nor. 524.
Faulkner *v.* Wilson, *supra.*

March 17, 1879. THE COURT. In Huling *v.* Drexel (7 Watts, 126), it was decided by this Court that a stipulation in a mortgage that in the event of the necessity of proceeding to recover the mortgage by suit, the mortgagee shall be entitled, in addition to the debt and interest, to damages, for costs and expenses incident thereto, was not usurious, and might be enforced in the scire facias. In consequence of this decision it has become common to insert a provision not only in mortgages, but notes and other instruments for the payment of money, that the creditor in the event of being obliged to resort to a suit shall recover a certain percentage as commissions to the attorney who is retained by him to collect the debt. This commission, it has been held, does not belong to the attorney, but to the creditor. It cannot be collected as costs, but must be included in the judgment. (Mahoning County Bank's Appeal, 8 Casey, 158; McAllister's Appeal, 9 P. F. Smith, 204; Faulkner *v.* Wilson, 3 WEEKLY NOTES, 339; Schmidt & Friday's Appeal, 1 Norris, 524.) In Robinson *v.* Loomis (1 P. F. Smith, 78), it was ruled that such commission was not a penalty, but an agreed compensation to the mortgagee for expenses incurred by the default of the mortgagor.

It is undoubtedly true that the parties to a contract may lawfully agree that the damages in case of a breach shall be liquidated at a certain amount. Equity will not relieve against such a contract fairly entered into, unless it is evidently a penalty. This principle of liquidated damages is not applicable, however, to a contract for the loan of money; at least such stipulation is subject to the control of Courts of Equity. As in the day of Solomon, "the borrower is servant to the lender;" and Courts of Equity from the earliest period have assumed the jurisdiction of relieving the borrower from unreasonable and oppressive stipulations exacted from his necessities, altogether apart from the statutes against usury. Especially has this always been the case as to mortgages. Agreements embarrassing or restraining the equity of redemption have invariably been set aside. The stipulated commission for the attorney may be so far beyond the ordinary rate charged for such services as to require imperatively the interposition of the equitable powers of the Court. Equity has always been a part of the law of Pennsylvania. In the administration of equitable principles, it is the Court, and not the jury, who exercise the functions of the Chancellor, even where the action is in the common law form. The jury, like the same tribunal in an issue directed by the Chancellor, decide disputed facts; but it is the Court that must be satisfied and apply the equity on the facts found or undisputed. If they think an equitable title to relief not made out by the proofs, it is their duty so to direct the jury, and contra, if they think the equity has been established. These rules are so familiar and well settled that it would be a work of supererogation to cite the numerous cases which support them.

We think these principles apply to the question

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raised upon this record. The lender of money on any species of security cannot exact an unreasonable stipulation in the shape of an agreed liquidation of damages. Equity interposes her shield to protect the borrower. The debtor in cases of this kind will readily yield to the demand of the creditor as he would be apt to regard collection by suit as a remote and improbable contingency. Even at law, what is reasonable is often indeed a question of fact, but in many cases it is a pure question of law. Thus, notice of the non-payment of a promissory note, though it was first submitted to the jury to decide whether it was within reasonable time, is now unquestionably the exclusive province of the Court. So it is now held that after a lapse of seven years an abandonment of a title by settlement is a conclusive presumption of law. No Court has thought of sending an issue to a jury to determine what is reasonable compensation to trustees. They would be a tribunal entirely unsafe to entrust with such a question. These decisions have been reached by the necessity of certainty in the rules in such cases. Many other illustrations could be given. It is important, unless we are prepared to say that the lender may stipulate for any amount as commissions for the collection of his debt, that there should be some more certain rule than could be reached by submitting every case to a jury.

It would practically in a great number of cases have the effect of destroying the stipulation altogether. If the question must in every case be referred to a jury, the creditor will abandon the claim sooner than encounter the delay, and the risk of a very small sum being allowed. The Court, from practical knowledge of professional work, are able to say in every particular case, what ought to be the compensation or rate of commission for collecting a debt by suit. Whatever is stipulated beyond a reasonable rate should be relieved against upon equitable principles; certainly no certain commission can be determined upon to be applied to all cases. As responsibility, as well as labor and skill, is involved, in reason and the usage of the profession it depends upon the amount collected, but not absolutely so. If there should be no defence to the mortgage or other instrument of writing for the payment of money, the Court in giving judgment can decide whether the stipulated rate is too large, and enter judgment for what is right. Should, however, a defence be set up in whole or in part, and the case necessarily go to a jury, it would be the province of the Court to instruct the jury what, under all the circumstances, should be allowed, of course not exceeding the agreed rate.

It does not appear by the paper-books that there was in this case any rule for judgment for want of an affidavit of defence, though it does appear that there was no other defence than the amount of the collection fee. Had there been such a rule the Court should have decided the question, and not have sent the case to a jury. We think the learned Judge below was right in refusing to leave it to the jury to determine the rate of commission; but he was wrong in instructing them to find the full amount agreed upon. Five per cent. upon $14,000—in other words, $700—was far beyond what was reasonable, even in view of the fact that the defendant below had interposed a defence against the commission, and that the case might be carried by writ of error to this Court.

We think, even under these circumstances, two per cent. would have been an ample and liberal allowance, and the jury should have been so instructed. In general this Court will not review the exercise of a sound discretion by an inferior Court upon such a question, and the presumption will always be in favor of their decision, unless it is plainly excessive, or, as appears to have been the case here, founded on the mistaken idea that they had no equitable power to interpose and moderate the agreed amount.

Judgment reversed, and venire facias de novo awarded.

Opinion by SHARSWOOD, C. J.

MERCUR, J., dissents.

March 17, 1879. Concurring opinion by WOODWARD, J. So long as contracts stipulating for the payment by debtors of the expenses of litigation incurred by their creditors shall be held to be within the policy of the law, the rule that has prevailed hitherto ought to be maintained. The rule has been to treat the amount of collecting fees agreed upon as stipulated damages, and not as a penalty. The agreement of parties should be carried out, except where, in affidavits of defence, or in trials of causes, circumstances of oppression or injustice should be affirmatively disclosed, or an attempt to evade the usury laws should be indicated. In every such instance, the question as to the amount of the allowance should be settled by a jury. Scarcely any case could arise in which some element of fact outside the instrument in suit would not enter. And an inquiry into doubtful and complicated facts would be frequently indispensable. The Judges of the Courts ought not to be required to assume a duty of this sort.

Acquiescing in the action of the majority of the Court in reversing the judgment, I would refer the question in controversy to the determination of a jury.

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July, '78, 47. Jan. 28, 1879.

Appeal of the Lehigh Coal and Navigation Company.

Practice—Trust estates—Transfer of corporation stock to non-resident trustees.

A. and B., residents of New Jersey, filed a bill in equity against the Lehigh Coal and Navigation Company, alleging that C., a citizen and resident of Georgia, devised property upon certain trusts to D. E. and F., the survivors and survivor of them, their and his executors, administrators and assigns, that the trustees thus appointed invested a portion of the property in stock of the company defendant; that they the original trustees were all dead; and that A. and B. were the executors of F., the survivor of them, and, therefore, under C.'s will and the laws of Georgia, their successors in the trust. The prayer was for a transfer of the stock to A. and B., and payment to them of the accrued dividends.

The defendant's answer admitted substantially the facts set forth in the bill, and averred the company's readiness to transfer the stock to the proper parties, but asked that the cestuis que trustent be made parties to the proceeding, and that for greater certainty copies of C.'s will, and of F.'s will, and the letters testamentary to his executors, be filed.

Held (dismissing the bill and reversing the decree below) that notice to the cestuis que trust, and the production of these documents, were necessary prerequisites to a final decree in the plaintiff's favor.

Appeal from the Common Pleas No. 1, of Philadelphia County.

Bill in equity, filed by Bayard Stockton *et al.* executors of Richard Stockton, who was the surviving trustee under the will of James Potter, against the Lehigh Coal and Navigation Company, to compel the transfer to the plaintiffs of certain shares of the company's stock and the payment to them of accrued dividends thereon.

The bill alleged (1) that James Potter, a citizen of the State of Georgia, by his will, dated May 15, 1861, duly proved in the Court of Ordinary of Chatham County, in the said State, devised and bequeathed certain portions of his residuary estate to Robert F. Stockton, Richard Stockton, and Dr. W. H. Cuyler, and the survivors or survivor of them, their and his executors, administrators and assigns, upon certain trusts for his children and others, which trusts are still valid and continuing under the laws of Georgia. (2) That in 1866 these trustees, being all then living, purchased with funds of the trust estate, 167 shares of the Lehigh Coal and Navigation Company stock, which have ever since been standing in their names as trustees, and on which dividends were received by them or the survivors of them up to and including that declared in May, 1867, after which date no dividends were declared by the company until May, 1874. (3) That Robert F. Stockton died on October 10, 1866, and W. H. Cuyler on November 12, 1869, leaving Richard Stockton, then domiciled in New Jersey, the sole surviving trustee; that on April 10, 1876, Richard Stockton died, leaving a will in which he appointed the plaintiffs his executors, and that they duly took out letters testamentary in Mercer Co., New Jersey, and entered upon the duties of their office. (4) That under the laws of Georgia and the will of James Potter, they became the legal successors of the trustees originally appointed by the will, clothed with all the estates and duties of the said trustees as fully as if they had been therein mentioned by name as trustees; and (5) That the plaintiffs were, therefore, entitled to have the above-mentioned stock transferred to them and the dividends declared since May, 1874, paid to them; that they had asked the company to make such transfer and payment; and that the company wholly refused to do so.

The bill prayed that the defendants might be required to transfer the said stock and pay the said dividends, and that the Court would grant such further relief as might be necessary.

The Lehigh Coal and Navigation Company filed an answer admitting substantially the state of facts alleged in the bill, but asking, for greater certainty, that the persons interested in the trust estate be made parties to the proceeding, and that copies of the wills of James Potter and Richard Stockton, and of the plaintiffs' letters testamentary be filed; and averring its readiness to transfer the stock to the proper parties, but denying the right of the plaintiffs under the laws of Pennsylvania to have it transferred to them.

The Court filed a decree ordering the defendants to transfer the stock to the plaintiffs, and to pay them the dividends due thereon, upon the production and deposit with them, of a duly certified copy of the will of James Potter, and affidavits of the deaths of Robert F. Stockton and W. H. Cuyler prior to the death of Richard Stockton, and also a duly certified copy of the will of Richard Stockton. The defendant thereupon took this appeal, assigning for error the decree of the Court.

Charles Gibbons, for the appellants.

The bill does not disclose the nature of the trust, or the names and residences of the cestuis que trustent. Without notice to them, the appellants are ordered to transfer their property to strangers, not citizens of Pennsylvania, who are not even required to give security. The appellants could not perform the decree with safety, because the cestuis que trustent would not be affected by a proceeding to which they had not been made parties.

Bayard *v.* Bank, 2 Sm. 235.
Bohlen's Estate, 25 Id. 304.

The case is not within the jurisdiction of the Common Pleas, but of the Orphans' Court.

Act April 7, 1859, § 1, Purd. Dig. 1423, pl. 54.
Wapples's Appeal, 24 Sm. 100.

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E. Spencer Miller, contra.

Notice to the cestuis que trustent is unnecessary. It is not sought to transfer their property to strangers, but merely to vest the legal title thereto in the new trustees.

March 3, 1879. THE COURT. This bill in equity was filed to compel the plaintiffs in error to transfer certain shares of stock standing upon their books in the names of Robert F. Stockton, Richard Stockton, and William H. Cuyler, trustees, and also to pay over certain dividends which have accrued upon said stock. All of said trustees were deceased at the time of the filing of the bill, and this proceeding was commenced by the executors of Richard Stockton, deceased, who was the surviving trustee. The executors are non-residents, as were also the deceased trustees. It was alleged in the bill that the trust under which the stock was held was created by the will of James Potter, a citizen of the State of Georgia, and domiciled therein at the time of his death; that by the laws of that State, where a testator in his will expressly provides that in case of the death of a surviving trustee his executors shall become trustees, such executors of the surviving trustee, though they may be created such executors by a will proved in another State, become and are the legal successors of such deceased trustee, clothed with all the estates and duties of such deceased trustee as fully, and in the same manner as if they had been originally named as the trustees in the will of the testator.

The answer of the defendants admits a portion of the averments of the bill; but they ask that the persons interested in the said trust estate may be made parties, and demand the production of the will of James Potter and Richard Stockton respectively, and of the letters testamentary granted to the executors of said Stockton. The answer further avers the willingness of the defendants to transfer the stock to the proper parties, and to submit to such decree as shall seem just and equitable.

Upon the bill and answer as filed, the Court below, without the production of the documents referred to, made a decree requiring the company to transfer the stock in accordance with the prayer of the bill, and also to pay over the dividends remaining due and unpaid. This decree is the subject of the several assignments of error.

It is not alleged that the plaintiffs in error are making any captious objection to the transfer. On the contrary, it is manifest they only desire the right of the complainants to be established with reasonable certainty. This would seem the more necessary from the fact that if a mistake is made, they would not be protected by the decree for the reason that the parties beneficially interested in the stock are not made parties, and would not be bound by any decree made without notice to them. Before the strong arm of a chancellor is put forth to compel the transfer of this stock, we must see that the plaintiffs in error are not exposed to the danger of a suit by the parties in interest for such transfer. This record does not furnish satisfactory evidence of the right of the complainants to the transfer. The important papers, oyer of which was asked by the defendants, are not produced. They might have sustained the allegations of the bill. But this decree is too severe, too summary, to be based upon conjecture or probabilities. The learned Judge of the Court below appears to have realized the force of this when he so framed the decree as to order the transfer to be made upon the production of the papers referred to, and their deposit with the defendant, accompanied with affidavits of the deaths of Robert F. Stockton and William H. Cuyler prior to the death of Richard Stockton. Mere ex parte affidavits would not furnish the evidence upon which a final decree could be made with safety, and the papers when produced might show that the appellees were not entitled to have the transfer made.

We need not discuss the question of jurisdiction. There was no demurrer to the bill, and this point was not seriously pressed upon the argument.

The decree is reversed, and the bill dismissed without prejudice, the costs to be paid by the appellees.

Opinion by PAXSON, J.

Jan. '79, 98. March 26, 1879.

Price v. Kirk.

Mechanic's lien law— What constitutes such work done about the erection of a building within the meaning of the Act of June 15, 1836, as will justify the filing of a lien—Architect.

An architect who makes plans and specifications for a building, but who does nothing more, is not within the provisions of the mechanic's lien law, and is not, therefore, entitled to a lien against the building for his labor.

Bank *v.* Gries, 11 Cas. 423, distinguished.

Error to the Common Pleas of Chester County.

Scire facias sur mechanic's lien, by Benjamin D. Price against Wm. S. Kirk.

The lien, filed May 31, 1877, was as follows:—

The amount claimed to be due is $195 for drawings, plans, and specifications, and for labor and services in and about directing and overseeing the same, furnished from October 5th, 1874, to November 29th, 1875, by the claimant as an architect, for and about the erection and construction of said building.

The defendant pleaded that the plaintiff was not entitled to a lien for his services.

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By agreement the case was heard by the Court, (BUTLER, J.), without a jury, who found the facts as follows: "We find from the evidence that the plaintiff is an architect. That his claim is for preparing drawings and specifications for the house against which his lien is entered, and (in his own language) three visits to West Chester to locate the building and explain the drawings to mechanics. We find, however, that he visited West Chester but once to explain the drawings; that this was before the building was commenced and consumed a very short period of time. He did not superintend the construction of the house or have anything to do with it, other than as has been stated."

The Court further found that his lien had not been filed in time.

Upon these facts his Honor held that the plaintiff was not entitled to a lien for work and labor done, and entered judgment for the defendant, whereupon the plaintiff took this writ, assigning for error this action of the Court.

R. Jones Monaghan, for plaintiff in error.

This case would seem to be ruled by the case of Bank *v.* Gries (11 Casey, 423). In rendering such services as the plaintiff rendered one certainly performs labor, and that it was for "constructing" and "erecting" a building hardly admits of question.

Knight *v.* Norris, 13 Minn. 473.

Wm. B. Waddel, for defendant in error.

In Bank *v.* Gries (*supra*) the architect, whose lien was allowed, was employed to oversee the workmen, and to perform the offices that are generally performed by a builder. Such a claim as the one at bar was expressly negatived by the dictum of Mr. Justice STRONG, in the opinion of the Court.

May 5, 1879. THE COURT. Without referring to the finding of the Court that it would appear from the record and evidence that the lien was not filed within the time provided by the statute, we are of opinion that upon the facts as found by the learned Judge, to whom it was submitted without the intervention of a jury, the plaintiff had no lien. In Bank *v.* Gries (11 Casey, 423), the architect was employed, not only to make plans and specifications for the building, but to direct and oversee its erection in accordance therewith. His claim, therefore, was for work done about the erection of the building within the words of the law. The mere drawing of the plan and writing out the specifications is no more of this character than would be the work of an attorney in preparing the contract.

Judgment affirmed.

PER CURIAM.

July, '78. Feb. 3, 1879.

Sheets v. Allen.

Landlord and tenant—Verbal lease of an unenclosed lot, with the right to dig clay—Analogy to mining leases—Notice of tenancy—Sale of the lot without reservation—Effect of, upon the rights of the tenant.

The principles governing mining leases, that actual possession of the tenant carrying on his operations is notice of his interest to a third person, and that a lease for a term not exceeding three years is valid though not in writing, apply to a lease of land with the right to quarry minerals or dig clay.

A. made a verbal lease to B., with the right to dig clay from an unenclosed lot, which he subsequently sold without reservation. The tenant, who had received no notice to determine his tenancy from either his landlord or his grantee, and who had taken clay from part of the lot, was hauling away clay from the lot when he was notified by the purchaser, who knew of his tenancy, of the change of ownership, and afterwards was served with a writ of injunction:

Held (affirming the judgment of the Court below), that the right of the tenant in possession under the verbal lease, which was none the less a lease although the land was not enclosed or cultivated, was not extinguished in favor of a purchaser who knew the fact of the tenancy. When the tenant is taking the clay, the notice to third persons is marked, for the working is upon the surface.

Error to the Common Pleas No. 2, of Philadelphia County.

Trespass *vi et armis*, by Peter Sheets and Elizabeth Hinckle, trading as Sheets & Hinckle, against Benjamin Allen and John A. Gerritt, for digging and removing clay from the plaintiff's premises. Plea, not guilty. From the evidence the following facts appeared:—

Sheets & Hinckle, who were brickmakers, bought at public sale, on March 25, 1875, without reservation, from John J. Griffith, 11 vacant lots on Griffith or Wilder Street, between Eighteenth and Nineteenth Streets. These lots were part of old Buck Road, which ran diagonally through them, and were laid out only on paper. Griffith, who owned half of the plot of ground out of which the lots were laid out, lying north of Buck Road and bisected by it, upon the opening of Wilder Street, proposed to Gerritt, who owned the half of the plot lying south of the road and fronting on Wilder Street, to exchange therefor land lying north of the road, for the purpose of squaring the plot. Gerritt accordingly, on May 30, 1874, conveyed to Griffith, without reserving any rights, the half of the plot lying south of Buck Road, which, upon its vacation by the city, by Act of March 4, 1873, had reverted to the owners fronting thereon. In 1854, Gerritt leased to Allen a large tract of land, including part of the plot in question lying between Long Lane and Buck Road, at that time

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an open common, at a yearly rental of $1000, with the right to dig clay. Allen, who was in possession under this lease, which was in writing and under seal, had erected thereon kilns, sheds, offices, etc., and upon the reversion to Gerritt of part of the bed of Buck Road, by vacation, had taken clay off of the road under a *verbal* lease made in 1873 or 1874. The defendant had taken clay off of the western end of the lots in question in May, 1875, shortly before the plaintiffs went into possession under their deed of May 28, 1875, from Griffith, and had commenced again to haul clay from the lots in Dec., 1875, under instructions from Gerritt to go on and haul away the clay, when the plaintiffs notified his men that they were digging on their ground. Whereupon the men stopped, but resumed work the next day, when the plaintiffs arrested them. Notices were afterwards served upon Allen, but pending proceedings in equity for an injunction, he hauled away all the clay. It was in evidence that the plaintiffs knew that Allen was a tenant of Gerritt, but there was no evidence that notice had been served upon him either by Gerritt or by the plaintiffs to determine his lease.

Upon the trial, before MITCHELL, J., the defendant offered to show that "Allen was a tenant of Gerritt for these premises, prior to conveyance to the plaintiffs, for more than twenty years; that the fact was well known to Sheets, and that he was in possession of these lots under his lease, with a right to dig clay, before plaintiffs bought from the landlord." Objected to. Objection overruled. Exception.

The plaintiffs submitted the following point: "If Gerritt conveyed the premises in question to Griffith in May, 1874, without reserving any rights, and the latter conveyed to the plaintiffs in 1875, without reservation or notice, the lease relied on would have no force as against the plaintiffs, and the defendants had no authority in January, 1876, to enter upon the land and remove the clay, and their verdict should be for the plaintiffs." *Refused*, because there is no evidence of any notice on the part of defendant's landlord, or his grantees, the plaintiffs, to terminate the running of the lease.

The learned Judge charged the jury as follows: "If there was a lease for these premises, either verbal or in writing, prior to the conveyance to Mr. Griffith, then Mr. Allen was entitled to the possession of that property, and to take away the clay from it, and no conveyance of his landlord would affect those rights; his right was not subject to any action of his landlord, or any other purchaser over his head; when Mr. Sheets became owner of this property he acquired then the right which Mr. Gerritt previously had, to give notice to Mr. Allen that he had determined to terminate the lease, but there is no evidence of any such notice having been given, and, therefore, the plaintiff has proceeded as if there was no lease. If Mr. Allen was a tenant before Sheets bought the property, then he was entitled to take the clay."

After the jury had been out for some length of time to deliberate upon their verdict, they returned to the court-room to inquire of the Judge whether the lease, being a verbal one, was binding upon the plaintiffs; whereupon the learned Judge further instructed them as follows: "If there was a verbal lease made in 1873 to cover the lots in question, it was a lease from year to year, and if notice was not given by the plaintiffs to the defendant to quit at the end of any year, the lease would be binding as to them, and they cannot recover."

Verdict for defendants. A rule for a new trial having been refused, judgment was entered upon the verdict, and the plaintiffs took this writ, assigning for error the admission of the defendant's offer, the refusal of their point, and the charge of the Court.

J. M. Moyer, for the plaintiffs in error.

The right of the defendant was not under a lease for enclosed lands, or for the use and occupation of a tenement from year to year, or at will, but under a parol license to enter upon the land, dig clay without limit as to time and quantity. To hold that such a right can be created otherwise than by grant or by prescription, would not only trench upon the statute of frauds, but would virtually repeal the common law principle that every interest in land should pass by deed. Clay is parcel of the land, passes to the heir by inheritance, and not as a personal chattel to the executor or administrator.

Toller's Law of Executors and Administrators, 193.
Roberts on Frauds, 365.
Richard Tiford Case, 11 Rep. 46.

Taking clay does not differ from cutting trees, which are annexed to the freehold and are part of the realty. The right to take clay or any incorporeal privilege, cannot exist except by deed.

Huff *v.* McCauley, 3 Sm. 206.

The defendant held no deed, not even a written lease, to enter and take clay from these lots. He was not in actual possession of the land, which was part of a common open to the public, for which, at the time of conveyance to the plaintiffs, he had paid no consideration.

Therefore, he is not within the principle of an executed license.

LeFevre *v.* LeFevre, 4 S. & R. 240.

But at the time of the conveyance to the plaintiffs the license was executory, and hence revocable.

The sale or conveyance determined the license.

Yeakle *v.* Jacob, 9 Cas. 376.
Drake *v.* Wells, 11 Allen, 142.
Coleman *v.* Foster, 1 Hurl. & Nor. 37.

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The rule that where a tenant is in possession, his possession is notice to a purchaser is inapplicable, for there was no one in possession.

W. A. Manderson, contra.

The defendant's right to dig clay was not a mere license, but a right by grant, created by deed, arising from the lease executed in 1854. Upon the reversion of Buck Road to the owners on either side, the lessees were entitled to dig clay on that part of the bed of the road which reverted to their lessor.

February 17, 1879. THE COURT. At the outset the plaintiffs assume that Allen's defence was a parol license to enter upon the land and dig clay, without limit as to time or quantity. Upon this their argument is built, fortified by numerous authorities, demonstrating that the learned Judge committed a series of blunders. There is no escape from this conclusion if it be true that Allen claimed an incorporeal hereditament —a mere right to take clay resting upon an oral promise. Therefore, we pass at once to consider the nature of the defence, as set forth in the defendant's offer of testimony, the receiving of which is assigned for error, namely, "that defendant, Allen, was a tenant of Gerritt, for these premises, prior to conveyance to plaintiffs, for over twenty years; that the fact was well-known to Sheets, and that he was in possession of these lots under his lease, with the right to dig clay, before plaintiff bought from his landlord."

Instead of a mere license, the defendant puts forward an actual interest or estate in the land, a leasehold in the possession of the tenant, which was known to the plaintiffs when they purchased and took title. In order to constitute a lease of mines, it is not necessary that the lessee should have an interest in the surface, for minerals may form a distinct inheritance in the lands of which they are part, and, consequently, an estate may be created in, and restricted to, any specified mineral. In the mining districts, leases of lands for purposes of taking ore, coal, or petroleum, are common, wherein the tenants are restricted to the use of only so much of the surface as is necessary for mining purposes, with the right in the lessor to use the surface as he chooses, save that he may not interfere with the rights of the lessee. Frequently the lands are unoccupied for any purpose other than the mining; and frequently they are occupied by the lessor for agricultural or other uses. The actual possession of the tenant, carrying on his mining operations, is notice of his interest to a third person as fully as is the tenancy of a dwelling-house. And if the lease is for a term not exceeding three years, it is valid though not in writing. A parol agreement that a person shall enter on the land of another, dig ore, erect buildings, etc., and pay fifty cents a ton for all ore removed, amounts to a lease. Moore *v.* Miller (8 Barr, 272.) Like principles apply to a lease of land with right to quarry minerals or dig clay. The right of a tenant in possession, under such a lease, is not extinguished in favor of a purchaser who knew the fact. And when the tenant is taking the clay, the notice to third persons of his estate is marked, for the working is upon the surface. It is none the less a lease if the land is not enclosed or cultivated. The offer was admissible, and if the testimony established the facts as therein alleged, the defence was complete. That the evidence thereof was sufficient to submit to the jury, is not denied; nor is the error assigned to its submission. Indeed, Sheets himself testified that he knew Allen was Gerritt's tenant, and had his brickyard on the ground; that he dug clay for his bricks, and had taken about eight feet off the west lot at time of purchase; and that there was no division of the property into lots, except on paper. This matter may have been materially qualified or explained away by other parts of his testimony, in its application to the land he purchased. The whole testimony was for the jury. The learned Judge seems to have clearly apprehended the nature of the defence, and his rulings, as set forth in the assignments of error, were entirely sound.

The plaintiff raised and discussed some points not embraced in the assignments, upon which the Court was not requested to charge, and these cannot now be considered. If error was committed, it must be shown by the record. For aught that appears, the Court gave correct instructions in reference to the portions of land occupied for a highway prior to vacation of Buck Road, in 1873.

Judgment affirmed.

Opinion by TRUNKEY, J.

Jan. '78, 120. Jan. 21, 1879.

George v. Bell.

Evidence—Defendant's notice of special matter, when part thereof may be adopted by plaintiff as admission and part contradicted—Practice—Errors and Appeals—Assignments of error.

Neither the refusal of the Court to strike a case from the list nor its refusal of a rule for a new trial are subject to review upon a writ of error.

In proving the defendant's admissions from his notice of special matter the plaintiff must give the whole notice in evidence, but having done so, he is not precluded from contradicting parts of the notice.

Error to the Common Pleas No. 3, of Philadelphia County.

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Assumpsit by Bell against George. Pleas non assumpsit, payment with leave, etc. Before the trial, the defendant moved that the case should be stricken from the list, which motion was refused. The defendant having filed a notice of special matter, at the trial the plaintiff offered in evidence certain admissions therein contained, and on objection from the defendant offered the whole notice in evidence to prove those admissions. The plaintiff afterwards contradicted a portion of the notice.

The defendant requested the Court to charge, *inter alia*, as follows: "That the offering in evidence by plaintiff of defendant's notice to him of special matters of defence to be offered by said defendant on the trial, was a virtual adoption of the whole, and he is precluded from adopting any portion of the same as evidence to sustain his cause and rejecting any other portion." *Negatived.*

Verdict for the plaintiff. The defendant then moved for a new trial, which was refused, and judgment was entered on the verdict. The defendant took this writ, assigning for error (1) The refusal of the Court to strike the case from the list; (2) The refusal of the above point; (3) The refusal of a new trial.

MacMullan, for the plaintiff in error.

(No counsel appeared for the defendant in error, and no paper-book was presented for him.)

February 10, 1879. THE COURT. The first and third assignments of error are for matters not assignable for error in this Court. In refusing to charge as complained of in the second assignment that the counsel for the defendant in error, having placed plaintiff's notice of special matter in evidence virtually adopted the whole with the matters of defence therein contained, and was precluded from contradicting it, we think the learned Judge below was entirely right. It is possible that some parts of the notice may have admitted facts material, but surely the plaintiff below might go on and contradict the rest. A party must give the whole admission of his adversary in evidence, but having done so he may certainly contradict by other evidence any fact which may be injurious to him.

Judgment affirmed.

PER CURIAM.

Common Pleas—Law.

C. P. No. 2. March 5, 1879.

Fick v. Wellendorf.

Appeal from the judgment of an alderman—The Court will not allow an appeal nunc pro tunc from a judgment four years old.—Practice.

Rule to allow an appeal *nunc pro tunc.*

Judgment was entered before an alderman in January, 1874.

The affidavit upon which the rule was granted set forth that the defendant was a German, and did not understand English; that his father-in-law took the matter in hand, and he supposed that it had been attended to; that he knew nothing more of it until he was recently arrested on a *capias*.

The depositions set forth a defence upon the merits.

W. P. Bowman, for the rule.

Sulzberger, contra.

THE COURT. This application comes too late. Rule discharged.

C. P. No. 2. March 15, 1879.

Schoneman v. Sternberger.

Appeal from the judgment of a magistrate—When allowed nunc pro tunc—Practice.

Rule to allow an appeal *nunc pro tunc.*

From the depositions the following facts appeared. Schoneman & Sons brought an action in a Magistrate's Court against M. Sternberger & Brother, and having obtained a judgment, on January 8, 1879, issued an attachment execution wherein L. & S. Sternberger were garnishees. The attachment was returnable January 16. On January 11th, Samuel Sternberger, one of the garnishees, went to the Magistrate's Court and asked what was necessary for him to do. The magistrate informed him that he must answer the interrogatories, and directed him to some one in his office who would prepare them. The answers were prepared and left there with the magistrate. After the return day, notwithstanding the answers and the fact that the garnishee had been at the Court, a judgment was entered for want of an appearance, and on February 8th a levy was made upon the property of the garnishees. This rule was then taken.

Sulzberger, for the rule. Apart from the fact that the garnishee was misled by the magistrate, in view of the facts a judgment for want of an appearance was erroneous.

THE COURT. Rule absolute.

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C. P. No. 2. March 5, 1879.

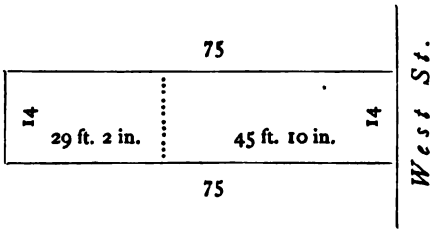
Donagan v. McKee.

Ground-rent—Conveyance of portions of the land bound "under and subject" to the entire ground-rent—Apportionment—Contribution—Estoppel—New trial.

Motion for a rule for a new trial.

Assumpsit, by Donagan, against McKee. Upon the trial, before MITCHELL, J., the following facts appeared:—

John W. Claghorn, by indenture dated June 28, 1849, conveyed to Wm. S. Vandewser a certain lot of ground, 14 feet by 75 feet, reserving thereout a ground-rent of $30. By divers mesne conveyances, John McKee, the defendant, became the owner of the premises, subject to the ground-rent, in 1865. By deed dated March



29, 1865, McKee conveyed a portion of the premises, 14 feet by 45 feet 10 inches, to Patrick Lanagan, "under and subject, nevertheless, to the payment of the said ground-rent or sum of $30." This deed was made in pursuance of an agreement between McKee and Lanagan, duly sealed and recorded, in which, after reciting that five lots (one of which is the one in question) were sold subject to the payment of a ground-rent of $30 each, Patrick Lanagan agreed "to assume the payment of the said ground-rents . . . to keep harmless the said John McKee and his heirs, . . . and to have the said ground-rents paid off and discharged from and against said McKee's part of said lots (including the balance of the lots first above described).

By deed dated Sept. 24, 1866, Lanagan conveyed the premises which he had purchased from McKee to Donagan, the plaintiff, reciting the title from McKee, and "under and subject to the payment of a certain yearly ground-rent or sum of $30."

Donagan took possession under the conveyance, and paid the entire ground-rent for eleven years. This action was brought to recover contribution from McKee, for the proportion properly chargeable upon his part of the lot, viz., 14 feet by 29 feet 2 inches.

The Court excluded the agreement between Lanagan and McKee, above recited, from the consideration of the jury, and directed a verdict for plaintiff. Verdict for the plaintiff accordingly; whereupon this motion was made.

Stover, for the motion.

It is clear that Lanagan, the plaintiff's grantor, could not have recovered contribution of McKee in view of his having agreed to pay the whole ground-rent himself; nor can Donagan, if he had in any way notice of this agreement. The test, as to whether a general recital is an estoppel, is whether it was intended so to be.

Bigelow on Estop. 278.

The payment of the rent was part of the consideration of the plaintiff's deed, and he is bound to perform the conditions of his own title.

Heckerman *v.* Hummel, 7 H. 70.
Freeman *v.* Auld, 44 N. Y. 50.

The recital in the deed was sufficient to put the plaintiff on inquiry as to the agreement, and the agreement should therefore have been admitted in evidence.

Heckerman *v.* Hummel, *supra.*
Olwine *v.* Holman, 11 H. 284.
Wistar *v.* Mercer, 6 Phil. 44.

THE COURT. Rule refused.

C. P. No. 3. April 5, 1879.

Winpenny v. Winpenny.

Equitable ejectment—Part execution of a parol contract for land—An equitable ejectment is one adjudged and determined upon equitable principles—One verdict and judgment in favor of defendant founded upon an equitable title is conclusive.

Ejectment. Rule for a new trial.

The plaintiff and defendant are brothers, claiming under their father John Winpenny, the plaintiff as heir-at-law, and the defendant as a purchaser by parol agreement. Upon a trial in a prior action between the same parties, there was a verdict and judgment for the defendant. Upon the trial in the present action, the plaintiff, having closed his case, the defendant offered in evidence the record showing a verdict and judgment in the former action. He then proved by witnesses that the testimony upon which he recovered in the former trial was in substance as follows: The defendant in 1848 made a contract with his father, the testator, by which he was to be paid $500 for some work. After it was done, he had a conversation with his father, in which the latter said that he, Joseph, did not want the money, and offered in payment to convey to him the house and lot in dispute. He, Joseph, agreed to the proposition, and entered into possession in May of that year. During a temporary absence his father collected the rents and accounted for them. From 1855 down to the time of the trial, he had resided on the property, made improvements, and treated it in all respects as his own. He had often asked for a deed, which his father promised to make, but it was never done.

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The Court charged the jury that the defendant in the former case rested on an equitable title and recovered, and that they had nothing to do but to find a verdict for him. This charge was excepted to.

Verdict for the defendant. Plaintiff moved for a new trial, assigning as his reasons, *inter alia*, the charge of the Court.

John Dolman and *Benjamin Harris Brewster*, for the rule.

The action of ejectment at common law is grounded upon a violation of the right of possession merely, and has, therefore, ever been regarded as a possessory action.

There appeared no elements of an equitable title upon the former trial of this case.

Seitzinger *v.* Ridgway, 9 Watts, 496.

The defendant in this case had no such claim or title as chancery would enforce, and had he gone into a court of equity he would have been told that he had an abundant remedy at law, he had no status there; and if this were an issue in equity, the Court under those circumstances, would order another trial, for it is not bound by one verdict, and for its better satisfaction may direct as many trials at law as it sees fit.

Boyse *v.* Rossborrough, 6 H. L. C. 2.
Stevens *v.* Church, 8 Phila. 642.
Meyers *v.* Hill, 10 Wright, 9.
Taylor *v.* Abbott, 5 Ibid. 353.
Treftz *v.* Pitts et al., 24 Smith, 349.

From the record of this case it is impossible to say whether the Court determined the title to be an equitable one or not.

Myers *v.* Hill, *supra*.

Even if the defendant once had an equitable title it merged in the legal, which he had by livery of seisin, by payment of consideration, by uninterrupted possession for thirteen years, etc., and if such is the case, why, of course, the plaintiff is entitled to a new trial.

Charles Davis, *J. J. Lewis*, and *Wayne McVeagh*, contra.

This is an equitable ejectment, and there having been a verdict already rendered in the same cause (D. C., March Term, 1869, No. 1829), the plaintiff is concluded, and can take no further action. The holder of the legal title may maintain ejectment against every one but the equitable owner.

Brolaskey *v.* McClain, 11 Sm. 146.

One verdict and judgment upon an equitable title is conclusive between the parties and their privies, where the action is a substitute for a bill in equity; and it is, also, a bar to a subsequent ejectment for the same land.

Taylor *v.* Abbott, 5 Wright, 353.
Stevens *v.* Church, 8 Phila. 642.
Crea *v.* Hertzler, 8 Ibid. 644.
Meyers *v.* Hill, 10 Wright, 9.
Peterman *v.* Huling, 7 Casey, 432.
Ballentine *v.* White, 34 Leg. Int. 232.

Where the record of a former suit is in evidence, it is settled that a party may give parol evidence of what transpired on a former trial, in order to show that it was the same subject matter, and the same title that was passed upon.

Brindle *v.* McIlvaine, 10 S. & R. 282.
Haak *v.* Breitenbach, 5 Id. 204.
Carmony *v.* Hoober, 5 Barr, 305.
McDermott *v.* Hoffman, 20 Sm. 52.

C. A. V.

April 12, 1879. THE COURT (after stating the facts). The principle established in Seitzinger *v.* Ridgway (9 Watts, 496), is, that one verdict and judgment in an action of ejectment brought to compel the specific execution of articles of agreement for the purchase and sale of land is conclusive between the parties, and a bar to any subsequent action; this action being in that case regarded as a bill in equity, and not as a possessory action at common law.

The present action was not "brought to compel the specific execution of articles of agreement for the purchase and sale of land." Nor was the former action between the same parties brought for that purpose. It is evident, however, that the defence in the first was upon an equitable title alone. Does this bring the case within the spirit of the principle in Seitzinger *v.* Ridgway?

This question does not appear to have been directly decided in this State. It, perhaps, never could arise so as to come within the precise language of the ruling in Seitzinger *v.* Ridgway, where the purchase-money has been paid and possession surrendered to or obtained by the vendee. The vendor would have no cause of action, for the purchase-money is paid, and the vendee, being in possession, could not bring an action of ejectment.

What then constitutes an equitable ejectment? It can only be one which is adjudged and determined upon equitable principles. If this be so, then it is immaterial whether the equity arises in the plaintiff's claim or in the defence. It is still an equitable ejectment if it be decided upon equitable principles. It is the controversy which is raised and determined which gives character to the cause.

When either of the "parties is vendor or vendee, or claims or defends in either capacity," and succeeds, the other party must necessarily be either vendee or vendor. If the claim or defence be upon a parol agreement, it is an equitable one. If it be established by a verdict and judgment, it compels the specific execution of an agreement for the purchase and sale of land, and the suit may be said to have been brought for that purpose. It would seem, therefore, that the vendee, who has paid the purchase-money, and depends upon his parol agreement, should be within the spirit of the ruling in Seitzin-

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ger *v.* Ridgway. If he is not, he is in a worse condition than he who has not paid, and has obtained possession.

Meyers *v.* Hill *et al.* (10 Wr. 9), is a step in advance of Seitzinger *v.* Ridgway, and sustains this conclusion. There an action of ejectment was brought by Henry Myers against the heirs of David Witherson. The title which the plaintiff set up was an equity growing out of an alleged parol sale made by David Witherson to Samuel Witherson, whose title Peter Epley bought at sheriff's sale. In 1824, David Witherson, under whom Hill *et al.* claimed, brought an action of ejectment against Peter Epley, under whom Myers claimed. It resulted in a verdict and judgment against David Witherson. On the trial in Myers *v.* Hill *et al.*, a principal question was whether this verdict and judgment were conclusive of the right between the parties. STRONG, J., p. 12, says: "Seitzinger *v.* Ridgway settled the law as it then was and is now, that in equitable ejectments between a vendor and his vendee by articles, the first verdict and judgment concludes the right. If, therefore, it appears by the record, or by the record and legitimate evidence not contradictory of the record, that the verdict and judgment rendered in the first ejectment brought, in 1824, was an adjudication in favor of the parol sale by David Witherson, the sale under which the plaintiff now claims, the case is governed by the rule laid down in Seitzinger *v.* Ridgway."

It will be seen from an examination of Myers *v.* Hill *et al.*, that the first ejectment brought by Witherson *v.* Epley was not "brought to compel the specific execution of articles of agreement for the purchase and sale of land;" that the defendant was in possession; that the defence was a parol sale by plaintiff. STRONG, J., says, a verdict and judgment upon this defence alone would have been conclusive. It failed simply because it was not the only defence, and the verdict might have been on the other defences.

Joseph Winpenny, in the District Court, claimed under a parol sale, with possession and visible acts of ownership, for more than thirteen years. It was the only defence made, and the verdict and judgment was an adjudication in his favor, and in favor of the parol sale by John Winpenny. It was therefore conclusive of the right between him and all claiming under John Winpenny. His case may not be distinguished from Myers *v.* Hill *et al.* The verdict and judgment in the District Court were conclusive against the plaintiff in the present action.

The rule is discharged.

Opinion by FINLETTER, J. YERKES, J., dissented.

C. P. No. 3. April 5, 1879.

Riley v. Cullen.

Covenant against surety on a lease executed by the lessee alone—Lessor a married woman who makes no separate acknowledgment—Title under such a lease—Landlord and tenant—Rent.

Rule for judgment for want of a sufficient affidavit of defence.

Covenant. John Smyth, by an instrument signed and sealed by him alone, agreed to take and rent from Mrs. Mary Ann Riley two houses in West Philadelphia for the term of one year, and Walter Cullen, the defendant, by a separate instrument under seal, became surety for the faithful performance of the terms of the lease. Smyth entered into possession under the lease, and, failing to pay the rent, this action was brought against Cullen as surety.

The affidavit of defence set forth that at the time of making the alleged lease, Mary Ann Riley was a married woman; that it was not separately acknowledged by her as required by law; and that for these reasons no title or interest passed to Smyth, and defendant had assumed no legal obligations whatever in undertaking to be responsible for the performance, by the lessee, of the terms of the lease.

E. P. Smithers, for the rule, cited—
Mansley *v.* Smith, 6 Phila. 223.
Pickard *v.* Kahn, 2 WEEKLY NOTES, 95.
W. W. Wiltbank and *Henry Reed*, contra.
Rule absolute.

U. S. Circuit Court—Law.

May 7, 1879.

In re C. C. Cole.

Attorney and client—Privileged communications—Scope of privilege—Commission to take testimony.

Where the process of this Court is sought in aid of a commission issued from the Court of another circuit, this Court will not inquire into the regularity of the proceedings there, but will compel witnesses here to answer all material questions not privileged.

The communication is not privileged, if relating to the perpetration of crime by the attorney.

In this case the communication was from the attorney to the client, and was alleged to relate to certain libellous

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publications, of which the attorney was accused of being the author.

Motion for attachments.

The Iowa Central Railroad Company retained C. C. Cole, Esq., as counsel in a suit brought in the U. S. Circuit Court of Iowa, to foreclose a mortgage on that railroad. Richard L. Ashhurst, Esq., of this bar, was, at the same time and subsequently, chairman of a committee of stockholders of the road. Both of these gentlemen, and also J. F. Cate, president of the company, were in frequent and confidential communication in regard to the litigation and matters more or less connected with it. During the progress of the suit, divers libellous publications appeared, attacking the character and motives of Hon. JOHN DILLON, United States Circuit Judge for the district of Iowa; whereupon the Iowa Bar Association instituted a proceeding against Cole to effect his disbarring, charging him with the authorship of the publications, and averring that they were intended and calculated to obstruct the due administration of justice in the Circuit Court. That Court then issued a commission in the matter, directed to a United States Commissioner in this district, to take the testimony of witnesses residing here. Before the commissioners, Messrs. Ashhurst and Cate refused to answer certain questions addressed to them, as to whether they had received certain letters from Cole, etc. etc., relying on the professional and confidential relations subsisting between themselves and their counsel as making all such communications privileged.

Lane and *Cook* (of Iowa), thereupon moved for a rule for attachments against the witnesses.

Platt and *Bullitt*, contra.

May 9, 1879. THE COURT (BUTLER, J.), after stating the facts, said, in substance, that two questions were raised on the argument: (1) That the Circuit Court of Iowa had no authority to issue the commission; and (2) that the communications were privileged.

As to the first question, it is not difficult. I, as a Judge, have no authority to inquire into the jurisdiction of the Circuit Court of Iowa, or whether or not there is there pending a civil action. That Court has decided that question, and issued a commission. It would be highly discourteous to look behind its record, and I decline to do so.

Secondly, are the communications privileged? The general law in regard to privileged communications is well understood, and originated far back in the history of jurisprudence. How far, in modern times, the law has been modified, it is not now necessary to consider. It is sometimes said that all communications between counsel and client are privileged, but this is too general, and is inaccurate. They must relate to the business and interest of the client, and, moreover, they must be lawful; for if unlawful, public policy forbids their concealment under the plea of privilege; and, if lawful, they must fall within the scope of professional duty. Communications by counsel to client, likewise are usually privileged, because closely connected with the client's interests and business. The rules on this subject are laid down in Veeks on Attorneys, chapter on Privilege.

Suppose a case most favorable to the witnesses, viz., that these communications were by the client to counsel, would they be privileged? I do not mean to imply any fault in these gentlemen. I have no doubt they are entirely free from blame. But suppose a client had devised, with the assistance of counsel, a scheme to obstruct the administration of justice, would the communications be privileged? The authorities applicable to such cases say not. The charge here is that Mr. Cole intended to promote the perpetration of crime. Had it not been for the learned argument of counsel who opposed the motion, I should not have had the slightest doubt about the case. The matter does not fall within the scope of professional employment.

Moreover, these communications have been already given to the public. The seal of secrecy is broken; and the object of the inquiry is not what they were, but who made them. How are the client's interests affected by this? The protection is for the benefit of the client, not the counsel.

I am of opinion that the witnesses must be required fully to answer all material questions under this commission.

If it is intended that the process of the Court should be invoked, the questions must be first written out and shown to be material.

Oral opinion.

Oct. 1877, 70. April 26, 1879.

McElhenny et al. v. The First National Bank of Ashland et al.

Equity—Practice—Costs of Master, by whom paid—Jurisdiction—Conflict of, between judiciary and executive—Payment of Master's costs by defendants decreed before final relief granted.

The United States Circuit Court, having appointed a Master to investigate the affairs of a national bank, defendant in a creditor's bill in equity filed for discovery and other appropriate relief, upon allegations of fraud by the officers of the corporation, has jurisdiction of the suit after the subsequent appointment of a receiver by the comptroller of the United States Government.

Master's costs ordered in such a case to be paid by the

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receiver of the bank, his services having been beneficial to the corporation.

Rule to show cause why the costs of the Master should not be paid by the defendants.

The facts were these: On the 15th of January, 1878, the complainants filed a bill in equity on behalf of themselves, as well as of other creditors who should come in, against the First National Bank of Ashland, Robert Gorrell and William Torrey, and the directors of the bank, alleging that they were holders of stock in the bank defendant of which Gorrell was president, and Torrey the cashier; that the defendants Gorrell and Torrey had grossly mismanaged the affairs of the bank, had fraudulently appropriated certain of its assets to their own private uses, and were still directing its affairs in an improper and fraudulent manner; that in July, 1877, the bank had gone into voluntary liquidation, and had closed its affairs with the Comptroller of the Currency, by depositing legal tender notes to the extent of its outstanding circulation and withdrawing the government bonds given to secure the same. The bill also alleged that the bank was still indebted to its depositors alone in about $30,000, and prayed discovery, a receiver, an account, and an injunction restraining the defendants, Torrey and Gorrell, from interfering with, or in any way disposing of the assets.

Answers were filed by the defendants, and on a motion for the appointment of a receiver the Court (CADWALADER, J.) appointed John P. Hobart, Esq., as Master, to investigate the affairs of the bank, and report its condition to the Court; to ascertain what, if any, material errors or omissions had occurred in the report of the Examiner, already appointed by the Comptroller of the Currency, and for this purpose directed that he should have access to the books and papers of the bank.

Subsequently to the appointment of this special Master, a receiver of the bank was appointed by the Comptroller of the Currency, whereupon he was made by amendment a party defendant to the bill.

A lengthy report of the condition of the bank was subsequently filed by the Master, and his charges in the matter, including the expenses of an expert accountant employed by him amounted to several hundred dollars. The bill was still pending, and no relief other than the discovery mentioned had been decreed.

A rule was first taken by him upon the plaintiffs to show cause why they should not at that stage of the case, pay his costs. This rule was discharged upon depositions showing the poverty of the plaintiffs, that the Master's services had been beneficial to all the stockholders, and that in consequence of the investigation set on foot by this bill, there had been a thorough overhauling of the affairs of the bank by the receiver appointed by the United States Comptroller, which had resulted in the recovery of large sums of money by the receiver. Thereupon the Master took this rule upon the defendants to show cause why these costs should not be paid out of the assets of the bank in the hands of the receiver.

A. Sydney Biddle and *Hughes & Farquhar*, for the rule.

It will be argued that this Court has no jurisdiction since the appointment by the Comptroller of a receiver, and that the payment of these costs is, on that account, beyond the control of this Court. No objection is made to the amount, but it is said that, as the case is substantially at an end, the plaintiffs are to pay the costs. We admit that no further proceedings are likely, as, though the bill is still pending, the relief sought for is being administered by the receiver, who is, in a proper way, winding up the bank's affairs. But the services were beneficial to him, and the relief we wanted, *i. e.*, discovery, was decreed us. The plaintiffs do not care to take the bank's affairs out of the hands of the present receiver, though the Court could doubtless, in its discretion, do so, having obtained jurisdiction of the bank's affairs, through this bill, before that of the government accrued by the appointment of its receiver, which was subsequent to the filing of this bill. See as to this—

Bank *v.* Bank, 14 Wallace, 383.
Case *v.* Terrell, 11 Wallace, 203.
Kennedy *v.* Gibson, 8 Wallace, 505.

The Court now called upon *George R. Kaercher* and *Charles M. Swain*, contra.

These costs should be paid by the complainants, as it was upon their application that the Master was appointed, and he discovered nothing more than what the examiner previously appointed by the Comptroller of the Currency had already reported.

If any of the defendants are to be charged with the costs it should be Torrey and Gorrell, whose acts in the matter made the investigation necessary.

The Comptroller of the Currency has sole jurisdiction of the matter, and when a receiver had been appointed by him, the jurisdiction of this Court ceased.

[McKENNAN, J. Do you admit the propriety of the amount of the charge?]

Yes, but we are not bound to pay it.

[BUTLER, J. Were not these services beneficial to the corporation in enabling the receiver to get in the assets with greater ease? Did not the bank directly benefit by them?]

We admit that. But this Court has no jurisdiction. The compensation is wholly within the receiver's discretion, since his appointment by the executive of the government.

Eo die. Rule absolute.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, JUNE 19, 1879.* [No. 8.

Supreme Court.

July, '77, 39. Feb. 26, 1879.

Craig v. The City of Philadelphia.

Constitutional law—Street improvements—Foot front rule of assessment not applicable to rural property—Exercise of power of taxation, when reviewable—Power to make local assessments for public improvements—Act of April 5, 1870; Act of April 19, 1843.

That the assessment of a tax for improving highways according to the "foot front rule" is unconstitutional, as against rural property, is now well settled.

Upon the trial of a *scire facias* to recover the amount of the assessment of a tax for street improvement, the defendant offered to prove that "the widening . . . . was not called for by any reason save as a public improvement:"

Held (reversing the judgment of the Court below, PAXSON, J., dissenting), that this evidence was admissible.

Seely *v.* City of Pittsburgh, 3 WEEKLY NOTES, 413; Washington Ave., 19 Sm. 352, followed.

Per WOODWARD, J. The Act of April 19, 1843, limiting the defence to a municipal claim to a denial that work had been done or materials furnished, or to proof of value or payment, or a release, extends only to the incorporated districts of the county of Philadelphia.

Per PAXSON, J., dissenting. The Act under which these proceedings were had was an exercise of the taxing power of the Commonwealth, which is lodged in the Legislative department of the government, and is not subject to control by the judicial department.

Error to the Common Pleas No. 2, of Philadelphia County.

Scire facias sur municipal claim for paving, filed by the city of Philadelphia to the use of W. W. Dickinson against Robert Craig "for work against a lot of ground, situate on the south side of Market Street west of Forty-ninth Street; fronting on Market Street 300 feet, depth 214 feet to Ludlow Street."

The defendant pleaded the general issue, and also the following special plea: "And for a further and special plea in this behalf says that the said plaintiff ought not to have or maintain his aforesaid action against him, because he says that the work done and the labor performed under the contract between the said plaintiff, W. W. Dickinson, and the Commissioner of Highways, were charged for according to the frontage rule of assessment; and that the ground in front of which said paving and curbing were done, and against which said claim has been filed, is and was at the time of doing said work *rural* property, and assessed as such, wherefore," etc.

Upon the trial it appeared that the work was done under an Act of Assembly of April 5, 1870 (P. L. 890), authorizing the Commissioner of Highways to open Market Street from Forty-third Street to the eastern end of the bridge over Cobb's Creek, at Sixty-third Street to the "full width, as laid down on the plan of the city, and to grade said street, and to enter into a contract with a competent paver to curb and pave the same; said contractor to collect the cost thereof, except the paving of intersections, from the property owners, as is now by law and ordinance provided." The contract was entered into between Mahlon H. Dickinson, the Commissioner of Highways, and W. W. Dickinson, the equitable plaintiff. When the work was completed claims were filed according to the frontage rule of assessment, @ $1.50 per square yard.

The defendant proved that no notice of the intention to grade or pave was ever served on the property owners, nor was any petition ever signed by them asking that it should be done. The property of the defendant is used as a nursery for plants and flowers. There is but a small dwelling house on it.

The defendant offered to prove (1) That his premises against which the claim was filed were situated in a rural district of the city of Philadelphia; and that a large part of Market Street, from Forty-third to Sixty-third Street, passes through rural and farm property, now used for farm purposes. (2) That this property was assessed as rural property, and that all the property fronting on Market Street, from Forty-third to Sixty-third Street, not exempt from taxation, was assessed as rural property and farm land. (3) That the said widening of Market Street was not called for by any reason, save as a public improvement, and to keep a grand avenue through the city of a uniform width to the Delaware County line.

Objected to; objections sustained; exceptions; (first, second, and third assignments of error).

There was some conflict of testimony as to the character of the work; after reviewing this the Court (in the general charge) said: "Upon the whole case the question is, whether the plaintiff is entitled to the contract price, or whether there should be a deduction for inferior work. If the contract has been substantially complied with, and this was a fair job, as good as other roads are, you should find a verdict for the plaintiff for the whole amount. If inferior in quantity or quality, or the work was careless or not good, you should make a fair deduction, so that de-

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fendant should not pay more than it is fairly worth, taking as a standard of what it is worth, a good pavement as was called for by the contract."

Verdict for plaintiff $2258.48, and judgment thereon. . Defendant took this writ, assigning as error (1, 2, and 3) the rejection of his offers of testimony, and (4) the portion of the charge above quoted.

John H. Campbell and *Geo. W. Biddle*, for plaintiff in error.

The question whether the property charged was rural was material, and was raised by the pleadings, it was error therefore to refuse to admit the testimony.

Washington Ave., 19 Sm. 353.
Seely *v.* Pittsburgh, 1 N. 360.
Kaiser *v.* Weise, 5 WEEKLY NOTES, 45.

The offer to prove that the widening was not called for, except as a public improvement, was erroneously rejected. The tendency was to prove that the defendant was not benefited by that for which he was charged, and this was within the line of the decisions.

Hammett *v.* City, 15 Sm. 146.
In re Market Street, 32 Leg. Int. 370.

The Act of April 19, 1843, limiting the character of the defence to a municipal lien, is not operative within the district in which this work was performed (the Twenty-seventh Ward), for although, as was decided in Fell *v.* The City (31 Sm. 58), the Act of 1843 is still in force in the then incorporated districts, it is not in force in other parts of the present city; and by reference to the Acts of 17 February, 1844 (P. L. 44), 3 April, 1851 (P. L. 302), and the 14 April, 1853 (P. L. 422) it will be seen that the first incorporation of this portion of the county as the district of Belmont took place in 1844, subsequently of course to the passage of the Act of Assembly referred to.

Jos. R. Rhoads and *David W. Sellers*, for defendant in error.

It is a presumable fact, recognized by the decisions, that ground fronting on an established highway is improved in value more than the cost of the first paving, which has always led to a maintenance of that charge.

McMasters *v.* Commonwealth, 3 Watts, 292.
Lipps *v.* City, 2 Wr. 503.

The owners along the line of Market Street were to be treated like all other owners on all other streets in the city. The ruling in Hammett *v.* City (*supra*) has no application. The case at bar falls within the ruling of—

Stroud *v.* City, 11 Sm. 255.
City *v.* Tryon, 11 C. 401.

The right of the city to tax rural property for municipal purposes is well settled.

Kelly *v.* Pittsburgh, 4 N. 176.
Huidekoper *v.* Meadville, 2 Id. 156.

May 7, 1879. THE COURT. A contract was made between W. W. Dickinson and the city of Philadelphia, on the 26th of November, 1872, in which Mr. Dickinson undertook "to grade, curb, and pave Market Street from Forty-third Street to the eastern end of the bridge over Cobb's Creek at Sixty-third Street." The work was done, and after its completion this proceeding was begun to enforce payment by Robert Craig, the defendant below, of the sum assessed on his property, as his proportion of the cost. The claim was filed against a lot of ground on the south side of Market Street, having a front on that street of 300 feet, and extending in depth 214 feet to Ludlow Street.

The authority to make the contract, and the right to enforce the lien against the defendant's land, are rested on the provisions of the Act of the 5th of April, 1870, by which it was made the duty of the Chief Commissioner of Highways, immediately after the interest of the West Chester Plank Road and Turnpike Company in the road-bed of Market Street should be surrendered to the city of Philadelphia, "to proceed by giving due notice to property owners along the line of said Market Street," between Forty-third and Sixty-third Streets, "and by all other requisite proceedings, to open the said street between the points named to the full width, as laid down on the plan of the city, and to grade said street, and to enter into a contract with a competent paver to curb and pave the same, said contractor to collect the costs thereof, except the paving of intersections, as by law and ordinance provided." A verdict was rendered and a judgment entered, in the Common Pleas, for the full amount of the plaintiff's claim.

At the trial three offers were made on behalf of the defendant, and were rejected by the Court. The first and second were propositions to prove that the defendant's "premises, against which this claim was filed, are situated in a rural district in the city of Philadelphia, and that a large part of Market Street, from Forty-third to Sixty-third, passes through rural and farm property, now used for farm purposes," and "that all the property fronting on Market Street, from Forty-third to Sixty-third, not exempt from taxation, is assessed as such rural property and farmland." It was decided in the case of Washington Avenue (19 P. F. S. 352), that an Act of Assembly authorizing a local assessment for a general public benefit was unconstitutional, and that while the assessment of a tax for improving streets in towns in proportion to the frontage on the street, is a reasonable exercise of the taxing power according to the benefits received, yet such a rule applies only to cities and large towns, where, from the density of the population and the small size of the lots, there is a reasonable

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certainty of arriving at a true result. In Seely *v.* The City of Pittsburgh (1 Nor. 360), which was a scire facias on a municipal claim for a frontage-tax, the facts were disclosed in a case stated. It was agreed that the line of the highway ran in part through the rural or suburban part of the city, and that the defendant's premises were situated in that rural district. The Act of the 2d of April, 1870, which had provided for the improvement and authorized the assessment, was held to be unconstitutional so far as it applied to lands in such a district. "The blending of town and country, of city lots and farm lands," was pronounced by AGNEW, C. J., to be "so plainly, palpably, rankly, and ruinously unjust," as to be "void as against the right of property as protected by the Bill of Rights." These cases have been followed in Kaiser *v.* Weise (4 Norris, 366), and recognized in Bidwell *v.* The City of Pittsburgh (Idem, 412). A rule of law settled by this Court, in the western district of the State, must necessarily prevail as a rule of law in the eastern district. The evidence was legitimate, and should have been received.

The third proposition was to prove "that the widening of Market Street was not called for by any reason, save as a public improvement, and to keep a grand avenue through the city of a uniform width to the Delaware County line." Perhaps the terms of the offer were vague, but under the rules laid down in the cases that have been referred to, it was admissible. Its object was to show that the improvement was for the benefit of the general public, without producing any local advantages to the owners of lands along its line. "Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be so imposed when the improvement is either expressed or appears to be for general public benefit." (SHARSWOOD, J., in Hammett *v.* Philadelphia, 15 P. F. S. 146.) It may be added that they cannot so be imposed when it is *proved* to be for the public benefit, without advantage to local properties.

A complete system for the improvement of this particular highway, was provided by the Act of the 5th of April, 1870. The consent of a majority of the property owners on the line; the selection by them of a contractor; the passage of an ordinance by the councils, and the advertisements, under the ordinance of 1862, were all dispensed with. Previous laws and existing ordinances were to be applied only in the collection of the cost of the work. Nothing appears in the record to show that notice was not given to owners, or that there was neglect to take "all other requisite proceedings to open the street."

In the argument of the fourth assignment of error, the counsel for the defendant discussed the cause as if in the trial the Act of the 19th of April, 1843, had been held applicable to this claim. That Act, which limited a defence to a claim to a denial that work had been done or materials furnished, to proof of value, or to proof of payment, or a release, extended only to the incorporated districts of the county of Philadelphia. Was this part of Market Street ever included in such a district. It seems certain that it was not in 1843. It could scarcely have been in West Philadelphia, which was chartered as a borough in 1844, and incorporated as a district in 1851. Was it within the district of Belmont, which was incorporated in 1853? The boundaries describing that district in the incorporating Act, indicate that it embraced no territory south of a line protracted westwardly from the western end of the northern boundary of West Philadelphia. It has sometimes been said that the Act of 1843 has been extended to the whole city, by an ordinance of Councils, under the authority of the proviso to the 44th section of the Consolidation Act of the 2d of February, 1854. But no instance is recalled in which such an ordinance has been produced. The question was not raised in the trial, and is unimportant now. But it may become material hereafter.

Substantially, the defendant's points were answered, and in that, as the case was tried, no mistake or inaccuracy has been discovered.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by WOODWARD, J.

May 7, 1879. Dissenting opinion by PAXSON, J. Had this case stopped where Seely *v.* The City of Pittsburgh ends, I would have allowed it to pass with a mere dissent. But as it is another step forward, I desire to place upon record my reasons for such dissent. They are:—

(1) The Act of Assembly under which Market Street was widened and paved, was an exercise of the taxing power of the Commonwealth. This power is lodged by the Constitution in the legislative department of the government, subject to the single restriction that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." Beyond this there is no constitutional restriction upon this power. It is bounded only by the necessities of the State and the will of the people. It was within the recognized power of the Legislature to enact that Market Street should be widened and paved, and the cost thereof assessed upon the property owners fronting on said street. Whether the power was exercised wisely, is a matter with which we have no concern. It is not a judicial question.

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(2) The Legislature having decided that the cost of said improvement shall be assessed in accordance with the foot-front rule, we are bound to assume that such rule is just until the contrary appears. It has been assumed and asserted that such rule is unjust and oppressive, as applied to rural property, but it has never been proved. On the contrary, the arguments against it have been based upon the assumption that improvements through rural property are oppressive, and, therefore, unconstitutional. There was no attempt made in the Court below to show that the foot-front rule was unjust in its application to the property of the defendant. The offer to show that the property on Market Street, from Forty-third to Sixty-third Street, was assessed as rural, was irrelevant, unless we assume that it is unconstitutional to open streets through rural property. There is nothing in the Constitution to warrant such assumption, and to adopt it would be to put a stop to the future growth of towns and cities. Street improvements of necessity precede building improvements, and rural property can only be converted into urban by opening, grading, and paving the highways. Whether a street is ripe for such improvements, is a legislative not a judicial question.

(3) I am unable to see what a jury have to do with questions of power or constitutional law. The law does not confer upon a jury in a common law proceeding the authority to revise the discretion of the Legislature, or to decide when streets shall be opened. The evidence rejected amounts to this, if it amounts to anything. This clearly appears from the third specification, which is, "that the widening of Market Street was not called for by any reason, save as a public improvement, and to keep a grand avenue through the city of a uniform width, to the Delaware County line." One jury will decide this question one way, another jury will take the opposite view of it. Neither, in my judgment, has anything to do with it, nor has this Court.

(4) If the Courts may thus interfere with the taxing power of the Commonwealth, I am unable to see where it is to stop. It is impossible, under any system of taxation, that perfect equality shall exist. In framing general laws there will always be cases of individual hardship. If a citizen may decline to pay his general tax, or his special tax in the way of assessments (and they rest substantially upon the same principle), until the question of the sufficiency of his benefits may be settled in a common law proceeding by a jury, we have introduced a principle into our jurisprudence which, in my judgment, is subversive of law and good government.

(5) I am opposed to the judiciary absorbing the powers of the co-ordinate departments of the government. The foregoing sufficiently indicates my objections to this judgment. I have no desire to elaborate. With profound respect for the views of the majority of the Court, I must be allowed to express the opinion that the practical difficulties in the way of this line of decision will hereafter be found to be very serious, if not wholly insurmountable.

Jan'y, '79, 182. Wm. M. M. March 6, 1879.

Merkel's Appeal.

Advancement—Question of intention—What evidence sufficient to rebut presumption of debt arising from existence of a note—Subsequent declarations of parties.

To establish an advancement, the intent must be proven to have existed at the time of the transaction, and by the contemporary acts and declarations of the parties. Subsequent verbal declarations are insufficient; they must be shown to be a part of the *res gestæ*, and accompany the acts done; but in connection with evidence of acts done or declarations made at the time, tending to show an intent of advancement, subsequent acts and declarations in recognition of the original act and intention are entitled to weight.

What evidence is sufficient to rebut the presumption of a debt arising from the existence of a note.

Appeal from the Orphans' Court of Berks County.

This was an appeal by J. Merkel, surviving administrator of D. W. Dietrich, from a decree of the Orphans' Court, reversing the report of the auditor appointed to ascertain whether a claim of $1500 presented against the estate of D. W. Dietrich was a debt or an advancement.

Before the auditor it appeared that in April, 1873, B. Dietrich and wife conveyed to their son, D. W. Dietrich, the decedent, a certain farm for the sum of $7610.11, taking in payment a certain amount in cash, two bonds bearing interest, and a note for $1500, payable on demand without interest, which note represented the claim now in suit. From the facts which appeared (as fully set forth in the opinion of the Court, *infra*), the auditor found that the note for $1500 had been intended to be an advancement, and reported accordingly.

Exceptions being filed, the Court (SASSAMAN, J.) sustained the exceptions, and reversed the auditor's report. J. Merkel, the surviving administrator of D. W. Dietrich took this appeal; assigning for error the sustaining of the exceptions and the reversing the auditor's report.

H. Y. Kaufman, for appellant.

Advancement is a question of intention, and there was ample evidence in this case to show that this note was so intended. The note was given merely as an evidence of the advancement.

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H. H. Swartz, for appellee.

The making and delivery by one party to another of a promissory note is *prima facie* evidence of indebtedness, and there is no evidence here of declarations made at the time to rebut this presumption. Subsequent declarations are not sufficient, the intent must be shown to have existed at the time.

May 5, 1879. THE COURT. A single question is presented by this record. It is whether the note of $1500 given by Daniel W. Dietrich to Benjamin Dietrich was intended as an acknowledgment of an advancement to the former, or as an obligation of indebtedness, the payment of which might be required? The auditor found that it was designed by the parties thereto as a recognition of an advancement. On exceptions to his report the Court overruled his finding, and decreed it to be a debt. This is assigned for error.

An advancement is an irrevocable gift by a parent to a child of the whole or part of what it is supposed the child will be entitled to on the death of the parent intestate (Eshleman's Appeal 24 P. F. Smith, 42). Both parties to the note died before the present contention arose. The case, therefore, lacks much express and direct testimony that could have been given by them. A conclusion must now be reached from a consideration of what is proved to have transpired at the time of its execution, and the reasonable and natural conclusion flowing from the subsequent acts and declarations of the parties to the transaction.

On the 4th of April, 1873, Benjamin Dietrich, the father, in consideration of $7610.11, conveyed to Daniel W. Dietrich, his son, a certain farm; the son gave to his father three instruments of writing of the same date, of the following amounts, to wit: a bond payable April 1, 1874, for $3950, with interest at 5 per cent.; another bond for $1500, with interest payable annually to Benjamin during his life, and after his death, annually, to his widow, Anna, during her life, and at her death the principal sum to his legal representatives; a note for $1500, payable on demand without interest, and the residue of the consideration in cash. This last note represents the claim in question. *Prima facie*, then, the note is a promise to pay money.

The evidence relied on to remove this presumption consists of several parts and kinds. The form of the note is a circumstance. It does not bear interest, nor is it payable on any specific day. Standing by themselves alone these circumstances would not in the slightest degree impair its validity as a note, yet the other evidence in the case tends to show that it was so written to hold as evidence of an advancement. Besides, if designed as an actual payment of part of the consideration for the land, no reason is shown why it should not have drawn interest. Daniel lived nearly three years thereafter, yet it does not appear that any demand was ever made on him for its payment, or that he recognized it as an existing claim for him to pay.

On the hearing before the auditor it was shown that the deed, and such other writings as were executed at the time of making the conveyance, were drawn by Solomon Dreibelbis, a justice of the peace, at the request of Benjamin Dietrich. A receipt purporting to have been executed on the same day, and claimed to have been given by Daniel to Benjamin, was given in evidence. It read as follows, to wit:—

"Received, Greenwich, April 4th, A.D. 1873, of Benjamin Dietrich, the sum of one thousand five hundred dollars, on account and part of the inheritance which is to come to me of the said Benjamin Dietrich.

$1500. (Signed) DANIEL W. DIETRICH."

The testimony of Dreibelbis establishes that the receipt is in his handwriting, and, we think, with reasonable certainty, that he must have drawn it at the same time he drew the other writings. Beyond this his want of memory throws very little light. He does not recollect seeing it signed. The evidence fails to disclose who took possession of the receipt or its whereabouts until it was shown to be in the hands of Daniel's administrator two or three months before the audit. Daniel died on the 2d of March, 1876, and letters of administration on his estate were issued to Benjamin Dietrich and the appellant. Benjamin died on the 8th of March, 1877. Joseph Kutz testified that, after Daniel's death, Benjamin told him, "that he had left standing in the property $1500 on account of his son Daniel's inheritance." Peter Dietrich testified that, in a conversation which he heard between Benjamin and the widow of Daniel, Benjamin said that $1500 would remain in the property belonging to Daniel's estate. Henry W. Dietrich, a brother of Daniel's, testified that in part payment of the bond of $3950, Daniel gave a note of $1500, which his father gave to him (Henry) "for the purpose of keeping my brother Daniel and myself alike." As Henry neither paid nor agreed to pay anything for this note, the only reasonable construction to put on that language is, that the father thereby declared he had already advanced Daniel that amount, and therefore made an advancement of equal amount to Henry. This evidence comes from one testifying against his interest, as he now claims to hold the note in controversy against Daniel's estate.

Still further, in August, 1876, Benjamin united with his co-administrator in an application to the Orphans' Court for an order to sell the real estate of Daniel for the payment of his debts.

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They therein set forth a list or statement of the debts of said Daniel deceased, and swore it was just and true to the best of their knowledge and belief. That statement included, *inter alia*, the note of $1500, then due to Henry W. Dietrich, and the bond held by Benjamin; but did not, in any manner, mention the note of $1500, now in question. This omission of Benjamin to mention it as a part of the indebtedness of Daniel due to himself, when his sworn duty required him to present a true statement, is only reconcilable with the fact that he did not then consider it an indebtedness. It is true, under objection, the appellee gave some parol testimony, with the view of destroying the effect of this omission, that soon after the petition was sworn to, Benjamin declared he had another claim of $1500 against the estate. It appeared, however, he stated in the same conversation that, at the time of the execution and delivery of the deed, he had given Daniel $1500 on account of his inheritance; but that Daniel, in a day or two thereafter, returned and gave him a note.

This evidence wholly fails to show any reason for not stating it as a debt in the petition. It admits that, at the consummation of the purchase, it was agreed the $1500 should remain as an advancement, but seeks to change the effect of that agreement by alleging a subsequent one. This statement by Benjamin of a subsequent contract is insufficient to establish one. It was not made in the presence of Daniel, but after his death. Nor can the fact that Benjamin assigned the note to Henry on the 6th of February, 1877, without recourse, affect the character which had been impressed on the instrument during the life of Daniel.

Advancement is a question of intent; that intent must be proven to have existed at the time of the transaction, and by the contemporary acts and declarations of the parties. Verbal declarations of a parent that money, for which he held a note or bond against a child, was intended as an advancement, are insufficient to establish it as such. They must be shown to be a part of the *res gestæ*, and accompany the acts done. If, however, there be evidence of acts done or declarations made at the time of the transaction tending to prove that the money was then so intended by the father, his subsequent acts and declarations in recognition of the original act and intention, are entitled to weight. The acts of the parties at the time of the conveyance, recognized and confirmed by the subsequent acts and declarations of the father, are amply sufficient to justify the conclusion that the money mentioned in the notes was, at the time of its execution, intended as an advancement. There is no competent evidence of any contract afterwards to change its effect. The learned Judge, therefore, erred in decreeing otherwise.

Decree reversed at the costs of the appellees; exceptions to the auditor's report dismissed, and his report confirmed.

Opinion by MERCUR, J.

January, '78, 56. March 6, 1879.

Ritter et al. v. The Lehigh Valley R. R. Co.

Principal and agent—Contract by agent—Secret agreement to receive share of proceeds—Fraud.

A secret agreement, between an agent employed to purchase and the vendor, that such agent shall receive a share of the profits of the sale, renders the contract fraudulent and voidable, and it cannot be enforced against the purchaser.

Error to the Common Pleas of Lehigh County.

Assumpsit, by E. F. Ritter *et al.*, trading as Ritter & Co., against the Lehigh Valley R. R. Co. to recover $440, the amount of freight paid by plaintiffs under an alleged agreement with the agent of the defendants that the said sum would be repaid. Plea, non-assumpsit. On the trial, before LONGAKER, P. J., the following facts appeared:—

The plaintiffs are engaged in cutting and clearing timber-lands, and selling railroad-sills and lumber, and own a timber tract on the line of the Ironton R. R., some distance from its junction with the defendants' line. One Spencer, the agent of the company, whose duty it was to see that certain sections of the road were in good repair, and for that purpose to purchase sills or ties and other necessary materials, made a contract with the plaintiffs by which the latter agreed to sell all the sills, etc., made on the above-mentioned tract to the defendants at a stipulated price; the plaintiffs further alleged that Spencer agreed for the company that it would repay them the freight over the Ironton R. R., which they were obliged to pay in the first instance on account of the defendants' agents living at a distance, and because the railroad refused to ship any lumber unless the freight was prepaid. The defendants denied that any such agreement had been made by Spencer, and further produced evidence that he had made a secret agreement with the plaintiffs by which he was to receive a share of the profits of the sale of these sills to the railroad.

The Court charged the jury, *inter alia*, as follows: "If, however, the testimony is of such a character as to satisfy you of the fact that Osborn Spencer in making this contract was acting within the scope of his authority, and it was thus made, then the defendants will be bound by this contract, unless you are reasonably satisfied from the evidence in this cause that the plaintiffs, or some

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of them, entered into a combination with O. Spencer to defraud the defendants. I say to you that O. Spencer, being the agent of the defendants to purchase these sills, had no right to contract to receive any compensation whatever from the plaintiffs. If he did so, it was a fraud upon the company, it was a fraud in which the plaintiffs participated, and they can reap no benefit from that fraud; it will avoid the sale. But, insomuch as the defendants have taken the fruits of that contract, received the sills and used them, and the rule of law is that where the contract is tainted with fraud, it may be disaffirmed, the defendants must pay the market value of the goods delivered to them."

Verdict for defendants, and judgment thereon; the plaintiffs took this writ, assigning for error the charge of the Court as above given.

E. Harvey, for the plaintiffs in error.

Two distinct contracts were made between the plaintiffs and the defendants; one to sell the sills at a certain price, which was executed on both sides; and the other for the repayment to us of the freight. If the agent did receive a profit from the sale of the sills, that would not vitiate the second contract. Moreover, the remarks of the Court about our right to recover the market value of the sills only tended to mislead the jury; it was acknowledged that that was paid, and we only sued for the freight we had advanced.

R. E. Wright & Son, for defendants in error.

It is perfectly well established that when an agent employed to purchase, makes a secret contract with the vendor by which the agent is to receive a share of the profits of the sale, the contract cannot be enforced against the purchaser.

Everhart *v.* Searle, 21 Sm. 261.
Fisk *v.* Sarber, 6 W. & S. 22.
Cadbury *v.* Duval, 10 Barr, 272.
Aberdeen Railway Co. *v.* Blakie, 1 Macq. 461.
Flanagan *v.* Great Western R. W. Co., 7 L. R. Eq. 116.
Fox *v.* Mackreth, 1 Lead. Cas. in Equity, 219.

March 24, 1879. THE COURT. No one can doubt for a moment that if an agent employed to purchase goods makes a secret agreement with the seller to receive a profit or commission on the transaction, such an agreement taints the contract with fraud, and all the seller can recover is the fair market price of the article—if he can even recover that. This is the dictate of sound morality, as well as of law. We see no error in the answer and charge of the learned Court below of which the plaintiffs in error have any right to complain.

Judgment affirmed. PER CURIAM.

Oct. & Nov. '78, 116. Nov. 7, 1878.

McQuiston et al. v. The Central Board of Education.

Usury—Acts of February 12, 1869, and February 24, 1870—Construction of.

The T. W. Bank having agreed under the provisions of the Act of February 24, 1870, to pay the Central Board of Education of Pittsburgh 6⅞ per cent. interest on daily balances, and to charge 8 per cent. on overdrafts:

Held, That the contract was authorized by the statute, and was, therefore, binding.

Held, further, That under the contract the bank was not entitled to the commission allowed by the 10th section of the Act of February 12, 1869.

Error to the Common Pleas No. 1, of Allegheny County.

Debt, by the Central Board of Education of the city of Pittsburgh, against James McQuiston and others, sureties on the bond of the Tenth Ward Bank, to recover a balance of $2518.02, with interest, claimed to be due from the latter as the depositary or treasurer of the Board.

A case stated was submitted to the Court, from which it appeared that the Tenth Ward Bank became the depositary or treasurer of the Board, under a contract made in pursuance of the Act of February 24, 1870 (P. L. 231),* by which the bank agreed to pay 6⅞ per cent. interest on daily balances, and to charge 8 per cent. on overdrafts.

Upon a final settlement, the bank claimed that the board could not require it to pay more than six per cent. interest on daily balances, and that it (the bank) was entitled to a commission of one per cent. on the moneys that had passed through its hands as depositary or treasurer, for its services as treasurer of the Board, under the provisions of the 10th section of the Act of February 12, 1869 (P. L. 150).†

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* "An Act Supplementary to 'An Act relating to the school laws of the city of Pittsburgh, in the county of Allegheny,' approved the twelfth day of February, Anno Domini one thousand eight hundred and sixty-nine.

"Section 1. That the Central Board of Education of said city shall . . . . select from the several banks . . . . a treasurer or place of deposit . . . . ; and the selection shall be made upon the opening of said proposals, of the bank or exchange broker who shall give satisfactory security by at least four sureties, by bond, . . . and shall pay for the use of said school fund the highest rate of interest on current balances.

"Section 2. . . . . any part of said school law inconsistent herewith is hereby repealed. . . . . ."

† "Section 3. That annually, . . . the members of said Central Board shall meet and organize by choosing . . . . a secretary and treasurer; which last-mentioned officers may be members of the Board or not, at the direction of the members thereof.

"Section 10. That the treasurer . . . . shall be allowed to retain for his services a sum not exceeding one per centum on the money received and paid out by him."

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The Court entered judgment on the case stated in favor of the plaintiff, for the whole of its claim, STOWE, P. J., in an opinion filed, saying: "The questions raised by the case stated are: First. Whether plaintiff, under the supplement to the Act of 12th of February, 1869, approved the 24th day of February, 1870, has a right to make a valid contract with the Tenth Ward Bank, for which the defendants are sued in this case as sureties, for the payment of a greater interest than 6 per cent. for the privilege of acting as treasurer or depositary for plaintiff.

"Second. Whether the provision in said Act of 12th February, 1869, 'that the treasurer shall be allowed to retain for his service (as such) a sum not exceeding one per cent. on the money received by him,' is repealed by said supplement.

"Upon the first question, we are clear the agreement for more than 6 per cent., to wit, as set out in the case stated, was valid and legal.

"As to the second, we are not free from doubt; but thinking that the general intent of the Legislature in passing the said supplement was to change the entire system as it had existed in regard to the treasurer of the School Board, and that the purpose was to enable the board to obtain a compensation for allowing one to be treasurer, instead of compelling them to pay for the services of a treasurer, as before provided, we are upon the whole led to conclude that the second question should also be decided in favor of the plaintiff."

Whereupon the defendants took this writ, assigning the judgment for error.

M. A. Woodward (*J. L. Koethen* with him), for the plaintiffs in error.

The bank, by paying more than six per cent. interest, would be obliged to violate the usury laws when loaning its funds. As violation of the law is not encouraged by legislation, it would be an unreasonable construction of this statute, to say, that the Legislature intended to allow the parties to contract for more than six per cent. interest, thus compelling the bank to adopt a suicidal policy.

The Act of 1870 did not repeal the 10th section of the Act of 1869, hence the depositary was entitled to the commission formerly allowed to the treasurer of the Board.

Josiah Cohen, contra.

The power to take above legal interest was a legislative grant in aid of that cause which lies nearest the best interests of the State—the education of its youth. It was a power specially delegated for a special purpose, and one which proved far more beneficial, *in this instance*, to the bank, which took 8 per cent., than to the board, which only received 6⅞ per cent.

The Act of 1869 is inconsistent with the Act of 1870, and is, therefore, repealed thereby.

January 6, 1879. THE COURT. It was provided by the 10th section of the Act of 12th February, 1869 (P. L. 152), that the treasurer of the Central Board of Education of the city of Pittsburgh, "shall be allowed to retain for his services, a sum not exceeding one per centum on the money received and paid out by him." The supplement to the foregoing Act, approved February 24, 1870 (P. L. 231), makes a change in this respect, and provides a system by which the custody of the school fund should be made a source of profit to the Board. The first section of the supplement requires that the treasurer shall be selected from the several banks, or regular exchange brokers, of the city of Pittsburgh; directs the Board to invite sealed proposals from such banks and brokers to act as the treasurer or depositary of said school fund, whereupon the "selection shall be made upon the opening of said proposals of the bank or exchange broker who shall give satisfactory security of at least four sureties, by bond, to be approved by said Board, and shall pay for the use of said school fund, the highest rate of interest on current balances." The bond in controversy was given under this Act, and its payment is resisted by the sureties, because: (1) The contract is not binding as to the excess of interest over the legal rate; and (2) That the bank was entitled to deduct a commission of one per cent. upon the amount of money received and paid out while acting as treasurer. Neither position is tenable. The contract for more than six per cent. was legal because authorized by the supplement. The bank or broker who should bid "the highest rate of interest on current balances," was to be selected as treasurer. The Act does not restrict the bid to the legal rate of interest. The object was, evidently, to give the custody of the money to the bank or broker who should bid the highest for its use, evidently overlooking the fact that, so far as money is considered, the highest bidder is not always the best. There is nothing in the supplement of 1870 allowing a commission to the treasurer. No reference to it was made by the bank in its bid. It was, evidently, not in the contemplation of the parties at the time the contract was made. The commission allowed by the Act of 1869 was not to exceed one per centum. The rate, therefore, would have been a subject of agreement even were commissions allowed under the supplement of 1870, and would naturally have been included in the bid. It does not appear there or elsewhere in the contract of the parties, and we think was properly disallowed.

We see no error in this record, and the judgment, therefore, must be affirmed.

Opinion by PAXSON, J.

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Jan. '79, 61. Feb. 3, 1879.

Cremers's Estate. D'Arros's Appeal.

Husband and wife—Joint earnings—Incapacity of the wife to devise away from her husband—Act of May 4, 1855—What acts of the husband forfeit his right to his wife's personal property upon her death without issue—Practice—Evidence, what necessary to enable the Court to review—Exceptions, filing of.

The Supreme Court will not review the findings of fact in the Orphans' Court unless the entire evidence is brought up.

Semble, that the Court will dismiss an appeal where no exceptions have been filed by the appellant in the lower Court.

Under the Act of May 4, 1855, to deprive the husband of his right to his wife's personal property upon her death without issue, failure on his part to support her must concur with drunkenness.

Certiorari to and appeal from the Orphans' Court of Philadelphia County.

Appeal of Marie D'Arros from a decree dismissing exceptions to and confirming the adjudication upon the account of the executor of the estate of Marguerite Cremers, deceased. The facts are these:—

Marguerite Cremers died without issue March 28, 1874, having left a will, in which after certain pecuniary legacies, she bequeathed all the residue of her estate to her sister, Mary Roberts, afterwards Marie D'Arros. She further provided as follows:—

"I do not desire any construction to be placed upon any clause of this will by which any of my said estate shall accrue to my husband, Calixe Cremers."

In 1868 the decedent and her husband, who were natives of France, arrived in the city of Philadelphia, with about $200 in money in their possession, with which they began housekeeping in a small way. They were industrious and frugal, the decedent working as a dressmaker, and the husband as a tailor. Their earnings were deposited by the decedent in the Academy of Notre Dame, and at the end of two years they had accumulated money enough to buy out the establishment of a mantuamaker, to which they both removed, the husband buying the furniture. Business cards were printed and circulated bearing their joint names. About three years before the decedent's death the husband began to indulge to excess in strong drink, and although continuing to work at his trade of a tailor or cutter, would frequently return home in a state of intoxication, when his conduct was sometimes violent. He was often brought home drunk by the police officer, both by day and night, and was sometimes picked up from the pavement, and taken to the station-house.

At other times he was sober, worked at his trade, gave his wife his earnings, and assisted her in her business, by keeping her books of account and making out bills for her.

The decedent went to church with her husband, was kind and affectionate to him, nursed him in sickness, and lived happily with him, except at times when he drank to excess. She managed the domestic affairs of the family, paying servants' wages, house rent, etc., which was sometimes paid by the husband.

In August, 1873, she accompanied him to the steamer, and gave him money to visit his relations in France. He remained abroad about six months, during which they corresponded with each other, and during part of the time the husband was at work. He returned to Philadelphia as soon after the death of his wife as he could, and went to his house, where he was refused admittance by his sister-in-law, who was in possession. At the audit the husband claimed the balance of the fund in the hands of the executor after payment of administration expenses, etc.

The auditing Judge (HANNA, P. J.) found that the business was conducted in the joint names of husband and wife; that the husband gave his wife his earnings, or at least part of them; that though addicted to frequent intoxication, he did not become an habitual drunkard; that he did not desert, refuse to support, or neglect his wife; and that the goods, chattels, property, and effects in possession of the decedent at the time of her death were in the joint possession of herself and husband.

He was, therefore, of opinion that the facts did not present a case contemplated by the Act of 1855, but that the husband was the owner of and entitled to the custody of the goods, stock in trade, money, and other personal property of the decedent in her possession at the time of her death. He accordingly awarded the balance of the fund in the hands of the executor to the husband, disallowing the accountant credit for payment of collateral inheritance tax. To this adjudication the executor filed exceptions, which the Court below dismissed, confirming the adjudication. (Reported 6 WEEKLY NOTES, 240.)

Marie D'Arros, the residuary legatee, took this appeal, assigning for error the decree of the Court, but no exceptions were filed by her.

Benjamin Harris Brewster, for the appellant.

The evidence shows that the husband was for three years in an almost constant state of intoxication, and thereby physically incapacitated from contributing to the support of his wife. Although he did not formally, yet he practically by his conduct refused to support her. He went abroad, and abandoned her to her own resources. In either case he is within the Act of 1855, which

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is in the alternative, providing for cases in which the husband "shall neglect, or refuse to provide for his wife, or desert her."

The case is governed by—

Black *v.* Tricker, 9 Sm. 13.

Daniel Dougherty, for the appellee.

The wife undertook to devise away from her husband the joint earnings of herself and husband, which in law are the property of the husband.

Speakman's Appeal, 21 Sm. 25.
Bucher *v.* Ream, 18 Id. 421.

To bring the case within the Act of 1855 there must be proof not only of habitual drunkenness, but also of desertion, and refusal to support.

But the evidence does not sustain that. The husband's habit of occasionally drinking to excess does not constitute him such a drunkard or sot as is contemplated by the Act. There is a plain distinction between occasional indulgence in drink and habitual drunkenness.

But the appellant has no standing in this Court, because she did not take exceptions in the Court below. It is a general rule that the Supreme Court will not reverse a decree except on exceptions filed in the Court below from which the appeal is taken.

Mylin's Estate, 7 Watts, 64
Hise's Estate, 5 Watts, 157.

Black *v.* Tricker (*supra*) is distinguishable, for there the evidence was that the husband repeatedly and for a long period of time illtreated and neglected his wife and family, refusing to provide for them, and repeatedly deserting them, and, further, the property was acquired by the wife after the period of the husband's drunkenness and refusal to provide for his family.

March 3, 1879. THE COURT. The evidence printed in the appellant's paper-book is headed "Summary of Testimony." It is clear that to enable this Court to review the findings of fact in the Court below, the entire evidence should be brought up. The present appellant did not file exceptions, and the executor who did has not appealed. He is the only party aggrieved by the surcharge of the collateral inheritance tax, and that exception is not before us. We think, however, though the appeal might be dismissed on these grounds without going further, that the conclusion arrived at by the learned Court from the facts as found by the auditing Judge was entirely right.

Decree affirmed, and appeal dismissed, at the costs of the appellant.

PER CURIAM.

July, '78, 92. Jan. 24, 1879.

Orr's Appeal.

Decedents' estates—Evidence—Admission of indebtedness by administratrix.

An acknowledgment of the estate's indebtedness by an administratrix is inadmissible to establish a claim against the estate.

As a widow is incompetent as a witness in support of a claim against her late husband's estate, so her admissions, declarations, or promises are not competent evidence.

Appeal from the Orphans' Court of Philadelphia County.

This was an appeal by Jane Orr from a decree dismissing her exceptions and confirming the adjudication made on the account of Matilda McFarland, administratrix c. t. a. of William McFarland, deceased. The auditing Judge (HANNA, P. J.) found the following facts:—

On September 30, 1872, the claimant, Jane Orr, was the owner of five shares of the stock of the American Building and Loan Association, and on that day assigned and transferred the certificate which she then held unto the decedent, which assignment was on the same date approved by the secretary of the association.

Upon said certificate was printed the assignment in the following words: "For value received we, the undersigned subscribers, do hereby assign, transfer, and set over this certificate, together with all benefits and advantages to be derived therefrom." To which the claimant affixed her signature. Decedent subsequently transferred said shares of stock to the association as collateral security for a loan to him.

He died March 1, 1875. Since his death the accountant, who is also the widow, has admitted the indebtedness to claimant and promised to pay it, and gave to claimant the following acknowledgment, to wit:—

$1000. Phila., Oct. 1, 1877.

This is to certify that I hereby acknowledge owing and promise to pay to Miss J. Orr the sum of one thousand dollars, together with lawful interest thereon, the rate of said interest being six (6) per cent. per annum, or five dollars ($5) per month. MATILDA MCFARLAND.

The auditing Judge decided that the words "for value received" in the assignment raised a presumption of a valuable consideration paid by the testator, which the admissions of the accountant, either as widow or as administratrix, were incompetent to rebut, and he therefore disallowed the claim. Exceptions were filed, and these being dismissed by the Court, the appellant took this appeal, assigning for error the action of the Court.

Albert E. Peterson and *Henry Reed* (with them *Wm. W. Wiltbank*), for the appellant, argued that the Court below erred in attaching

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an undue weight to the words "for value received," and in denying the power of the administratrix to admit the validity of a claim. These words have only a formal effect where the consideration is denied.

The second point is equally well settled. An executor or administrator has power to state an account, and to bind the estate by his admissions.

Hill *v.* Buckminster, 5 Pick. 393.
Faunce *v.* Gray, 21 Id. 245.
Heywood *v.* Heywood, 10 Allen, 106.
Haleyburton *v.* Kershaw, 3 Dessaus. 111.
Matoon *v.* Clapp, 8 Ohio, 249.
Sample *v.* Lipscomb, 18 Ga. 690.
Lawson *v.* Powell, 31 Id. 683.

The cases of Loud *v.* Bull (1 Wh. 238) and Lobb *v.* Lobb (2 Casey, 331), the only authorities relied on by the Court below, are not in point. In the first, it was held that an administratrix could not bind the real estate of her decedent by confessing a judgment for a debt which was incurred several years after the decedent's death. In the second, there is no suggestion of what the decision would have been had the evidence there offered been to prove an original liability of the estate.

W. W. Montgomery, contra, contended that the rule established by the appellant's cases was not the law of Pennsylvania. But even if it were, the admission of the accountant is made by her personally and is only a personal promise to pay.

February 24, 1879. THE COURT. The acknowledgment and admission of the administratrix were clearly inadmissible to prove a claim against the estate of the decedent. Such we consider to be the well-settled law of this State. (Lobb *v.* Lobb, 2 Casey, 331; Anderson *v.* Washabaugh, 7 Wright, 119; Clark *v.* Maguire's Adm'r, 11 Casey, 259; Fleck *v.* Hagar, 1 P. F. Smith, 464; Hummel *v.* Brown, 12 Harris, 312.) The acknowledgment given in evidence did not profess to bind the estate of the decedent. It was the admission of a debt due by the widow, not as administratrix, but individually. It is true the auditing Judge states that since the death of the decedent the accountant has admitted the indebtedness to the claimant, and taking it to be an admission of the indebtedness of the estate, it was insufficient to charge the estate for the reason stated. We think the evidence adduced was entirely insufficient to establish the demand of the appellant.

Decree affirmed and appeal dismissed at the cost of the appellant

PER CURIAM.

Common Pleas—Equity.

C. P. No. 2. June 5, 1879.

Warren v. Stagner.

Partnership—Receiver—When one partner will be appointed.

Bill in equity for winding up partnership and for appointment of receiver.

Application for appointment of plaintiff, one of the partners, as receiver.

It appeared from the bill that the parties had been in partnership under articles, and that the time had expired; that the plaintiff had furnished all the capital; that the defendant since the dissolution had been collecting the claims due the firm, and applying them to his own use. These facts were admitted by defendant. The bill further averred that the defendant had largely overdrawn his share of profits, and that on full realization of all the assets and final account nothing would be due to defendant. This the defendant denied.

Defendant did not oppose the appointment of a receiver, but urged that he should be a disinterested person.

Junkin, for complainant, cited—

Kerr on Receivers, p. 109, sect. 10, and ch. 4, p. 136.
Wilson *v.* Greenwood, 1 Sw. 471.
Maund *v.* Allies, 4 M. & Cr. 507.
Sheppard *v.* Oxenford, 1 K. & J. 501.
Blakeney *v.* Dufaur, 15 Beav. 44.

THE COURT. It appears clearly here that the complainant will be entitled to very nearly, if not quite all, that may be realized from the assets of the firm, and that the amount to be so realized will depend largely on the management of the assets, and especially the proper disposition of the goodwill and fixtures. It, therefore, follows that the complainant's own judgment ought to be allowed great weight in the management of the winding up, and as there is nothing to impeach his integrity or his capacity for this business, we think he is entitled to be appointed receiver. The order will be made, however, with a stipulation, that complainant is to perform the services without commissions, and that the goodwill shall be sold without delay, with leave to either party to purchase.

Decree accordingly.

Oral opinion by MITCHELL, .

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Common Pleas—Law.

C. P. No. 2. March 5, 1879.

In re Petition of Thomas Banes.

Satisfaction of lost mortgages—Act of April 10, 1849, P. L. 621—The publication required by the Act and rules of Court being for the protection of unascertained persons will not be dispensed with on motion of the parties before the Court—Practice.

Thomas Banes filed his petition for a decree of the Court for the entry of satisfaction of a lost mortgage, which he alleged to have been paid.

The answer of Charles J. Stillé set forth that the mortgage had been made by the petitioner and another jointly, that the mortgage had long since been paid, but that he could not recall the circumstances nor the reasons why satisfaction had not been entered at the time.

Ernst, for the petition, requested the Court to make an order dispensing with the advertisements required by the rule of Court.

THE COURT. Though quite satisfied of the good faith, and propriety of the application, yet where there is a possible outstanding interest, *e. g.* an assignee or one of two mortgagors who having paid the mortgage is entitled to subrogation, the Court cannot make an order without notice by publication as provided in the statute and rules of Court.

Order refused until publication should be made.

C. P. No. 4. March, 1879.

Persch to use of Wallace, Assignee, etc. v. The Consolidation National Bank.

Bailment—Stock held by bailee pledged by him as collateral.

A bailee of stock who has pledged the same cannot recover any excess over the debt due, realized by the pledgee from a suit against the corporation in which the stock is held for a refusal to transfer said stock, when the owner of the stock gave the notice which occasioned the refusal.

An assignee for the benefit of creditors does not acquire any new right or title after the date of the assignment.

Rule to show cause why non-suit should not be taken off.

Case, by the assignee for the benefit of creditors of John P. Persch, to recover an alleged balance due by defendant, after payment of a certain debt which it had collected from collaterals pledged therefor. On the trial the following facts appeared: On December 1, 1863, Persch made an assignment for the benefit of creditors to one Bernard Sprungk, and in 1868 Sprungk was discharged, and Wallace, the equitable plaintiff, was substituted in his stead. Among various transactions was one in which the defendant discounted a note of the plaintiff for $24,000, due December 29, 1863, attached to which were certificates for 253 shares of the stock of the West Branch and Susquehanna Canal Company, and seventy-three shares of the stock of the bank defendant. Cash to the amount of $1250 was collected, and the seventy-three shares of stock of the bank were sold, and the contest was narrowed to the amount actually received by the defendant from the 253 shares of stock of the West Branch and Susquehanna Canal Company.

These 253 shares were the property of James W. Quiggle, and Cordelia his wife, who entrusted the same to Samuel Hepburn, as their trustee, and to whom they executed an assignment or transfer, with the usual power of attorney. Hepburn for a consideration of one per cent. per month loaned the same to Persch, who was a broker, for the purpose of being used as collateral. Persch, in the course of his financial operations, pledged the said stock with the defendants as collateral for the note of $24,000. About the time this note matured, Mr. and Mrs. Quiggle discovered that their trustee had misappropriated their property, and the pledge made of it by Persch. Mr. and Mrs. Quiggle and Hepburn then gave notice to the Canal Company of the negotiation of their stock, and offered to indemnify the Canal Company if they would refuse to recognize a transfer of the stock. (See Quiggle *v.* Persch, Hepburn's Appeal, 7 Smith, 247.) The note of Persch having matured, and not being paid, the bank looked to its collateral. It demanded a transfer of the stock on the books of the company, which was refused, and having made a sale of the stock, and being unable to complete the title by a legal transfer, it commenced suit against the Canal Company on November 22, 1864, for the recovery of the damages suffered by the failure to transfer the stock. (See Bank *v.* West Branch Canal Co., Leg. Gaz. June 3, 1870, p. 169.)

A judgment was entered by the Supreme Court in this last case in favor of the bank for $32,672.85. This amount was based upon the value of the stock at the time of the refusal to allow the transfer and interest. As the stock in the mean time had depreciated, it was decreed to be sold at public sale, and the difference between the price thus realized and the amount of the judgment was paid in cash by the Canal Company to the bank. The sum thus realized, together with the stock of the bank and the cash received, it is alleged exceeded the debt due to the bank on the $24,000 note, and

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it is now maintained that the assignee for the benefit of creditors of Persch is entitled to recover such surplus.

It was shown by the testimony of Persch, and the records of the cause, that the title to the stock of the West Branch and Susquehanna Canal Company was not in Persch, but was in Mr. and Mrs. Quiggle, as recited. It was also shown that after the judgment in the case of Quiggle *v.* Hepburn and Persch, and after his assignment to Sprungk, Persch had paid on account thereof about the sum of $3000.

On this evidence ELCOCK, J., entered a non-suit, and the present rule having been obtained—

Geo. W. Thorn, showed cause.

The title did not pass to the assignee; nothing but what a man owns can pass to his assignee for the benefit of creditors. Persch was not the owner of the stock. The bank was compelled to defend its title against the real owners. The collateral holder of stock is entitled to have all reasonable expenses in maintaining the title to the same.

Geo. L. Crawford, for the rule.

The bank has $17,000 over and above all, which it will take as clear profit. Our title was fixed before Hepburn gave notice to the Canal Company.

C. A. V.

April 5, 1879. THE COURT (after stating the facts, *ut supra*). The question is, had Persch at the time of the assignment for the benefit of creditors any right to said stock for which he could maintain an action against the bank. His assignee, not being a purchaser for value, stood simply in the place of his assignor. If he had paid the principal debt to the bank, and received the collaterals back, he would have been obliged to deliver them to Mr. and Mrs. Quiggle. As a bailee of the stock, in form, he would be entitled to maintain an action for it, if he was an honest bailee; but as he was not, and had no right whatever to traffic with the stock, his assignee would have no claim arising therefrom. A part payment of $3000 on the judgment in the suit of Quiggle *v.* Hepburn and Persch might vest in him some right to be determined between those defendants, but as that right was not perfected at the time of the assignment, and was not a right as against the bank, or by virtue of a *bona fide* title to the stock existing prior to the assignment, the assignee had no title.

But if it was admitted that the assignee had a right to maintain such action, the action by the Bank *v.* The Canal Company, being for damages for a refusal to transfer, and that being founded upon the actual amount which the bank would suffer as a loss upon its debt for which the stock was pledged, the bank would in equity be only entitled to the actual loss upon its debt. Therefore, if any amount was realized from other collaterals pledged for said debt, it went, as a matter of course, in reduction of the bank's loss, and after crediting all sums realized the Canal Company would be entitled to a return of the amount between the sum it paid and the actual independent loss of the bank; nor could Persch or Hepburn recover this, because they were parties to the wrong, and occasioned the very loss which the Canal Company had to pay. To give them standing they would have had to pay the Canal Company the total amount which it was obliged to pay by reason of their fraudulent conduct and notice; this they have not done. As no balance, therefore, is found to exist in the defendants' hands to which plaintiff was in any way entitled, the non-suit was properly entered.

Rule discharged.

Opinion by ELCOCK, J.

C. P. No. 4. Feb. 15, 1879.

Adams v. C. D. Harland, defendant, and the Executors of Eliza Harland, garnishee.

Attachment execution—Judgment against executors pending the final determination of exceptions to adjudication—Stay of execution.

Rule for judgment against garnishees.

The answer of the garnishees to the interrogatories of plaintiff, a judgment creditor of Chas. D. Harland, stated that the respondents had filed their account as executors in the Orphans' Court, upon the adjudication whereof there had been awarded to Chas. D. Harland as a legacy $500, and as surplus $607.25, total $1107.25; that exceptions had been filed which had not yet been heard, and, until the final determination thereof, it would be impossible to ascertain the exact amounts payable to Chas. D. Harland; "but in the event of either the dismissal or sustaining of said exceptions there will be payable to said Charles D. Harland the said amount of $1107.25, less costs and expenses."

Henry Edw. Wallace, for the rule, cited—

Lorenz's Administrators *v.* King, 2 Wr. 93.

THE COURT. On the principle adopted in Woodward *v.* Carson (6 WEEKLY NOTES, 396), you are entitled to a judgment upon such terms as will not interfere with the rights of the parties as finally determined. The present state of the record shows more than enough money in the hands of the garnishees to answer the debt of defendant.

Judgment for $475 and costs, the plaintiff to issue no execution until the exceptions filed in the Orphans' Court shall be finally disposed of.

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C. P. No. 4. June 7, 1879.

Eldred v. Richardson.

Affidavit of defence law—Instrument not within the Act—Interpleader bond.

Rule for judgment for want of a sufficient affidavit of defence.

Debt, against the surety on a claim of property bond filed upon a rule to interplead. The plaintiff having filed a copy of the bond, the defendant set forth in an affidavit that he was advised by counsel that he was not bound to file an affidavit of defence, as the instrument was not a bond for the absolute payment of a determinate sum of money, but only intended as a security for damages for not producing certain goods, the value of which did not appear on the record.

Louis F. Benson, for the rule.

M. Arnold, contra.

THE COURT. These bonds are not within the Act, as this Court has before decided, because the amount to be recovered is unliquidated and undetermined. The condition is that the goods be forthcoming. The value of the goods must be ascertained by a jury.

Rule discharged.

Orphans' Court.

April 22, 1879.

Calahan's Estate.

Decedents' estates—Will—Devise of income of real estate in trust for wife during life or widowhood, and upon death or marriage the real estate to be sold and proceeds divided among children "then living"—Interest of remaindermen, whether vested or contingent—How such devise is affected by election of widow to take against will.

Sur exceptions to Master's report, upon petition for order of sale.

Timothy Calahan, the decedent, by his will, provided as follows:—

"I devise to my wife Margaret, the same to be held in trust for her by my executor hereinafter named, for and during the period of her natural life, or so long as she shall remain my widow, the premises in which I now reside . . . said executor to receive the rents of the same . . . and pay over balance to my said wife; and at her decease, or upon her remarriage, I hereby direct the same to be sold by my executor, either at public or private sale, . . . and the net proceeds thereof to be divided equally among my children *then living*, and the child or children of such as may be deceased," etc.

The testator appointed his brother, William Calahan, his executor. The widow declined to take under the will, but elected to take under the Intestate Act, whereupon the executor petitioned the Court for an order of sale, for purposes of distribution, alleging that although the widow was alive and unmarried, still, by her aforesaid act, the interest in the realty devised to her by the testator was at an end. This petition was united in by the widow, and all the children, one of whom, a minor, was joined by her husband. The Court referred the matter to a Master, who reported, in substance, as follows: That the interests in the proceeds of the house proposed to be sold, were in the nature of contingent remainders, and would not become vested until the death or marriage of the widow, until which time it must remain uncertain as to who will take the fund; that if the house were sold now, the proceeds must be reinvested to await the contingency; and that a sale for the purpose of present distribution would be for an unauthorized purpose, and the sale would therefore be unauthorized; that the Court is without jurisdiction to make it, and it would pass no title, citing: Torrance *v.* Torrance (3 Smith, 505); McBride *v.* Smyth (4 Smith, 245); Huber's App. (30 Smith, 348); List *v.* Rodney (2 Norris, 483); Delbert's App. (Ibid. 462).

The Master recommended that the prayer of the petition be refused, and the petition dismissed.

To this finding of the Master, the petitioners excepted.

Leonard Myers, for the exceptants.

The devise by testator was to all his children as a class, and the remainder vested in them upon his death.

Hawkins on Wills, 71-2. See also—
Womrath *v.* McCormick, 1 Sm. 504.
Manderson *v.* Lukens, 11 Harris, 31.
Letchworth's Appeal, 6 Casey, 175.
Patterson *v.* Hawthorn, 12 S. & R. 113.
McClure's App., 22 Sm. 414.

If the interest did not vest at the death of testator, it must become vested on the determination of the estate of the widow.

Redfield on Wills, 258.
Holderby *v.* Walker, 3 Jones's Equity (N. C.), 46.
Clark *v.* Tennison, 33 Maryland, 92.

May 3, 1879. THE COURT. The testator devised certain real estate in trust for his wife during life or widowhood, and at her death or remarriage he directed that the same should be sold by his executor, and that "the net proceeds thereof be equally divided among my children then living, and the child or children of such as

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may be deceased, in such manner that the child or children of such as may be deceased will receive the share that their parent or parents would have received if living." The widow elected to take against the will, and by petition to the Orphans' Court, which was concurred in by the children, all of whom are *sui juris*, asked that a sale of the property might be decreed for the purposes of immediate distribution. The single question raised by the petition is, whether the children take a vested interest under the will.

Taking the earlier rulings in England as a guide, there is little reason to doubt that the devise to the children should be held a contingent interest. In Howes *v.* Herring (1 McC. and Y. 295), the surplus over a given sum was to be divided by the trustees amongst all the children of testator, "or such of them as should be living when the youngest should attain twenty-one." They all attained that age, but one died, leaving a child, before the time fixed for division. It was held that the child so dying took no vested interest in the surplus, but that it went to the surviving children. In Reeves *v.* Brymer (4 Ves., Jr., 693), there was a bequest of £5000 to the wife for life, and at her death the fund was to be equally shared by the testator's children who should then be living. The Master of the Rolls decided that the words "then living" were applicable only to the death of the wife, and that the children's interest was contingent. So in Smith *v.* Vaughan (Vin. Abr. "Devise," 381), an annuity was bequeathed to testator's sister for life, and, after her death, for the use of all her children, and if she left but one, then the whole to that one. The sister had one child, who died before her, and it was determined that no reversionary interest vested in the child. (See also Billingsley *v.* Wills, 3 Atk. 219; Thicknesse *v.* Liege, 3 Bro. Parl. Cas. 365; Bennett *v.* Seymour, Amb. 521.)

The cases relied on by the petitioner differ in essential particulars from the present. In Manderson *v.* Lukens (11 Har. 31), the testator devised to his wife his real estate for her life or widowhood, and at her death or intermarriage, he directed his estate to be equally divided among all his children "which may be then alive, or who may have left legitimate heirs." He left three children, of whom two died intestate and without issue. The mother then conveyed to the surviving son all her estate under the will, and afterwards the son died in her lifetime, leaving issue. The Court held that the children took a vested interest, subject to be divested in the event of their dying without issue during the lifetime of the tenant for life; and that Peter, the surviving son, inherited the share of his brothers, who died without issue, and thus with the devise to himself became entitled to the whole remainder. In Patterson *v.* Hawthorn (12 S. & R. 112), the income from the sale of the realty was directed to be paid to testator's wife during her life, and at her death the principal to be divided among testator's six children, naming them, or their heirs, in six equal parts. TILGHMAN, C. J., held that the word "heirs" here meant legal representatives, and that the children took vested interests.

In both of these cases the children who were named in remainder were all ascertained and in *esse* at the time of testator's death. And the gift was to them as a class; in which respect it differs entirely from the bequest in McBride *v.* Smyth (4 P. F. Sm. 245), which was to such of testator's children as might be living when his youngest child should attain twenty-one, and to their heirs. The interest of the children was held to be contingent, STRONG, J., saying: "This is not a mere postponement of the time of enjoyment. It is a selection of individuals from a class to be donees of a right; a description of persons, not a regulation of the interest given. It is impossible to admit that a gift to such a number of persons as may meet a defined description is a gift to all the persons, whether they meet the description or not. 'Where real or personal estate is devised or bequeathed to such children, or to such child or individuals, as shall attain a given age, or the children who shall sustain a given character, or do a particular act, or be living at a certain time, without any distinct gift to the whole class, preceding such restrictive description, so that the uncertain event forms part of the description of the devisee or legatee, the interest so devised is necessarily contingent on account of the person. For until the age is attained, the character is sustained, or the act is performed, the person is unascertained; there is no person answering the description of the person who is to take as devisee or legatee.'"

So in McClure's Appeal (22 P. F. Sm. 414), where there was a direction to sell on the death of the widow, and to divide among the children, naming them, of the brother and sister of testator, it was held that the distribution was postponed only to provide comfortably for the widow, and that the time for distribution was not annexed to the substance of the gift. This case went upon the familiar principle that the use of words indicating time, such as "then," "at," "upon," etc., when preceded by a limitation of the estate, do not of themselves import a contingency, but merely the order of succession.

The testator in Letchworth's Appeal (6 Cas. 175), devised as follows: "At and after the decease of my said wife, and in case she should marry, and when my youngest child shall arrive at the age of twenty-one years, then it is my will that all my estate shall be distributed by my ex-

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ecutors agreeably to the intestate law of this Commonwealth." It was held that the time fixed by the will related only to the payment, and not to the gift, and that the estate vested in the children at the death of the testator. One circumstance which favored the vesting was, that the income was expressly given to the widow for her support and for the maintenance and education of the children. LOWRIE, C. J., said: "The testator was not thinking of devising away the estate from his children and heirs, but only of directing how it should be administered for the benefit of the family so long as it had or stood in need of a head, and how it should afterwards be distributed. It is not a devise *to such children as should be living at a particular time*, but a direction for distribution among his natural heirs at a particular time."

Womrath *v.* McCormick (1 P. F. Sm. 504), was a direction by the testator that at the death of his wife, the estate should be divided into as many parts as he should then have children living, the issue of any deceased child to represent their parents. THOMPSON, J., following Manderson *v.* Lukens (*supra*), held that the devisees were all in being and ascertained, and that the word "issue" simply defined the quantity of the estate.

In the case in hand, the direction was to divide among the children who should be living at the death or remarriage of the life tenant, and the child or children of such as might be deceased. The words "child or children" cannot be enlarged to mean issue or heirs, except upon the clearest intention of the testator so to use them. (Huber's Appeal, 30 P. F. Sm. 355.) They are words of purchase, and indicate a class which may take, but which cannot be ascertained until the death or remarriage of the widow. The limitation of the remainder is in part to persons not in *esse*, and therefore comes clearly within the definition of a contingent remainder, as laid down by Mr. Fearne in his Treatise, p. 217.

The case of List *v.* Rodney (2 Nor. 483), is very close to the present. The devise there was to testator's daughter, and to her children living at her death, and to the lawful issue of any of them if deceased, and to their heirs. The daughter and her husband, when both were over seventy-five years of age, contracted, with the two sole surviving children, to sell the land. The Court held that there was under the will not merely a postponement of the division of the estate until the death of the life-tenant, but that the remaindermen could not be known until the time arrived to designate them, and that prior to that time the remainder was necessarily contingent, so far as related to the persons who were to take. It is true that there was in that case a possibility of after-born children, while here the children as a class are ascertained. But the contingency is simply postponed one stage, because at the time of distribution the grandchildren who may then be living of a deceased child will share. To the case just cited may be added a late English decision. In re Deighton's Settled Estates (2 Law Rep. Ch. Div. 783), the testator directed his trustees to pay the income of real and personal estates to his wife for life, and on her death to apply the income in maintenance of his children then living, and the issue of children then deceased, until his youngest surviving child should attain twenty-one years, and when such child attained that age to sell the real estate and hold the proceeds in trust for his children then living, and the issue then living of his child or children dying before that period. The youngest child attained twenty-one before the widow's death. Held that the class was not to be ascertained before the death of the widow, and that the legal representatives of a child who had died without issue in her lifetime took nothing.

Under these authorities it seems reasonably clear that the interests of the children are contingent, and must await the happening of the event contemplated by the testator. But it was argued that it is within the power of the life-tenant by such an arrangement as is proposed in the petition to terminate at any time the particular estate; and that, although the falling in of the particular estate would ordinarily work the destruction of those in remainder, the latter, in this instance, would be upheld by the trust, and would immediately become vested in the remaindermen. No authority was cited for this position, and the effect of the reasoning, if correct, would be to substitute the caprice of the life-tenant for the will of the testator. The very office of the trust created by the latter, whether he so intended it or not, was to guard against just such a contingency as is now attempted to be brought about. That trust was expressly declared to be not merely for the benefit of the widow, but for that of the parties who should be living at her death or remarriage. In advance of either of those events, it is now, however, proposed to pay to the widow a certain sum in consideration of the release of her life estate, and to divide the remainder of the property among parties, of whom it cannot be said with any certainty that a single one answers the description of those who are intended to take by the will.

The petition must be refused.

Opinion by ASHMAN, J.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, JUNE 26, 1879.* [No. 9.

Concerning the Removal of Causes from State Courts to Federal Courts.

THERE is no doubt that the tendency to remove causes from the State to the Federal Courts is continually and rapidly increasing. This is evinced by the number of statutes that the Federal Legislature has enacted on the subject; each enlarging the right of removal, until finally the Act of March 3, 1875, by using the same language as the Constitution, made the power of removal as broad as it could be consistently with the Constitution. In all these Acts the party desiring to remove the cause is directed to file a petition and bond in the State Court before removing the record into the United States Court.

The question then suggests itself: Is the jurisdiction of the State Court over the controversy ousted *ipso facto* by the filing of the bond and petition? Did the Legislature intend to paralyze all control of the State Court over the suit merely by the filing of the bond and petition? Were this so, undoubtedly great evils might follow: for the defendant in a case could avail himself of the statute and remove the cause; the right of removal would then have to be tested in the Circuit Court, and by the time the cause had been remanded and was again ready for trial in the State Court, the plaintiff might have lost all means of obtaining satisfaction. It would also seem, by the use of the word "petition," that something was to be granted or refused; for there would be no object in presenting a "petition" to the Court, if the Court was unable to grant or refuse it. In Taylor *v.* Rockefeller (6 WEEKLY NOTES, 283) STRONG, J., held that the jurisdiction of the State Court was not ousted unless the petition and bond show a case of which the United States Court has jurisdiction; and MCKENNAN, J., has held in several cases that only when the petition and bond are *rightly* filed is the jurisdiction of the State Court ousted. The subject was discussed at considerable length by MANNING, J., in *Ex parte* Grimball, in the Supreme Court of Alabama, and he held that it would be most unreasonable not to allow the State Court to examine the record in order to see whether the cause was a suitable one for removal.

It would seem, however, that the opinion of the State Court, cannot have any weight except so far as that of the individual judge is respected who gives it, for the case need not first be heard in the State Court and then appealed, but the petitioner for the removal may *at once* remove the record to the Circuit Court and have the right of removal determined there, and the decision of the Federal Court is supreme.

In the present number of the WEEKLY NOTES a decision is reported in the case of Middleton's Executors *v.* Middleton, in which one or two questions of considerable interest are involved. In this case two of the plaintiffs had the same State-citizenship as the defendant, and two a different citizenship. The defendant presented a petition to remove. The State Court dismissed the petition, following two Federal decisions (given, however, before the Act of March 3, 1875, was passed).

Now two important questions are involved in this case, which, however, do not appear to have been discussed, viz., (1) Is a cause removable where some of the plaintiffs have the same citizenship as the defendant, and others of the plaintiffs have some other citizenship? It was decided in Petterson *v.* Chapman (13 Blatch. 395) in the Northern District of New York, that such a cause was not removable; but in Taylor *v.* Rockefeller (*supra*), STRONG, J., seemed to be of the opinion that under such circumstances the cause could be removed, and in this MCKENNAN, J., concurred. *Dicta* have also fallen from BRADLEY and MILLER, J.J., of the Supreme Court of the United States, that such a cause is removable,* and the same view has been held by the Supreme Court of Alabama in *Ex parte* Grimball (*supra*); now under these *dicta* the Middleton case (*supra*) was removable, unless the fact that the plaintiffs were *executors* makes any difference; and the further question then arises: (2) Does such a fact take away the right of removal from the defendant? The objection to the right of removal is that these four executors constitute but one entity, and though the individuals constituting one half of that entity have a different citizenship from the defendant, yet this may not be under the Act "a controversy between citizens of different States," as that entity is not divisible, and the individuals constituting the other half have the same citizenship as the defendant. If, however, this entity has any citizenship at all it is just as reasonable to give it the citizenship different from that of the defendant as to give it the same; and if we take into consideration the fact that the removal acts were passed really to give a fair trial of a cause in the Federal Court when it could not be had in the State Court, it seems but just that the defendant should take advantage of the different citizenship of part of the executors to remove the cause, if he thought he could be bettered by it.

Again, though the executors legally represent

* See 18 Amer. Law Reg. 314.

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one person, and though they must all join to bring a suit, yet it is not in their representative capacity that they sue in the United States Courts. In the Federal Courts the citizenship of the executor, and not that of the testator, is looked to only, and they may so sue, because the person whom they represent cannot sue at all, and they are, as STORY, J., observed, the real actors and parties in interest before the Court. Now if they acquire the right to so sue, not in their capacity of representing the deceased, but as citizens, and as their citizenship is alone looked to in determining their right to sue in the Federal Court, it seems reasonable to treat them with regard to the question of removal also as mere individual citizens, and to look to their citizenship, as individuals, to determine the right of removal, and not in their representative capacity at all.

ARTHUR BIDDLE.

Supreme Court.

July, '75, 130. January 24, 1878.

Glading v. Frick.

Deeds and mortgages—Recorder of Deeds—When not required to record instruments in particular books—Mechanic's lien—Act of April 3, 1872, P. L. 857—Complied with by recording contract alone, without accompanying specifications, in the Deed Book—Practice—Entry of judgment non obstante veredicto.

In the absence of statutory enactment directing the Recorder of Deeds to record certain instruments of writing in a particular book, such instruments are properly recorded in *any* of the books kept by him; and a mortgage, or a builder's contract is valid, although recorded in the Deed Book.

Luch's Appeal, 8 Wr. 519, overruled.
McLanahan *v.* Reeside, 9 Watts, 511, affirmed.

The Act of April 3, 1872 (P. L. 857, repealed by Act of March 6, 1873, P. L. 217), enacted that every building erected under a written contract should be liable to the contractor alone for work done or materials furnished in pursuance thereof, with the proviso that such contract should be duly recorded within fifteen days of its execution. In an action upon a mechanic's lien against the owner, the defendant put in evidence a written contract for the construction of the house, recorded in the Deed Book. It was admitted that certain specifications accompanied, and were referred to, in the contract, which were neither offered in evidence nor recorded:

Held (1) that the production in evidence of the specifications was not essential, the plaintiffs not being parties to the contract. (2) That for the purposes of the Act, the recording of the contract alone, without the specifications, was sufficient. (3) That the contract was properly recorded in the Deed Book.

Per PAXSON, J. In contemplation of law a paper is recorded the moment it is lodged in the office, and the fees paid. . . . When a man has complied with the law by depositing his papers in the Recorder's Office, and paying the fees, it would be a hard rule that would deprive him of his lien or his estate because of an error of the Recorder in recording the instrument in the wrong book. It would be different were there an Act of Assembly directing in what book the particular paper should be recorded. In such case the Recorder might be liable upon his official bond for a failure to proceed as required by law.

MERCUR, J., dissents.

Upon the trial below, the Court directed a verdict for the *defendant* subject to a point reserved. The Court in banc subsequently entered judgment upon the point reserved for the plaintiffs, notwithstanding the verdict.

Held, to be incorrect. The better practice would have been to direct a verdict for the plaintiffs, subject to the point reserved.

Error to Common Pleas No. 1, of Philadelphia County.

Scire facias sur mechanic's lien by George L. Frick and Michael K. Snyder, trading as Frick and Snyder, against Samuel Glading, owner, and F. Cassel, contractor, filed February 25, 1873.

The claim was for $363 for materials furnished in the erection of a building on Susquehanna Avenue, Philadelphia.

Upon the trial, the defendant's counsel agreed to admit (1) The correctness of the book of original entries. (2) That the materials there charged were delivered by the plaintiffs, and used in the construction of the defendant's building. (3) That there were certain specifications for reference by both parties *which were not recorded.*

On the other hand, the plaintiffs' counsel admitted (1) That the house was not built according to the specifications. (2) That all extra work had been paid for; and (3) That the contractor had been paid in full.

The only question raised was as to the effect of the Act of April 3, 1872 (P. L. 857),* which reads as follows:—

"When any building or buildings shall be erected, in whole or in part by contract in writing, such building or buildings, and the land or lands whereon it or they stand, shall be liable to the contractor alone for work done or materials furnished in pursuance of such contract: *Provided*, Such contract be acknowledged before a proper officer of this Commonwealth, authorized by the laws thereof to take acknowledgments of deeds, and duly recorded in the office for recording deeds, within fifteen days after the execution thereof: *And provided further*, That the provisions of this Act shall be confined to the city and county of Philadelphia."*

The defendant offered in evidence a contract for the construction of the house between himself and Cassel, the contractor, dated September 4, 1872, and recorded in *Deed Book* J. A. H.,

* Repealed by Act of March 6, 1873 (P. L. 217).

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No. 279, p. 26, etc. Objected to, because (1) The whole contract was not offered; the specifications referred to in it and made a part of it not being offered with the contract. (2) The whole contract was not recorded as required by the Act of Assembly; the specifications, being a part of the contract, not having been recorded. (3) The contract was not properly recorded, having been recorded in the office of the Recorder of Deeds in Deed Book instead of Miscellaneous Book.

The Court admitted the contract in evidence and directed the jury to find a verdict for the defendant, subject to the point reserved for the opinion of the Court, whether it was error to admit the said contract in evidence. Verdict accordingly.

The Court in banc set aside this verdict, and entered judgment for the plaintiffs, the damages being assessed at $441. The defendant, Glading, took this writ, assigning for error this action of the Court.

H. Hazlehurst and *Jas. D. Bennett*, for the plaintiff in error.

The defendants in error, not being parties to the contract, cannot object that it was not properly recorded. As between the original parties all its terms were fully complied with. The moment this contract was recorded the material-men, for whose protection the Act was passed, had notice that the building was liable to the contractor alone. The object of the Act was thus accomplished, and the omission to record the specifications was immaterial.

There is nothing in the objection that the contract was recorded in the Deed Book, as decided in

McLanahan *v.* Reeside, 9 Watts, 518.

Joseph C. Ferguson, contra.

The specifications are made part of the contract by its terms, and alone determine the character of the house to be built. They should have been offered in evidence with the contract.

Starkie on Evid. 580.

The omission to put on record the specifications was very material, for by it alone could the material-man know whether the contractor was making a wise bargain or not, and whether he might safely trust him.

Jacques *v.* Weeks, 7 Watts, 268.
Friedley *v.* Hamilton, 17 S. & R. 70.
Sturtevant's Appeal, 10 Casey, 150.

A Deed Book was an improper place in which to record such a contract as this. Each instrument must be recorded in the proper book.

Goepp *v.* Gartiser, 11 Casey, 133.
Luch's Appeal, 8 Wr. 525.

January 6, 1879. THE COURT. What the precise ground was on which the verdict was set aside and judgment entered on the point reserved in favor of the plantiffs below the record does not show. Against the mechanic's lien of the plaintiffs the defendant set up a written contract between Glading, the owner, and Franklin Cassel, the contractor, for the erection of the building against which the lien was entered. The object of the evidence was to secure for the owner the benefit of the provisions of the Act of Assembly of 3d of April, 1872, that where any building or buildings should be erected in whole or in part by contract in writing, such building or buildings and the land or lands whereon it or they should stand, should be liable to the contractor alone for work done or materials furnished in pursuance of such contract, provided the contract should be acknowledged and duly recorded in the office for recording deeds within fifteen days after its execution. It was agreed at the trial on the part of the defendants that the book of original entries of the plaintiffs was correct; that the materials charged were delivered and used in the construction of the building, and that there were certain specifications for reference by both parties which were not recorded. And it was admitted on behalf of the plaintiffs that the house was not built according to the specifications; that all extra work had been paid for; and that the contractor had been fully paid.

When it was proposed to give the contract in evidence the plaintiffs objected to it, because "(1) The whole contract was not offered, the specifications referred to in it and made part of it not being offered with the contract; (2) The whole contract was not recorded as required by the Act of Assembly, the specifications, being a part of the contract, not having been recorded; and (3) The contract was not properly recorded, having been recorded in a Deed Book and not in a Miscellaneous Book." The paper was admitted, and a verdict directed for the defendants, the question whether the evidence were properly received being reserved by the Court for subsequent consideration. Judgment was afterwards entered in favor of the plaintiffs, notwithstanding the verdict for the defendant.

It would have been a more correct practice for the Court to have directed a verdict for the plaintiffs. The defendant could then have moved for judgment in his favor, *non obstante veredicto*. It was held in Robinson *v.* Myers (17 P. F. S. 9) that a judgment could not be entered upon a reserved point for the plaintiff when the verdict was for the defendant, for the reason that such judgment would have no verdict to support it. In the case in hand the admissions of record by the parties to some extent supply the place of a verdict, and it is possible the judgment might be sustained were there nothing else in the case.

Regard being had to the object of the defendant in offering the contract, it is not apparent how that object would have been promoted by

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accompanying it with proof of the specifications to which it referred. The owner of a lot of land, and the contractor for the erection of a building on it, were the only parties by whom it had been executed. The plaintiffs did not need the omitted evidence, for the accuracy of their books, and the use of their materials for the purposes of the defendant, had been admitted. The defendant was invoking the protection of the Act of 1872, and proposed to show that the building had been erected under a written contract. Evidence is essential when its production is required to bring out the whole of the special subject of dispute. If it bears upon the point in issue, it is relevant. If the point in issue cannot be determined without it, then its absence is a defect fatal to the case of which it should form a part. The question here was whether Mr. Glading's house had been built under a written contract with Mr. Cassell. The question of the compliance by either party with the specifications was between them alone. They were a part of the contract by reference only, and their production could have added no strength to the proof of the principal fact involved. They were not necessary to construe the contract, for the plaintiffs had no such interest as gave them the right to demand its construction. They were not necessary to adjust equities or settle accounts, for they could have exhibited no equities and explained no accounts with which the plaintiffs could have had any concern. The instrument was offered to establish the immunity of the defendant under the statute, and for that purpose the production of the specifications was not essential.

In the second place, it was objected that the contract was not "duly recorded," because the specifications were not placed on record. The purpose of the Legislature was to afford notice to mechanics and material-men of the existence of a written contract which would bar their claims against a property on which a building should be erected, and leave them to such remedy against the contractor as they could enforce. This purpose was adequately gained by the record of the contract without the specifications. An inspection of the contract was all that was needed to show the existence of the specifications which were referred to as being "in the possession of Solomon A. Kneedler." Such a reference was enough to put all persons who could be interested upon inquiry. While they formed, as to the immediate parties, essential parts of the contract, they could have no bearing upon agreements into which other parties should afterwards enter. A peculiar state of facts ought to exist to make the recording of ancillary documents like this indispensable. It is possible to conceive of specifications that would contain plans, drafts, or models of a kind to render their transfer to the record impossible, or at least intolerably inconvenient. A contract could provide for the duplicate of a house already built. It might stipulate for the production of machinery identical with machinery already furnished and in operation; and it would, in either instance, be an instrument no more complete in itself than this instrument. The rule that annuls the effect of an unrecorded agreement which forms a part of a single transaction, has no room to operate in such a case as this. Friedley *v.* Hamilton (17 S. & R. 70) and the line of cases following it do not apply.

In the final objection to the omission of the contract in evidence, the ground was taken by the plaintiffs that the record was defective because it was entered in one of the Deed Books instead of the Miscellaneous Book; and Luch's Appeal (8 Wright, 519) was relied upon to sustain this position. The particular point decided in that case, was that the record of mortgages in any other than a "Mortgage Book," was valueless and void as against a later lien; in other words, that in view of the immemorial usage under the statutes, a mortgage thus entered was not recorded at all. It is but just to the learned Court below to say that it required no strain to bring this case within the spirit and reasoning of Luch's Appeal. A careful consideration of the subject, however, has led us to seriously doubt the soundness of the principles upon which Luch's Appeal was decided. No one of the present bench was a member of the Court at the time that case was ruled, and we have hesitated in disturbing what appears to have been a unanimous decision of our predecessors. At the same time, the practical difficulties of going any further in that direction are so palpable, that we feel ourselves constrained to return to the rule laid down by Chief Justice GIBSON, in McLanahan *v.* Reeside (9 Watts, 511): "It is indeed," says the Chief Justice, "of no account that the conveyance and the articles were not recorded in the book set aside for mortgages. The keeping such a book is an arrangement to promote the convenience of the officer by contracting the surface over which he is to search for a particular thing, and he is bound to furnish precise information, get it as he may, of every registry in his office, whether made in the right place or not."

The instances are rare in which an Act of Assembly designates the book in which an instrument must be recorded. Where such direction is given in a statute, its terms must be complied with, or the record would be worthless. In many counties of the State the recorder classifies the papers brought to his office, and enters each in its appropriate book. This system has grown up

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with the increase of business, and we presume has become very general throughout the Commonwealth. It is undoubtedly a great convenience to the recorder, by "contracting the surface over which he is required to search," and if conducted with accuracy can injure no one. With this, however, the party depositing an instrument has nothing to do.

In contemplation of law, a paper is recorded the moment it is lodged in the office and the fees paid. In point of fact it may not be, and in many instances is not actually entered in the books until months afterwards. Where a man has complied with the law by depositing his papers in the recorder's office and paying the fees, it would be a hard rule that would deprive him of his lien or his estate, because of an error of the recorder in recording the instrument in the wrong book. It would be different were there an Act of Assembly directing in what book the particular paper should be recorded. In such case the recorder might be liable upon his official bond for a failure to record as required by law. In the absence of any such Act, we are unable to see how we can declare that a paper is not recorded when the holder has done all that the Act of Assembly requires in placing it on record. To do so would seem very much like legislation.

We are not insensible to the force of the reasoning of Mr. Justice READ, in Luch's Appeal. We think, however, that the argument *ab inconvenienti* would be more appropriate if addressed to the Legislature. That body has ample power to correct the evil if one exists. In the city of Philadelphia where, by reason of the large accumulation of books in the recorder's office, it was believed the application of the rule in Luch's Appeal was especially necessary, it is well known that both lawyers and conveyancers rely upon certificates of search. These the recorder is bound to give, and for their accuracy he is responsible. We presume he will continue to keep his books in such manner as to afford the greatest facilities for search. The labor and responsibility are his. If he records a paper in such a manner that he is liable to overlook it in making searches, he does so at his peril. We see no sufficient reason for the introduction of a rule the obvious effect of which is to lessen his responsibility.

There are many instruments which are authorized to be recorded by Act of Assembly, that are not easy to classify. Such was the character of the paper in Luch's Appeal. It was held by this Court to be a mortgage, yet it was not so in form. It required an astute lawyer to determine its legal effect. If we adhere to Luch's Appeal, the holder of such instruments would not know whether they were recorded until the Courts had passed upon their character. Such a rule is too uncertain, and cannot be continued without involving many innocent persons in loss and inconvenience. The application of it to the case in hand would be unjust. The contract was an instrument under seal. It was, technically, a deed. It is true it was not a conveyance of land; but it was a contract relating to land. It was for the erection and construction of a house. The fact that it was recorded in a deed book did not prejudice the plaintiffs; they had made no search, and were not misled.

We are of opinion that the contract was properly received in evidence. It follows that it was error to enter judgment for the plaintiffs.

The judgment is reversed, and judgment is now entered for the defendant upon the verdict.

Opinion by PAXSON, J.

Dissenting opinion by MERCUR, J. After a careful consideration, I dissent from the opinion of the majority of the Court. Luch's Appeal was well considered. It was decided unanimously. So far as I know no complaint has been made by the profession against its correctness. In the argument of the present case, we were not asked to overrule it. The case of Schell *v.* Stein (26 Smith, 398) ruled that the recorder was not bound to keep a general index of all the deeds and mortgages recorded in his office; a separate index to each book was thought sufficient. In the opinion of Mr. Chief Justice AGNEW, it is there said it is not intended to deny the authority of Luch's Appeal; yet without request, and without any argument in support of such action, this Court now denies its authority, and declares it of no force. Luch's Appeal was not a case originating in the populous county of Philadelphia, but in the county of Northampton, which ranks in population below twelve other counties in the State. The reason of the case rested largely on the fact that separate books were kept for the recording of mortgages therein. That distinction was emphasized by the Chief Justice in Schell *v.* Stein (*supra*). If this Court would now say, we will not apply the rule to counties where no separate books are kept for the recording of mortgages, the strongest objection would not arise. But if I am not mistaken as to the facts, there is no county to which the exemption from the general rule can apply.

Now after fifteen years' acquiescence in Luch's Appeal, after the business of the country has become adapted to its rulings, after probably every county in the State has separate books for mortgages, and the records in each county are made in conformity with that authority, the public is to be startled by the declaration that it is not law. It is said to be better to return to the doctrine of McLanahan *v.* Reeside (9 Watts, 508). It should not be forgotten that that case was considered in

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Luch's Appeal, and again in Schell *v.* Stein. In the former it was said by Mr. Justice READ, in regard to the language used in McLanahan *v.* Reeside, that it was "upon a point not necessary to the decision of the case before the Court." The case was again referred to in Schell *v.* Stein, but it was not then thought to contain sufficient reason to overthrow the authority of Luch's Appeal. Why then shall we now deny its authority, which has stood unquestioned for so many years, and the correctness of which was substantially affirmed, in Schell *v.* Stein, four years ago?

Conceding for the sake of the argument (what I am not prepared to admit), that Luch's Appeal was not correctly decided, by reason that separate books for the recording of mortgages were not then kept in all of the counties, yet that objection has now lost its force. All the lawyers in the State have based their opinions on it, as of binding authority. They have directed and guided their clients according to it. Relying on it, mortgages may have been abandoned as worthless which will now be held to be first liens. Titles which were supposed to have passed to good faith purchasers discharged of all liens, may by this new departure be found to be encumbered by mortgages equal to the whole value of the land. With due respect for the opinion of my brethren, I think their decision overruling the doctrine of Luch's Appeal is contrary to public policy, and may be fraught with great injury to private rights.

Jan. '79, 209. Wm. H. H. March 6, 1879.

Croll v. Thomas.
Clader v. Schaeffer.

Deeds and mortgages—Recording Acts—Index—Searches—Defective recording of deed—Deed is effective for the purpose of notice from time when left for record—Recording in wrong book and omission from indexes does not invalidate deed as notice.

A deed is in contemplation of law recorded when it is left for record at the Recorder's Office, and is valid notice from that time, though it be recorded in the wrong book and omitted from all the deed and mortgage indices.

Glading *v.* Frick, *ante*, p. 134, followed.

Error to the Common Pleas of Berks County.

Ejectment, by D. Clader (for whom his administrators A. J. Clader and M. S. Croll were substituted) and S. R. Grim against T. Schaeffer, S. Thomas *et al.*, to recover a tract of land in Maxatawney Township, Berks County.

On the trial, before HAGENMAN, P. J., the following facts appeared: The land in dispute had been devised to T. Schaeffer by his father "for the sum of $1200 on the following conditions, viz., to pay $50 per annum until the $1200 are paid," the first $50 to be paid to the eldest son, the next to the second, and so in rotation. T. Schaeffer having accepted the devise and paid several instalments, subsequently failed to pay, and, on petition, was cited to appear in the Orphans' Court and show cause why a decree should not be made for the payment of the sum due the petitioner. He filed an answer, but subsequently an order of sale issued, and the property was, on Dec. 19, 1868, sold by the sheriff to the plaintiffs in this ejectment.

The defendants offered in evidence an instrument of writing, dated March 25, 1861, by which T. Schaeffer conveyed to S. Thomas all the iron ore on the premises in suit, with the right of mining, etc., which was recorded in a Miscellaneous Book in the Recorder's Office, and a notice of which had been read at the sheriff's sale. Objected to, on the ground that the deed was not properly and legally recorded; objection overruled; exception. The plaintiffs then proved that the above deed was not recorded in any *deed* or *mortgage* book in Berks County, and was not indexed in any deed or mortgage index. It appeared, however, that it was recorded in the Miscellaneous Book, in said county. The plaintiffs requested the Court to charge that "the plaintiffs are entitled to recover against all the defendants." *Refused.*

The Court then directed the jury to find for the plaintiffs against T. Schaeffer for so much of the premises as had not been conveyed to S. Thomas by agreement dated March 25, 1861, and in favor of the other defendants for all the iron ore contained in the premises described in the writ.

The jury found a special verdict accordingly "in favor of the plaintiffs and against defendants Tilghman Schaeffer and Moses Bortz, for so much of the premises as was not conveyed and sold to Samuel Thomas by agreement of 25th of March, 1861; and in favor of Samuel Thomas, James Mickley, Patrick McCann for all the iron ore contained in the premises described in the writ, with the privileges of mining, etc.," and judgment was entered thereon. The plaintiffs took this writ as to the defendants in whose favor the jury had found, assigning for error the ruling on the evidence above given, and the refusal to charge as requested.

J. Ralston, for the plaintiffs in error.

The deed to Thomas not having been properly recorded was no notice of his title, and he was not a terre-tenant entitled to notice of the proceedings in the Orphans' Court. Deeds and mortgages in order to be of effect must be properly recorded.

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Bolton *v.* Johns, 5 Barr, 149
Goepp *v.* Gartiser, 11 Casey, 133.
Luch's Appeal, 8 Wr. 519.
Schell *v.* Stein, 26 Sm. 401.

G. F. Baer, for defendants in error.

Thomas was entitled to notice of the proceedings, and, not having had notice, he cannot be prejudiced. Had he been cited to appear, he could have asked the Court to direct a sale in the first place of that portion of the land still in the hands of Schaeffer. The notice of Thomas's deed, given at the sale, was sufficient to affect the purchaser.

Moyer *v.* Schick, 3 Barr, 242.

March 24, 1879. THE COURT. The contention of the learned counsel of the plaintiff in error is mainly on the assumption that the deed of Tilghman Schaeffer to Samuel Thomas having been recorded in the Miscellaneous Book in the Recorder's Office, and not in the Deed Book, was not properly recorded according to Luch's Appeal (8 Wright, 519). That case has since been overruled by this Court in Glading *v.* Frick [*ante*, p. 134], and it is now settled that a deed is, in contemplation of law, recorded when it is left for record in the Recorder's Office, and the record cannot be lost by being transcribed by the Recorder or his clerk in the wrong book. Thomas being the alienee of a part of the premises devised subject to the charge, was entitled to notice of the Orphans' Court proceeding, and, not having received such notice, his title was not divested. He might have asked that the unaliened portion of the estate charged should be first sold, and his interest only resorted to in case the unaliened portion should prove insufficient to meet the charge. The whole was sold together, surface and iron ore, and Thomas gave notice at the sale of his title to the latter. There was sufficient to affect the purchaser with notice of Thomas's title by the record without having recourse to the notice at the sale. We think the instruction of the learned Court below to the jury and the admission in evidence of the deed to Thomas were right.

Judgment affirmed.

PER CURIAM.

[See Brown and Wood's Appeal, 3 WEEKLY NOTES, 35; Act of March 18, 1875, P. L. 32, Purd. Dig., Supplement, 2003.]

July, '78, 36. Jan. 21, 1879.

Seabrook v. Moyer.

Landlord and tenant—Eviction, by paramount title, of a portion of demised premises—When not a defence to claim for rent of premises retained by tenant—Action for use and occupation.

When a tenant is evicted, under a title paramount to that of his landlord, from a portion of the premises leased to him, but continues to occupy and enjoy the rest of the premises, he remains liable to his landlord, in an action for use and occupation, for such proportion of the rent as the value of the part retained bears to the whole.

Error to the Common Pleas No. 2, of Philadelphia Co.

Debt, by Seabrook against Moyer for the rent of certain premises demised by the plaintiff to the defendant. The first count of the declaration was on a demise at $250 a month. The second count was for use and occupation. Pleas, nil debet, payment, and a special plea setting forth that the defendant had been evicted from a portion of the premises.

At the trial, the plaintiff gave in evidence the lease of the premises No. 718 Market Street for three years from January 1, 1874, at an annual rent of $3000, payable monthly, and showed that the defendant had paid rent up to February 1, 1875, after which he had paid nothing, though remaining in possession until the end of the term. In the plaintiff's evidence the following facts also appeared:—The rented premises included a right of way over an alley three feet six inches wide between the property leased and the adjoining building; the alley was one means of access to the upper rooms of the property leased, which rooms extended over the alley. In February, 1875, the owner of the adjoining building began to erect a party-wall encroaching eleven inches on the alley and rooms over it. Before the execution of the lease, the plaintiff and the adjoining owner had entered into an agreement under seal, whereby they had mutually relinquished to each other the right of way through the alley; the plaintiff, notwithstanding the agreement, notified the adjoining owner, when he began to build, to desist, but the wall was, nevertheless, erected.

The defendant moved for a non-suit on the ground (1) That the loss of eleven inches in the alley was an eviction which suspended the lease, and, therefore, no recovery could be had under the first count, which declared for rent by virtue of the demise. (2) That after such eviction the tenant might continue in possession until the expiration of the lease, and could not be held liable for use and occupation of the residue of the premises, and, therefore, no recovery could be had under the second count.

The learned Judge ordered a non-suit, which the Court in banc refused to take off, and the plaintiff took this writ assigning the entry of judgment of non-suit for error.

Charles Hart (with him *Chapman Biddle*), for the plaintiff in error.

In this case the tenant might have given up possession within a reasonable time after the partial eviction, and avoided future liability; but in Pennsylvania, where equitable relief is adminis-

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tered through common law forms, such a tenant remaining in possession of a portion of the demised property is liable, on a *quantum meruit*, for use and occupation, as is intimated in—

Bennett *v.* Bittle, 4 Rawle, 344.

McClurg *v.* Price, 9 Sm. 420.

E. Spencer Miller, contra.

In Pennsylvania a partial eviction suspends the whole rent, and it is expressly declared in McClurg *v.* Price, that the tenant's omission to give up possession of the remainder of the premises does not deprive him of this defence.

Where there is a lease under seal *debt* will not lie for use and occupation.

Vermilyea *v.* Austin, 2 E. D. Smith (N. Y.), 204.

Hart, in reply.

Vermilyea *v.* Austin was afterwards taken up to the Court of Errors and Appeals under the name of Christopher *v.* Austin (11 Kernan, 218). The Court, while affirming the lower tribunal, thus states the law applicable to the present case: "Where the tenant enters, but is prevented from obtaining the whole of the premises, by a person holding a part under a prior lease executed by the landlord, it has been placed upon the same footing as an eviction by title paramount, and the landlord has been permitted to recover for use and occupation on a *quantum meruit*."

May 5, 1879. THE COURT. This was an action of debt for the rent of certain premises demised by plaintiff to defendant. The term was for three years from January 1, 1874, at an annual rental of $3000, payable monthly. The *narr.* contained two counts, one on a demise at $250 a month, the other for use and occupation. The premises leased consisted of a building fronting on Market Street, with a right of way over an alley of three feet six inches in width between the leased building and the adjoining property. The defendant took possession, and paid the rent up to 1st February, 1875. In that month the adjoining owner began to build, and in so doing he constructed a party-wall on eleven inches of this alley way, thus reducing its width and also the width of the rooms in the second and third stories of the building. This taking by the adjoining owner was by virtue of a written agreement entered into between him and the plaintiff before the execution of the lease between plaintiff and defendant. By the terms of that agreement the plaintiff and adjoiner had each relinquished to the other the right of way over the alley. Insomuch as the defendant was not deprived of the premises by this interference of the adjoining owner he remained in possession of the building, but refused to pay any rent, claiming it to be such an eviction as discharged him from all obligation to pay. The plaintiff claimed that the defendant remained liable on a *quantum meruit* for use and occupation. The Court below ordered a judgment of non-suit to be entered. That is assigned for error.

It is a well-settled rule that if a landlord wrongfully dispossesses his tenant of any portion of the demised premises, the rent for the whole is thereby suspended. In the present case the plaintiff committed no act after possession taken under the lease, by which his tenant was deprived of any part of the demised premises. On the contrary, the evidence shows that he tried to prevent the eviction. His offence consisted in demising premises to the defendant to a portion of which he had no title at the time. The eviction of the defendant was by virtue of a title paramount to the title of his landlord. It matters not that the plaintiff had previously held it. At the time the lease was executed, and the relation of landlord and tenant between the parties was created, the outstanding title of the adjoiner was as superior to the title of the plaintiff as if he had never held it. If the defendant had been evicted by paramount title from the whole premises, he would have been discharged from the payment of the whole rent, after that time. But an eviction, by such title, from a part only of the demised premises, when the tenant continues in possession of the remaining part using and enjoying it, does not work a suspension of all subsequent rent. He remains liable to the payment of such proportion of the rent as the value of the part retained bears to the whole. On having been evicted from a part, he might have removed from the residue, and thereby wholly relieved himself from the payment of future rent; failing to do so, he became liable to a just apportionment. This conclusion is fully sustained in Taylor on Landlord and Tenant, § 378, and the English and American cases there cited. Our own cases recognize the same rule when the landlord conveys a part of the demised premises during the term and possession of the tenant, and the vendee has entered and evicted the tenant from the part thus conveyed. By retaining possession of the remaining part he becomes liable to pay for the use of the portion thus retained. It is held not to be such a wrongful eviction by the landlord as to release the tenant from paying a just compensation for that which he continues to enjoy. (Reed *v.* Ward, 10 Harris, 144; Linton *v.* Hart, 1 Casey, 193.) The learned Judge therefore erred in ordering a judgment of non-suit.

Judgment reversed, and a *procedendo* awarded.

Opinion by MERCUR, J.

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Jan. '79, 203. April 3, 1879.

Ely v. Wren.

Mechanics' lien law—Lien against machinery and improvements—Sufficiency of description—Act of Feb. 17, 1858—Practice.

When a special security and remedy are given to a favored class of creditors, they must conform with reasonable accuracy to the provisions of the law designed for their benefit.

The Act of Feb. 17, 1858, extended the mechanics' lien law in certain counties, to certain improvements, engines, etc., put up by tenants of leased estates on lands of others, provided that the lien should only extend to the interest of the tenants or lessees therein, and to such improvements, engines, etc., erected by the material-men entering liens thereon.

M. filed a claim under this Act against the improvements, engines, etc., erected on the leasehold estate of E. & Co., and against their interest therein, and against "so much *other* improvements immediately adjacent thereto as may be necessary for the ordinary purposes thereof." Appended was a list of machinery, in which the name of the claimant was opposite some of the items, and occasionally were memoranda. Judgment was entered "against the defendants," for want of an affidavit of defence:

Held, that the claim filed was insufficient, in not being confined, as the Act provided, to specific articles on which work was done or materials furnished, and that it was error to enter judgment for want of an affidavit of defence.

A levari facias issued after judgment, with a list of items of machinery annexed, to limit the articles on which the sheriff's levy was to be made:

Held, that the property against which the lien is given must be so accurately described, that when judgment is obtained on the scire facias a separate schedule will not be required to be annexed to the levari facias for the guidance of the sheriff.

Semble, that entering judgment against the defendants personally in such a case, if there were no other error, might be treated as amended.

St. Clair Coal Co. *v.* Martz, 25 Sm. 384, followed.

Error to the Common Pleas of Carbon County.

Scire facias sur mechanics' lien, by W. C. Wren against E. B. & S. W. Ely.

On February 12, 1876, Wren filed a mechanics' lien, under the Act of February 17, 1858 (P. L. 29)*, "for a debt due to him for work done and materials furnished by him, within the last six months, for and about the erection and construction, and upon the credit of certain improvements, engines, pumps, machinery, screens, and fixtures put up or erected by E. B. Ely & Co., tenants of leased estate on land of another in the county of Carbon." A lien was claimed under the said Act against said "improvements, engines, pumps, machinery, screens, and fixtures erected or put up on the aforesaid leasehold estate of E. B. Ely & Co., and the interest of E. B. Ely & Co., tenants, in and to the said improvements, engines," etc., "and their interest in and to so much other improvements," etc., "immediately adjacent thereto as may be necessary for the ordinary and useful purposes thereof." Appended to the claim was a schedule, entitled "List of machinery on premises of E. B. Ely & Co.," in which list certain articles of machinery had the name of the claimant written opposite to them, and in a few cases, there were memoranda in addition to the name.

In April, 1877, judgment was entered against the defendants for want of an affidavit of defence; the amount to be ascertained by the prothonotary, which was, *eo die*, ascertained to be $7473.07; upon which a fi. fa., and, subsequently, a lev. fa. issued, and annexed to the latter was a copy of the list of machinery contained in the claim.

Subsequently the defendants presented a petition and affidavit, to open the judgment and stay the levari facias, on which a rule *nisi* was granted. The rule was afterwards discharged, and in August, 1877, judgment was entered in favor of the plaintiffs in the sum of $6037.05. On this judgment an alias levari facias issued, and annexed to it was a list of machinery; but in the list there was only a portion of the articles inserted that were mentioned in the original claim; the rest were omitted.

The defendants took this writ, and assigned for error the original entry of the judgment, "against the defendants" for want of an affidavit of defence, and the subsequent entry of a similar judgment for a reduced amount.

F. Bertolette and *James E. Gowen*, for the plaintiff in error.

The judgments of the Court below being against the defendants *personally* were erroneous. The claim was filed under the Act of February 17, 1858, and should have conformed strictly to the provisions of that Act, which declares that the claim should be filed against certain improvements, etc., upon which work was done and materials furnished, and be limited to the interest

* This Act provides:—

"The several provisions of an Act, entitled 'An Act relating to the liens of mechanics and others upon buildings,' approved the 16th day of June, 1836, and the several supplements thereto, are hereby extended to all improvements, engines, pumps, machinery, screens, and fixtures erected or put up by tenants of leased estates on lands of others, in the counties of Luzerne and Schuylkill, and to all mechanics, machinists, and material-men, doing work or furnishing the articles or materials therefor; *Provided*, that the lien hereby created shall extend only to the interest of the tenant or tenants, lessee or lessees therein, and to the improvements, engines, pumps, machinery, screens, and fixtures erected, repaired or put up by the mechanics, machinists, persons, or material-men entering liens thereon."

This Act was subsequently extended by Act of April 4, 1868, to Carbon County.

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of the lessee in the specified articles. But in this claim, there were a large number of articles upon which no work or material was alleged to have been done or furnished. This was an incurable defect.

Summerville *v.* Wann, 1 Wr. 184.
Esterlye's Appeal, 4 Sm. 192.
Carey *v.* Wintersteen, 10 Sm. 395.
St. Clair Coal Co. *v.* Martz, 25 Sm. 384.

The claim should have furnished sufficient data for the sheriff to go upon, without annexing another list of articles to the writ of levari facias, which was irregular. The Court erred in reducing the amount of the first judgment.

H. Green, for the defendant in error.

Entering judgment against the defendants personally is no ground for reversal. If necessary it could be amended. The objection that the lien is not sufficiently precise is too technical, especially after judgment. The description in the claim is sufficiently precise. The claim, by the statute, may be filed not only against the improvements, etc., but also against the interest of the tenants therein. The claim of the lien upon the "immediately adjacent machinery" does not seek to include any machinery not connected with that furnished by the plaintiff. It would be impossible to describe separately each bolt or bar furnished. The suggestion that each item should have the name appended to it is hypercritical.

If the alias levari facias was erroneous by reason of its generality, that is no ground for reversal of the judgment; for we have carefully restricted, by a schedule annexed, the operation of the writ to those things which are bound by our lien.

May 5, 1879. THE COURT. The record in this case presents a series of irregularities and errors, some of which are fatal to the lien. When a special security and remedy are given to a favored class of creditors, it is not asking too much to require them to conform with reasonable accuracy to the provisions of the law designed for their benefit. If this is done, unnecessary complications, involving disinterested parties in litigation, and imperiling the rights of creditors and others, may be avoided. The property against which the lien is given should be so accurately described that when judgment is obtained on the scire facias, the writ of levari facias, following the claim, may so designate the property and extent of the interest therein to be sold, that a separate schedule will not be required for the guidance of the sheriff.

The plaintiff below undertook to file a lien under the Act of February 17, 1858, entitled, "An Act relative to mechanics' liens in the counties of Luzerne and Schuylkill," which extends the provisions of the mechanics' lien law "to all improvements, engines, pumps, machinery, screens, and fixtures erected or put up by tenants of leased estates on land of others in the counties of Luzerne and Schuylkill, and to all mechanics and material men doing work or furnishing the articles or materials therefor." This Act was subsequently extended to Carbon County. By the express terms of the proviso, the lien thereby "created shall extend only to the interest of the tenant or tenants, lessee or lessees therein, and to the improvements, engines, pumps, machinery, screens, and fixtures, erected, repaired, or put up by mechanics, machinists, persons, or material-men entering liens thereon." The lien is thus limited to the interests of the tenants in the specific improvements and machinery upon which the services and labor are bestowed, or for which materials are furnished. (St. Clair Coal Co. *v.* Martz, 25 P. F. Smith, 384.)

From the statement in this case it appears that the claim was filed against the "improvements, engines, pumps, machinery, screens, and fixtures, erected or put up on the aforesaid leasehold estate of E. B. Ely & Co., and the interest of E. B. Ely & Co., tenants in and to the said improvements, engines, pumps, machinery, screens, and fixtures, and their interest in and to so much other improvements, engines, pumps, machinery, screens, and fixtures, etc., immediately adjacent thereto, as may be necessary for the ordinary and useful purposes thereof." The claim was thus filed not only against the interest of E. B. Ely & Co. in the improvements, engines, etc., but against the improvements, engines, etc. themselves; and also against a number of undefined structures and articles adjacent thereto, upon which it is not claimed that any work was done, or for which any materials were furnished by the claimants. It was not confined, as the Act provides, to the specific improvements upon which the work was done, or for which materials were furnished. Appended to the claim is a schedule entitled "List of machinery on premises of E. B. Ely & Co." Presumably this was intended to designate all the machinery on the leasehold premises. Certain articles of machinery in the list have the name of the claimant written opposite them, and in a few instances there is added to the name a memorandum of articles and materials. From this it might possibly be conjectured that the claimant performed work upon or furnished materials for the machinery thus designated by his name; and where particular articles are mentioned in the memoranda attached to his name, it might perhaps be inferred that these specific articles were furnished; but after all, it would be only a matter of inference or conjecture. There is an entire absence of that certainty and precision which should characterize a statement that

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forms the basis of a special lien, which, if not otherwise satisfied, is designed to be enforced by a judicial sale, resulting in a transfer of title. The proceeding is *in rem*, and the claim should be so certain and definite as to indicate with at least reasonable precision the property that is to be subjected to the lien, and the extent thereof. Without this it fails to furnish sufficient data for the entry of a judgment upon which the levari must issue for the sale of the property. In this case the claim, as filed, was incurably defective, and wholly insufficient to justify the Court in entering judgment for want of an affidavit of defence. There was no act done, or omitted to be done, by the defendants below that could have the effect of waiving these defects. Their failure to file an affidavit did not do so. It was, of course, informal to enter judgment against the defendants personally in such a proceeding; but if there was no other difficulty in the way this might be treated as amended.

The judgment is reversed and set aside, and it is now ordered that the lien be stricken from the record.

Opinion by STERRETT, J.

May '79, 85. May 12, 1879.

Rose and Wife v. Latshaw et al.

Husband and wife—Judgment confessed directly to wife—Execution thereon.

In the absence of fraud, an execution may lawfully issue, with the husband's consent, upon a judgment confessed directly to the wife by the husband.

Error to the Common Pleas of Bedford County.

Case stated, wherein Aaron Rose and Catharine his wife, for the use of the said Catharine, were plaintiffs, and Abram Latshaw *et al.* defendants. The material facts were as follows:—

Aaron Rose being indebted to his wife gave her his judgment exemption note, for $55.32 with interest, upon which judgment was entered without the intervention of a trustee. A *fi. fa.* was issued thereon with the consent and at the request of the said Aaron Rose, and subsequently a *vend. exp.* under which the personal property of Aaron Rose was sold by the sheriff, Catharine Rose being the purchaser. The property bought by her at this sale was worth $94.05. After the said sheriff's sale, Abram Latshaw *et al.* (the defendants in the case stated), holding judgments against Aaron Rose, issued executions thereon and placed them in a constable's hands, who levied upon the same property sold at the sheriff's sale to Catharine Rose, and again sold the same, as the property of Aaron Rose, in satisfaction of their judgments.

Judgment to be entered, for plaintiffs, for $94.05 if the Court should be of opinion (1) That the *fi. fa.* and *vend. ex.* upon the said judgment to Catharine Rose, were legally issued; (2) That the sheriff's sale of Aaron Rose's personal property to Catharine Rose passed title to her; (3) that Catharine Rose could issue execution, levy upon, and sell the property of the husband upon said judgment, confessed directly to her by him, without the intervention of a trustee.

After argument, the Court (HALL, P. J.) entered judgment for defendants as to the said sum of $94.05. The plaintiffs took this writ, assigning for error, the refusal of the Court to enter judgment for plaintiffs for said sum.

(Counsel submitted the case without oral argument on their paper-books, from which the following arguments are taken.)

Russell & Longenecker, for plaintiffs in error.

The judgment was a valid one (Williams's Appeal, 11 Wr. 307), and although it is said that the policy of the law does not permit an adversary execution to be issued by a wife against her husband, yet where the execution is not adversary, but on the contrary is issued with the consent and at the request of the husband, there is nothing in the law or public policy to forbid it.

Shade *v.* Shade, 5 Clarke's P. L. J., 493.
Williams's Appeal, 11 Wr. 307.

J. M. Reynolds, for defendants in error.

Consent cannot take from an execution its adversary character. Besides, to allow such a proceeding, would open the door to fraud.

Williams's Appeal, *supra.*
Marvin's Estate, 30 Leg. Int. 361.

The *dictum* of PEARSON, J. in Shade *v.* Shade (*supra*), did not secure the sanction of this Court in the subsequent case of Williams's Appeal.

May 26, 1879. THE COURT. When it was judicially declared that a judgment given by a husband to his wife to secure her separate estate, is not void in law or equity, because of the legal unity of the parties, a principle was settled which entitles the plaintiffs to recover. In Williams's Appeal (11 Wright, 307), the only question for adjudication was the validity of a judgment upon a bond confessed by virtue of a warrant of attorney, in favor of Hannah Moore against her husband; and in Shade *v.* Shade (5 Clark Pa. L. J. R. 593), a like question was alone presented. The latter was first decided, and PEARSON, P. J., in an able and lucid opinion, held that a husband could lawfully confess judgment in favor of his wife; adding a *dictum*, that with the husband's consent, execution could be lawfully awarded. So in Williams's case there was no occasion to say that execution could not issue upon such a judgment; it was a mere *dictum*, not a point de-

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termined by the Court. The opinion of AGNEW, J., logically leads to the sequence that an execution, issued upon a judgment in favor of a wife, against her husband is not void.

At common law husband and wife are one person, and a man could no more confess judgment to his wife than to himself. For the same reason his deeds, contracts, and gifts to his wife without a trustee, were void, but these have long been supported in equity. At law the existence of a woman during her marriage was suspended in most respects as regarded rights of things. The equity doctrine which sustains conveyances and gifts to her by her husband, without the intervention of a trustee, recognizes her personal existence, and is not an invasion of the true principle of unity consequent upon marriage. Two persons are united, but it is not now true that the identity of one is lost. In Pennsylvania a wife's equitable rights have been maintained in actions at law; for rules in equity and of law are enforced in the same forms of procedure. Practically, principles of equity are a part of our laws. It having been established that a man's conveyances and gifts to his wife are good between themselves, and against all the world, when not fraudulent, it directly followed that a judgment to her, confessed or suffered by him, is of like force; and it would seem inevitable that execution could be lawfully issued upon that judgment.

Public policy forbids adversary proceedings at law, without a trustee for the wife, against her husband. When he confesses judgment to her, or wittingly suffers it to be entered by default, no one can avoid it unless for fraud. In legal contemplation the judgment is the act of the Court. A judicial writ is the command of the Court. It may be set aside for irregularity but if it be not, and is not void, all proceedings will be held valid as if it were regular. For many causes an execution for seizure and sale of property in satisfaction of a judgment may be voidable, but if not voided before the sale and satisfaction it will protect the officer who obeyed it and support the title of the purchaser. Execution of a judgment voluntarily suffered by the husband, is no more adversary than was the entry of judgment. In one sense both are adversary; where either is with his consent it is not adverse in the sense which the law forbids, for it does not disturb domestic relations.

We have taken no account of the foreboded ills to follow a decision that a wife's execution on a judgment against her husband is not a nullity. The Commonwealth is none the worse for the advanced legislation for security of married women in the ownership and enjoyment of their property, and will not be hurt if they are allowed process for collecting money honestly their due. An insolvent debtor may exhaust his means in payment of a favored creditor or he may confess judgment to that creditor and all his property be seized in satisfaction thereof. This has long been the law, and now that the statute secures the wife her separate estate, when the husband owes her he may rightly give her the preference. If fraud be alleged, the requisite proof to establish it is no stronger when the preference is given to a wife than if to a stranger, and far greater strictness in proof is imposed upon a wife to make out her claim than upon others.

Judgment reversed, and judgment is now entered for the plaintiffs for one hundred and two dollars and fifty-five cents ($102.55) with interest from Sept. 7, 1877.

Opinion by TRUNKEY, J.

Common Pleas—Law.

C. P. No. 1. March 9, 1878.

Middleton's Executors v. Middleton.

Practice—Removal of causes—Act of March 3, 1875—Citizenship, when not a ground of removal.

Rule to show cause why a petition for the removal of a cause to the United States Court should not be dismissed.

This was a *sci. fa.* to revive a judgment obtained against the petitioner, John W. Middleton, by the plaintiffs' testator in his lifetime. The defendant filed an affidavit of defence, and afterwards filed, in due form, his petition and bond for the removal of the cause to the Federal Court. The petition set forth, *inter alia*, that the petitioner was a citizen of Pennsylvania; that the testator was at the time of his death a citizen of New Jersey; and that two of the plaintiffs, executors of said testator, were citizens of New Jersey, and the other two citizens of Pennsylvania.

G. Bull and *J. H. Campbell*, for the rule.

The Act of March, 3, 1875, providing for the removal of causes, does not apply where the defendant is sued in his own forum; *a fortiori*, it cannot apply here, where two of the plaintiffs reside within the jurisdiction of the same forum as that of the defendant.

Act of March 3, 1875, § 2; Statutes at Large, 470.
Dunham *v.* Baird, 1 WEEKLY NOTES, 493.

The estate being in this forum, and ancillary letters taken out here, the domicil of the plain-

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tiffs is located here for the purposes of this case. The place of administration fixes the location of the executors plaintiffs, and it is immaterial whether they are actually resident here or not.

J. C. Longstreth, contra.

Whether this is a proper case for removal or not is for the Federal Court to determine. This is a controversy between the estate of a citizen of New Jersey and a citizen of Pennsylvania, and is within the meaning of the Act of March 3, 1875.

Gillespie *v.* Jamison, 34 Leg. Int. 58.

March 23, 1878. THE COURT. It has, we think, always been held, that the citizenship of the parties to the record alone must be looked to, in determining the question of the right of removal of a cause from the State Court into the Circuit Court of the United States. In the present case the suit is brought by four executors, and their citizenship, and not that of the decedent, must determine the right of the defendant to remove it. Two of the plaintiffs are citizens of the State of New Jersey, and two of the State of Pennsylvania. That, however, is not sufficient. It was decided by the Circuit Court of the United States in Wilson *v.* Blodget (4 McLean, 363), that a suit cannot be removed, when a part of the plaintiffs or defendants are citizens of the State where the suit is brought, and part of some other State. The citizenship of each individual must be such as to make the suit removable. Both of the points raised in this case will be found decided by the Circuit Court of the United States in Administrators of Belknap *v.* Northern Railroad Co. (25 Vt. 715).

Rule absolute.

Opinion by BIDDLE, J.

[See next case. And see *ante*, p. 133.]

C. P. No. 4. March 4, 1879.

Eby v. The Northern Pacific R. R. Co.

Practice—Removal of causes—Time of filing petition for removal—Sections 639 and 640 of the Revised Statutes of the U. S.

Petition for removal to the Circuit Court of the United States.

The defendant corporation, having entered its appearance in the Common Pleas, afterwards filed its petition for the removal of the cause to the Federal Court, setting forth that it was a corporation organized under the laws of the United States.

R. L. Ashhurst, for the petition.

As the defendants aver in their petition that they are a corporation organized under the laws of the United States, the petition for removal must be granted.

Rev. Stat's, U. S. sec. 640, Rev. Stats. p. 114.
Taylor *v.* Rockefeller, 6 WEEKLY NOTES, 283.
Arthur *v.* Ins. Co., Id. 403.

The provision of sec. 639 of the Revised Statutes which requires the petition to be filed at the time of entering the appearance does not apply to corporations organized under the laws of the United States.

F. E. Brewster, contra.

Sec. 640 Revised Statutes refers to the preceding section, which provides that the petition must be filed at the time of entering the appearance. As this has not been done there can be no removal.

C. A. V.

April 19, 1879. THE COURT. The petitioner is a railroad corporation organized under the laws of the United States, having been originally incorporated by the Act of Congress approved July 2, 1864, and subsequently reorganized by the purchasers at a sale made under a decree of the Circuit Court of the United States for the Southern District of New York, for the foreclosure of a mortgage created by authority of a joint resolution of Congress passed May 31, 1870. By Sec. 640 of the Revised Statutes of the U. S. (Rev. Stat. p. 114), it is enacted that "any suit commenced in any Court other than a Circuit or District Court of the United States against any corporation (other than a banking corporation) organized under a law of the United States, may be removed for trial into the Circuit Court for the District where such suit is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defence arising under or by virtue of the Constitution or of any treaty or law of the United States. Such removal in all other respects shall be governed by the provisions of the preceding section." The provisions of the preceding section (sec. 639) here referred to are plainly the provisions which require the petitioner, at the time of filing his petition, to offer good and sufficient surety for his entering in such Circuit Court, on the first day of its session, copies of the process against him, and of all pleadings, depositions, testimony, and other proceedings in the cause. The provision of sec. 639 which requires the petition for removal to be filed in the State Court at the time of entering an appearance there, applies only to a suit against an alien, or against a citizen of another State.

The defendant in the present case does not fall within either of these descriptions. A corporation chartered by Congress is neither an alien nor a citizen of another State. It is not a foreign corporation, but a corporation which has a legal existence in Pennsylvania, and in every one of the United States. For a corporation, as we had occasion to point out in this very case on a hearing upon another motion (6 WEEKLY NOTES, 385), has a legal existence any where within the limits of the sovereignty from which its corporate

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existence is derived, and cannot be said to be foreign to a jurisdiction which constitutes a part of that sovereignty.

The objection, therefore, that the petition for removal is too late, and ought to have been filed at the time of entering an appearance, is without foundation. Suits commenced in the State Courts against corporations organized under the laws of the United States may be removed at any time before trial or final hearing, upon a petition accompanied by the affidavit and tender of security required by the statute.

The petition is allowed.

Opinion by THAYER, P. J.

[See last case.]

C. P. No. 2. March 29, 1879.

Smethurst v. Oppenheimer.

Assignment for creditors and attachment execution on same day—Priority.

Rule for judgment against garnishee.

Plaintiff having obtained judgment against the defendant, issued an attachment sur judgment against one Schnaitman as garnishee. In his answer to the interrogatories he admitted a certain sum in his hands, but set up that the attachment had been served on him on December 20, 1878, about 11.15 A. M., and that on the same day the defendant had made a general assignment for the benefit of his creditors, which had been duly recorded within thirty days.

Lex, for the rule.

Pierce, contra.

April 5, 1879. THE COURT. There is no presumption of law as to priority in such a case as this, upon which we can give judgment. See Boyer's Estate (1 Sm. 432), and Ladley *v.* Creighton (20 Sm. 490).

Rule discharged.

C. P. No. 2. May 24, 1879.

In re Philadelphia Relief Association.

Application for charter—Action of the Court is an adjudication.

Motion for leave to withdraw an application for charter.

A charter of an intended corporation, whose character and object was the maintenance of a society for benefiting and aiding the widows and orphans of deceased members or their heirs and assigns, was presented to the Court on Saturday, March 29, 1879, and was disapproved, on the ground that it was virtually a charter for an insurance company, and not, therefore, within the class of corporations to be created by the Courts under section 3 of the Act of Assembly of April 29, 1874; whereupon this motion was made for leave to withdraw the application for a charter.

G. T. Diess, for the motion.

THE COURT. The application for a charter and the refusal to approve it constitute an adjudication, and this application is practically for leave to withdraw a record of the Court. This we cannot sanction.

Motion refused.

C. P. No. 2. May 3, 1879.

Bradley v. Dusenberry et al.

Affidavit of defence law—Practice—No amendment of the record after the statutory time for judgment will entitle the plaintiff to judgment under the affidavit of defence law.

Rule for judgment for want of a sufficient affidavit of defence.

The affidavit suggested that the copy of book entries filed did not entitle plaintiff to judgment, because the suit was against Dusenberry and another, and the charge in the book entries was against Dusenberry only.

T. J. Diehl, for the rule, offered to amend the record so as to leave Dusenberry the only defendant.

A. Shields, contra.

THE COURT. The plaintiff not being entitled to judgment when the statutory time for judgment arrived, cannot put himself in a better position *for the purpose of this judgment*, by any subsequent amendment.

Rule discharged.

C. P. No. 2. March 15, 1879.

State Bank v. Shaw et al.

Attachment under Act of 1869—When not dissolved, although allegations of fraud are denied.

Sur rule to dissolve attachment.

This was a suit upon a promissory note, begun by attachment under the Act of 17th March, 1869. The affidavit upon which the attachment was granted averred that the debt had been fraudulently contracted as follows: Shaw, one of the defendants, had brought the note in suit to the State Bank of Camden, N. J., for discount. The cashier asked him if the note was genuine business paper or merely an accommodation note. Shaw replied that it was business paper, and on the faith of that representation, which was false, the bank discounted the note.

The depositions taken for the defendants in behalf of the rule contradicted point blank these averments of the affidavit.

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Budd, for the rule.

The contradiction by our depositions of Martindale, the cashier of the bank who made the affidavit, ought to be sufficient to dissolve the attachment.

THE COURT. While there still appears on the face of the depositions sufficient to raise a presumption of fraud in this transaction, the attachment cannot be dissolved.

Rule discharged.

C. P. No. 2. April 12, 1879.

Birch v. Gregory.

Affidavit of defence law—Book entries of physician for "visits and medicine"—When not within the Act.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit for services rendered and medicine furnished by a physician.

The copy of entries from plaintiff's book of original entry consisted of items similar to the following, viz.:—

Cornelia Gregory.

1877.	Dr.	To John P. Birch, M.D.	
Sept. 28.	To 1 visit and medicine	. . .	$1.50
" 29.	" 2 " "	. . .	3.00
etc.	etc.	etc.	

The affidavit of defence suggested that the copy filed is not such as entitles plaintiff to judgment for want of an affidavit of defence.

A. H. Gangewer, for rule.

Mellors, contra.

THE COURT. A lumping charge for visit and medicine is not good.

Rule discharged.

C. P. No. 2. March 29, 1879.

Wiltbank v. Scattergood.

Assigned estate—Reconveyance by assignee—Publication ordered in accordance with Rule XIX.

Petition by an assignee of an insolvent's estate for leave to reconvey.

Diehl, for the petition.

THE COURT. The practice has been to order publication in the manner provided by Rule XIX. relating to notice to creditors.

Ordered accordingly.

U. S. District Court—Admiralty.

Nov. 13, 1877; April 4, 1879.

The Brig Muriel.

Williams, libellant, v. Shallcross, owner and consignee.

Peril of the sea—Freight—Partial loss of cargo—Burden of proof—"Output."

A claim for freight on a part of a cargo, ruined by sea water so as to lose its character entirely, not sustained; the libellant failing to show the quantity so ruined.

Quære as to the liability of a consignee in such a case, where the quantity is ascertainable.

(1) Libel by Shallcross, owner and consignee of a cargo of potatoes, against the brig Muriel, for loss of a part of the cargo by wetting by sea water.

(2) Libel by Williams, Master, against the cargo, for freight.

In December, 1876, Hyndman shipped a cargo of potatoes upon the brig, to be carried to Philadelphia, freight at the rate of twenty cents per Winchester bushel, payable on the "output" by consignee. The master signed bills of lading, by their terms exempting the ship from liability for loss arising from "perils of the sea," and receipting for 8390 bushels, "more or less."

Upon arrival, the master delivered to Shallcross, who had purchased the bill of lading, 6937 bushels in good condition, but the balance had become utterly destroyed by the action of sea water, and was a mere mass of mash. The consignee refused to receive this part, or to pay freight therefor. The master then shovelled the mash overboard, without any measurement of its quantity, and sued for his freight.

The suit for damage, being the first of the above actions, was first heard, and involved principally questions of fact in respect to stowage.

Roney, for libellant in first case, and for respondent in second.

Flanders, for respondent in first case, and for libellant in second.

Nov. 14, 1877. THE COURT (CADWALADER, J.). We have here a perishable cargo, with a voyage of extraordinary duration, and weather which, however described by the witnesses, appears by the log to have been at a certain period tempestuous. The preponderating tendency of the proofs is that the cause of the damage suffered was wetting by sea water. The occurrences of the voyage suffice to explain this. The Master of the vessel is therefore not liable to the merchant unless by reason of bad stowage.

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The question as to stowage is twofold. First, was there proper and sufficient dunnage? On this point I do not think that the case of the libellant is made out on the law and the facts. Secondly, is the proof of the grounding and shipping of water in the East River sufficient to show that the cargo theretofore taken in was wetted so that it was improper to complete the lading without reference to that occurrence? On this point, if the decision depended on the examination in chief of the steward, the decree should, I think, be for the libellant. But in the steward's cross-examination, he says that he did not see any shipping of water, and the master and the mate testify that no water was taken in. The case of the libellant is one of great hardship, but the libel must be dismissed with costs.

Decree accordingly.

An appeal was taken, but subsequently discontinued, whereupon the suit for freight proceeded (being the second of the above actions).

Flanders, for libellant.

The purpose of the ship owner is to be paid for the space occupied, and for the transportation of the cargo. If its condition was unsound, that, it has already been decided, was through no fault of the ship. And if its condition, whether arising from a peril of the sea, or from its intrinsic nature or character, is such that the quantity cannot be determined at the port of destination, then, the criterion is, the quantity taken in at the port of shipment. Upon that quantity the freight is to be paid.

Steelman *v.* Taylor, 3 Ware, 52.
Dakin *v.* Oxly, 33 L. J. (C. P.) 115.
Ganet *v.* Milhurst, 4 Jur. (N. S.) 943.
Gibson *v.* Sturge, 10 Exch. 622.
Firth *v.* Barker, 2 Johns. 327.
1 Parsons, 218.

Roney, for respondent.

The cargo not remaining in specie, and not having been lost by an intrinsic defect, but by a "peril of the sea," the vessel is relieved from liability, but the consignee is relieved in like manner from the payment of the freight.

April 12, 1879. THE COURT (BUTLER, J.), after referring to the former case, said, in substance: We are now called upon to determine whether the respondent is liable for freight on this part of the cargo. He says it was not delivered, was lost on the voyage; that this rotten mass of slush was not in any sense *potatoes*. If this is true, he is not liable. But the libellant denies that it is true. He contends that no part of the cargo was lost in the sense here involved, urging that the change in form and character of the part under consideration, and the consequent deterioration in value, is unimportant; that, although the potatoes assumed a different shape, they nevertheless continued to be potatoes.

The legal principles involved are familiar and simple, but the novelty of the facts renders their application difficult. There is, however, a preliminary question to dispose of before this point is properly reached. As before stated, the freight was to be paid at the rate named in the charter-party, viz., twenty cents per Winchester bushel, on the "output." This involved a measurement at the port of delivery. The proofs show a measurement only of 6,937 bushels, on which the freight has been paid. The remainder (here involved) was shovelled into the river, without ascertainment of the quantity, neither party treating it as if liable to freight. It was susceptible of measurement—could have been weighed—without difficulty. How are we to ascertain the quantity? The able counsel for the libellant saw this difficulty, and very candidly acknowledged its seriousness on his attention being called to it. He endeavors to surmount it by taking the number of bushels stated in the bill of lading and deducting therefrom the 6,937 which were measured here. The difference, he argues, represents the quantity that was not measured. To this there are two objections: First, that the bill of lading itself is indefinite. It states the quantity shipped to be 8,390 bushels, "more or less;" and, second, that the freight is to be paid, as we have seen, on the "output," giving to the shipper all advantages from shrinkage and diminution from every cause. If we knew the exact quantity shipped, we could not know, or even approximate with certainty, the quantity brought here, treating the decayed mass thrown away as potatoes. For, both in bulk and weight, there was serious decrease. Necessarily this must have been so.

The case of Gibson *v.* Strong (10 Exch. 622) is readily distinguished from this. There a quantity of wheat was shipped, to be paid for per bushel, without an exact ascertainment of quantity, but naming a given number of bushels as an approximate amount. Before reaching the port of delivery, it had so swollen from contact with water as to render ascertainment of the exact quantity shipped impossible. From the necessities of the case, the Court was compelled to take the approximate amount named and charge the shipper accordingly. Aside from other differences between that case and the one before us, it is quite sufficient that the necessity which called for and alone could justify what was there done, does not exist here. The extent of this cargo, as before observed, could readily have been ascertained.

No ascertained amount of "output" being shown, beyond that already paid for, we may postpone a consideration of the important question first stated until its decision becomes necessary. The libel must be dismissed.

Decree accordingly, with costs.

Oral opinion.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, JULY 3, 1879.* [No. 10.

Supreme Court.

Jan. '79, 28. March 26, 1879.

Kane v. Commonwealth.

Constitutional law—Constitution of Pennsylvania—Art. I. Sections 6, 7, and 9; Art. V. Sec. 24—Statute of 32 Geo. III. ch. 60—Act of April 12, 1875 (P. L. 42)—Right of jury to judge of the law in criminal cases—Not abrogated by the constitutional provision allowing a writ of error.

The Act of April 12, 1875 (P. L. 42), prohibiting the sale of liquors on election day, makes a sale during any portion of the twenty-four hours illegal.

The constitutional provision (Art. V. Sec. 24) for a writ of error in criminal cases does not alter the rule that the jury are judges of the law in such cases.

The jury, having the legal *power* finally to dispose of a criminal case by a verdict of "not guilty," notwithstanding the charge of the Court, have the legal *right* so to do.

In such cases the instructions of the Court, while they furnish the best evidence of what the law is, and may well be accompanied by recommendations why they should be so received by the jury, ought to be nothing more than arguments addressed *ad verecundiam.*

Per SHARSWOOD, C. J. "The power of the jury to judge of the law in a criminal case is one of the most valuable securities guaranteed by the Bill of Rights."

Error to the Quarter Sessions of Montgomery County.

Francis M. Kane, a tavern-keeper in the borough of Norristown, was indicted for selling liquor on election day, under the Act of April 12, 1875 (P. L. 42, Sec. 11), which provides:—

"It shall not be lawful for any person with or without license to sell to any person any intoxicating drink on any day on which elections are now required to be held."

Plea, "Not guilty."

The evidence showed that the defendant had sold the liquor on the evening of the day on which an election had been held, after the hour for closing the polls.

The defendant's counsel requested the Court (ROSS, P. J.) to charge, *inter alia*, (3) The jury are judges of the law and the fact. *Answer.* I decline to affirm this point, and as to it refer to the general charge. Exception.

In the general charge the Court said: "The defendant does not deny the sale, ... that he did sell after the polls closed. Is a sale under such circumstances a violation of the laws regulating the sale of liquor? I charge you as matter of law, distinctly and positively, that any sale of liquor made upon the day upon which elections are held, is a misdemeanor under the Act of April 12, 1875, Sec. 11 (P. L. 42); and that the word 'day,' as used in that section, applies to the whole twenty-four hours beginning at midnight of election morning and ending at midnight of election night. . . . The law recognizes no fractions of a day.

"You have been asked to disregard the charge of the Court as to the law, and you have been told that you, and you alone, are the judges, in a criminal case, of the law as well as of the facts. [You are instructed by the senior counsel for the defendant that the Court can only express an opinion as to what the law is, but that this opinion does not bind you. Now, gentlemen, it is well known that doctrine was one that I rigidly enforced, against, in many instances, the protest of learned counsel. But I believed it to be grafted in our system of jurisprudence, and I felt a jealous anxiety to preserve the rights of the citizen and the jury from judicial domination, usurpation, or dictation. When a defendant had no remedy after conviction, save a motion for a new trial or arrest of judgment, based upon errors of law, before the same Judge who committed such alleged errors, the doctrine was wise and right. But when the new Constitution, and the legislation in pursuance of it, gave defendants, in a criminal court, writs of error, the reason which led to the adoption of the doctrine ceased, and the doctrine no longer exists.] It was very recently, in the case of Commonwealth *v.* Blasius Pistorius, that I charged the jury they must receive and be guided by the law of homicide as declared by the Court. The defendant was convicted of murder in the first degree. This instruction was assigned as error, but the judgment was not reversed on that ground.

"You are the exclusive judges of the facts; they are for you alone. The law is for the Court, and you will be governed by it, or you will not, as you have sworn to do, try the case 'by the law and the evidence.' I do not assert that I am infallible. It is human to err, but it is not for you to declare my error. If I err, I am glad to know that I can be corrected, and the defendant protected, in a higher tribunal."

Verdict "guilty." The defendant took this writ, assigning as error, *inter alia*, the refusal of the Court to charge as requested (fourth assignment), and the portion of the general charge inclosed in brackets (eighth and ninth assignments).

Geo. N. Corson (*Geo. W. Bush* with him), for plaintiff in error.

The argument of the Court below, that the

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giving of a writ of error to defendants in criminal cases took away the power of the jury to determine the "law and the facts," is negatived by the provision that "trial by jury shall be as heretofore, and the right thereof remain inviolate." (Art. I. Sec. 6, Const.) Since the adoption of the Constitution of 1873, it has been held that the jury are judges of the law in criminal cases.

Hutchinson *v.* Commonwealth, 1 Norris, 478.

The Court was in error in construing the meaning of the word "day." It was a doubtful question, and should have been submitted to the jury.

Cromlien *v.* Brink, 5 Casey, 524.

Chas. N. Apple, for the Commonwealth, submitted no paper book.

May 5, 1879. THE COURT. None of the specifications of error are sustained except the fourth and ninth—the refusal of the Court to charge as requested in the third point, and the instruction in the charge on the same subject. We have no doubt that the Court were right that the word "day," as used in the eleventh section of the Act of April 12, 1875 (Pamph. L. 42), includes the whole twenty-four hours of the day upon which an election is held.

We are of opinion that the learned Judge committed an error in declining to affirm the defendant's third point, that the jury in the case were judges of the law and the facts. He admits that the law was as stated in the point until the Constitution of 1873 and the legislation in pursuance of it gave the defendants in criminal cases a writ of error to the Supreme Court. We cannot agree that in consequence of these provisions the reason which led to the adoption of the doctrine ceased, and that it has ceased, therefore, to be the rule.

I do not propose an elaborate examination of the question. I find it done to my hand in a very learned and exhaustive opinion of Mr. Justice HALL, of the Supreme Court of Vermont, in the State *v.* Croteau (23 Verm. 14), who traces the doctrine historically, and cites and comments upon all the cases, both English and American. There is a great variety of opinion in the Courts of the United States and of the several States. While all concede that under the provisions of the Bill of Rights no man shall be twice put in jeopardy of life or limb for the same offence, that where the jury find in favor of the prisoner a verdict of not guilty, it is final, it not being in the power of the Court to grant a new trial on the motion of the Commonwealth and against the prisoner's consent, or of any higher Court to reverse the judgment, it has been strongly contended that though the jury have the power they have not the right to give a verdict contrary to the instructions of the Court upon the law; in other words, that to do so would be a breach of their duty and a violation of their oath.

The distinction between power and right, whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything, has the legal right. No Court should give a binding instruction to a jury, which they are powerless to enforce by granting a new trial if it should be disregarded. They may present to them the obvious considerations which should induce them to receive and follow their instructions, but beyond this they have no right to go. The argument in favor of their taking the law from the Court is addressed very properly *ad verecundiam*. The Court is appointed to instruct them, and their opinion is the best evidence of what the law is. For my part I consider the following passage from the charge of Mr. Justice BALDWIN in the United States *v.* Wilson (Baldw. 99) as a model to be followed by other Judges, when called on to instruct the jury upon the subject: "We have thus stated to you the law of this case under the solemn duties and obligations imposed on us, under the clear conviction that in doing so we have presented to you the true test by which you will apply the evidence to the case; but you will distinctly understand that you are the judges both of the law and fact in a criminal case, and are not bound by the opinion of the Court; you may judge for yourselves, and if you should feel it your duty to differ from us, you must find your verdict accordingly. At the same time it is our duty to say, that it is in perfect accordance with the spirit of our legal institutions that Courts should decide questions of law and the juries of fact; the nature of the tribunals naturally leads to this division of duties, and it is better for the sake of public justice that it should be so. When the law is settled by a Court there is more certainty than when done by a jury, it will be better known and more respected in public opinion. But if you are prepared to say that the law is different from what you have heard from us, you are in the exercise of a constitutional right to do so. We have only one other remark to make on this subject. By taking the law as given by the Court you incur no moral responsibility; in making a rule of your own there may be some danger of a mistake."

No one acquainted with the life of the founder of this Commonwealth can entertain any doubt of his opinion or that of his friends and followers. In 1670 William Penn with George Meade was tried, under an indictment for seditiously preaching to a crowd in Grace Church Street, before the Recorder of London, who charged the jury that the Court was the sole judge

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of the question of sedition, and that all they had to do was to find whether the defendants had preached or not. As this was not denied, it was a binding instruction to find for the crown. The jury, however, acquitted the prisoners, and the Court considering it as a contempt, set a fine of forty marks on each of the jurors. Edward Bushel, one of them, refused to pay the fine, and being arrested, sued out a writ of habeas corpus before Lord Chief Justice VAUGHAN, who, without hesitation, discharged him from his illegal and arbitrary imprisonment (Vaughan's Rep. 135). In 1735, on the trial of John Peter Zengu for a libel against the government, before Chief Justice DELANCEY, of New York, Andrew Hamilton, of Pennsylvania, certainly the foremost lawyer of the colonies, in a forensic effort in defence of the prisoner, equal to that of Erskine afterwards in the case of the Dean St. Asaph, not only took the ground that the jury had a right to say whether the publication was a libel, but added in the most emphatic language: "I know that they (the jury) have the right *beyond all doubt* to determine both the law and the fact; and when they do not doubt of the law they ought to do so" (17 State Trials, 675). The jury in that case, contrary to the charge of the Court, returned a verdict of not guilty. The corporation of the city of New York passed a vote of thanks to Mr. Hamilton for his able and eloquent defence of "the rights of mankind and of the liberty of the press," and the freedom of the city was presented to him in a gold box. When Lord MANSFIELD and his associates, in King *v.* Woodfall (5 Burr. 2661) and King *v.* Shipley (3 T. R. 428, n.), undertook to enforce a similar doctrine in England, Parliament by a *declaratory statute* (Mr. Fox's bill), 32 Geo. III. ch. 60, settled the law to be that it should be competent for the jury in all cases of indictment or information for libel to give a verdict of guilty or not guilty upon the whole matter put in issue, but that the Court should, according to their discretion, give their opinion and direction in like manner as in other criminal cases. It was in view of this controversy that the framers of the Constitution of 1790, in Art. IX. Sec. 7, expressly declared "that in all indictments for libel the jury shall have a right to determine the law and the fact, under the direction of the Court, as in other cases."

In the judicial system of this Commonwealth from the earliest period to the present time, the tribunals invested with criminal jurisdiction, with few exceptions, have been composed of a majority of Judges not required to be learned in the law. That this majority can overrule the President upon questions of law has never been doubted, and there is more than one case reported in our books in which they have done so, and been sustained by this Court. If the doctrine now contended for be sound, the jury in a criminal case are absolutely bound by the opinion of the two Associate Judges, though contrary to their own clear conviction and that of the President.

The power of the jury to judge of the law in a criminal case is one of the most valuable securities guaranteed by the Bill of Rights. Judges may still be partial and oppressive as well from political as personal prejudice, and when a jury are satisfied that this is the case, it is not only their right but their duty to interpose the shield of their protection to the accused. It is as important in a republican as in any other form of government, that, to use the language of the Constitution of 1776, "in all prosecutions for criminal offences," a man should have a right "to a speedy public trial by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty." The provision of the Constitution of 1873, that "in all cases of felonious homicide and in such other criminal cases as may be provided for by law, the accused, after conviction and sentence, may remove the indictment, record and all proceedings to the Supreme Court for review," Art. V. Sec. 24, is evidently a very inadequate substitute for the constitutional guarantees expressly declared and reaffirmed in the same instrument, Art. I. Sec. 6, 7, 9.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by SHARSWOOD, C. J.

July '77, 36. February 26, 1879.

North v. Phillips.

Contract—Wagers—Stock exchange—Purchase and sale of stocks on margins—Damages, measure of.

In cases of failure to deliver stock, where the parties stand *in equali jure*, and there is no fraud shown, the measure of damages is the same as for any other marketable commodity, *i. e.*, the value of the stock on the day when it should have been delivered, with simple interest.

The rule for the measure of damages as stated in Bank *v.* Reese (2 Casey, 143), applies only to cases of trusts, and cases where justice could not be reached by the ordinary measure of damages.

Huntingdon and Broad Top Mountain R. R. Co. *v.* English, 5 WEEKLY NOTES, 354, followed.

Transactions in stocks by way of margins, settlement of differences, and payment of the gain or loss, without any intention to deliver the stocks, are mere wagers.

In an action to recover damages for the sale of certain stock by the defendants, who were the plaintiff's brokers, the plaintiff testified on cross-examination: "I directed the defendants to purchase this stock as an investment; the purchase-money was $18,000; I only gave $500; I

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was not asked for more" (and so on of other transactions); "I bought to make money on the advance of the stock; I never paid the balance of the purchase-money, and never had the stock transferred to me:"

Held (reversing the judgment of the Court below), that these were mere gambling devices, such as the Courts will not help the parties to enforce.

Kirkpatrick *v.* Bonsall, 22 Sm. 155, distinguished.

Error to the Common Pleas No. 1, of Philadelphia County.

Assumpsit, by James R. Phillips, against Geo. H. North and Wm. F. North, trading as George H. North & Co.

At the trial (before ALLISON, P. J.) the following facts appeared: In March, 1872, the plaintiff called at the office of the defendants, who were brokers, and gave them an order to purchase 300 shares of Pennsylvania Railroad stock, "buyer's 30 or 60 days' option," *i. e.*, that the buyer would have the privilege of calling for the stock at any time within the specified period upon one day's notice. The contract was that the defendants would buy as directed on Phillips's account "on margin;" the latter was to deposit 10 per cent. on the par value to protect North & Co. against a fall, and as often as the market declined, so as to reduce this margin below ten per cent., the plaintiff was to deposit an additional sum sufficient to keep it up to the prescribed sum. These transactions continued until the defendants were carrying 1500 shares for the plaintiff upon the same terms (substantially) as the first. The market was continually falling, and, as the contracts matured, they were extended. The amount of margin deposited was gradually less than what had been agreed upon.

At one time (Sept. 18, 1872) there was a temporary rise, and by agreement 500 shares were "unloaded." The defendants furnished the plaintiff with an account after these sales, in which he was given credit for the amount realized thereby, but in which he was shown to be still largely in their debt for "margins." He partially supplied the deficiency (by an arrangement to which they assented) and they continued to carry 1000 shares for him, upon a falling market, they constantly calling on him for "margin," and threatening to sell out.

On Nov. 9th, 1872 (Saturday), the Board of Brokers adjourned over until Tuesday, Nov. 12th, Monday being the day fixed for the funeral of General Meade. On Sunday, Nov. 10th, the great fire in Boston occurred, and a panic was anticipated in the stock market on account of it. By virtue of a provision in the constitution of the Board of Brokers, a special meeting was called for Monday morning. North & Co. sent to Phillips's place of business to notify him that they would sell; the office was closed; they knew no other address, and accordingly the stock was sold. It was claimed by the plaintiff (and his testimony was to that effect) that North & Co. had received a "shave" on Nov. 4, in consideration of which they were to "extend" the shares they were carrying for a period of sixty days. This was denied. On the morning after the sale Phillips went to North's office and found fault with their having sold the stock. North said, "I call on you for $5000 before 2.30 o'clock" (or, as Phillips said, in five minutes), "or I will sell your stock." When asked why he said this when the stock had been already sold, he replied that he could have replaced the stock in five minutes.

The testimony upon almost every essential point in the case was in direct conflict. As to the nature of the transaction, Phillips testified, on cross-examination: "I directed defendants to purchase the stock as an investment; at the first purchase the amount of purchase-money would have been $18,000; I only gave $500; I was not asked for any more." (And so on of the other transactions.) "I presume you may call it margins. I do not know whether it was wagering or betting on the future price of the stock. I bought to make money on the advance of the stock. I presume the balance of the purchase-money was to come from me. I have never paid it. I have dealt with other brokers in the same way. I suppose you may call it speculation. I never asked for a transfer of the stock; it was never transferred. The value of the stock carried for me was about $78,000. I was worth about $20,000."

The defendants requested the Court to charge, *inter alia*, (6) That the measure of damages, if the plaintiff be entitled to recover damages, is the difference between the price at which the stock was sold and the price at which his principal could have replaced it within a reasonable time after the notice of sale. (7) That the sale of stock by a broker, or agent, where the dealings were in differences, will only entitle the injured party to demand the return of the stock, or if the party fail, or refuse to make return thereof, then, within a reasonable time, to replace it himself, and recover, if entitled so to do at all, the differences in value.

To which his Honor replied: "I do not think this is the measure of damages in this State. . . . The plaintiff is not entitled to recover, if you find this is a betting contract. The plaintiff is not entitled to recover back this amount of money if he bet upon the rise and fall of stock. If you find this is a contract for the purchase and sale of stock, then I instruct you, upon the law of Pennsylvania, as very clearly settled in the case of Bank of Montgomery *v.* Reese (2 Casey, 143), that the true measure of damages is the difference between the value of

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the stock on the day it was sold and the highest value that it reaches up to the day of trial." (Twelfth assignment of error.)

In the general charge his Honor said: "When asked upon what terms this stock was bought, he said, in one portion of his evidence, 'I bought this stock for an investment, just as I would buy anything else, with the expectation of making money by the rise of the stock.' When, on cross-examination, he was asked if he did not buy this stock upon what is technically called margins, he said, 'I bought it with the expectation of making money by the rise; I suppose you can call it buying on margins.' When brought back to state exactly upon what terms he dealt with the defendants, he said, 'I bought the stock and I expected to pay for the stock at its maturity.' [This is important, because this case may turn very much upon what you, the jury, may find this to have been—whether it was a purchase by the defendants, acting as brokers or agents for the plaintiff, or whether it was a mere gambling on the part of plaintiff and the defendants that they would hold stock and agree to carry stock for him, he to pay nothing more than the call for margin, and not to be called upon at any time to pay for this stock when they should demand the payment at his hands.]

"This is important, because the distinction is a very difficult one to draw so as to bring it to the comprehension of those who are not familiar with these transactions. Yet, still, it is a substantial difference in our law, and the Supreme Court of Pennsylvania have had this question before them. It is decided in a very recent case, reported in 22d Smith. The question was there whether it was an agreement to purchase—that is, the custom or purchased stock—and whether he should, upon complying with the terms of the purchase, be entitled to have that stock delivered to him, or whether it was only an agreement that he should not risk anything more than the margin he had paid from time to time. In the first place, although it may be bought upon time, it may be a bargain for an option. If it is a bargain by which the right of property in stock vests in a customer, so that he would be entitled to call upon the seller to deliver the stock, that, in law, is a good contract. But if it was nothing more than an agreement that stock was to be carried for him by other parties, who did not part with the title, and did not agree to sell the stock and vest the title in him, so that he was simply to take the chances of making money or losing money by the rise or fall of the stock, the law says it would be an invalid contract. In the case of Kirkpatrick *v.* Bonsall, this distinction is endeavored to be set up by Chief Justice AGNEW. [We cannot call this on the face of it a gambling contract, so I say to you that a bargain for an option, if this was that kind of a contract, may be a legitimate and perfectly fair and proper business transaction.]"

Verdict and judgment for plaintiff $4000. Defendant took this writ, assigning for error, *inter alia*, the answer to his sixth and seventh points, and those portions of the general charge enclosed in brackets.

S. Edwin Megargee (*James W. Latta* and *Chapman Biddle* with him), for plaintiff in error.

There is very little doubt that this was a gambling transaction. It was nothing more than a transaction by the way of margin, settlement of differences, and payment of gain or loss. Such a contract the Court will not enforce.

Maxton *v.* Gheen, 25 Sm. 168.
Kirkpatrick *v.* Bonsall, 22 Sm. 155.

The rule of damages announced in Bank *v.* Reese (2 Casey, 143) is confined to cases where some trust relation exists; it is founded upon the principle that a trustee may not receive any benefit by dealing with the property of the *cestui que trust;* and where it has been applied to cases of ordinary contracts for the delivery of merchandise and the like, it has been because the price had been paid, and the vendor was therefore a trustee *pro hac vice*.

West *v.* Beach, 3 Cow. 83.
Clark *v.* Penney, 7 Id. 681.

It has never been the rule unless this relation existed.

Wilson *v.* Whitaker, 13 Wr. 115.
Neiler *v.* Kelley, 19 Sm. 409.
McHose *v.* Fulmer, 23 Sm. 367.
Huntingdon R. R. *v.* English, 5 WEEKLY NOTES, 354.
Wagner *v.* Peterson, 2 N. 241.
Greening *v.* Wilkinson, 1 Carr. & Payne, 625.
Hart *v.* Ten Eyck, 2 Johns. C. C. 117.
Baker *v.* Drake, 53 N. Y. 211.

To apply the rule of the highest price to a case like the one at bar would be fraught with injustice to the defendants. Phillips had risked little or nothing. If, as he says, he was an intended bona fide purchaser, he still had in his pocket the price of the stocks, less the trifling sum he had advanced for margins. Aside from decisions, is it not the juster rule that he should either tender the purchase-money to the defendants, or that he should go into the market, and, with that money, buy the stocks he desired.

Robert D. Maxwell and *Wm. S. Price*, for defendant in error.

The question whether this was a gambling transaction has been set at rest by the jury under proper instruction from the Court.

The measure of damages as determined in Bank *v.* Reese (*supra*) has been re-affirmed, and is the established rule in this State.

Musgrave *v.* Beckendorff, 3 Sm. 310.
Reitenbaugh *v.* Ludwick, 7 C. 132.

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May 7, 1879. THE COURT. "If," says the learned Judge of the Court below, in his charge to the jury, "you find that this is a contract for the purchase and sale of stock, then I instruct you, upon the law of Pennsylvania, as very clearly settled in the case of Bank of Montgomery *v.* Reese, that the true measure of damages is the difference between the value of the stock on the day it was sold and the highest value it reaches up to the day of trial." No longer ago than the 4th day of March, 1878, in the case of the Huntingdon and Broad Top Railroad Co. *v.* English (5 W. N. C. 354), this Court, without dissent, ruled that the rule of damages, as stated in the Bank *v.* Reese (2 Casey, 143), did not apply to ordinary stock contracts, but only to trusts and cases where justice could not be reached by the ordinary measure of damages.

Where parties, as in the present case, stand *in equali jure*, there cannot be two different rules of compensation for the breach of a contract, one for the buyer and another for the seller. Were North & Co. suing on a breach of the alleged contract by Phillips, their damages would be measured by the market price of the stock on the day fixed for its delivery, as compared with the contract price. If we reverse the parties, the same rule applies. If North & Co. refused to execute the contract, then Phillips was entitled to the difference in the prices as above stated, but nothing more, unless fraud was practised upon him, and then his damages might be exemplary. In fine, the rule governing damages in contracts for stock is the same as that in contracts for any other marketable commodity. Without special notice of the remaining assignments of error, we pass to an examination of the character of the contract, or contracts, between these parties. It would seem from the statement of the counsel for the plaintiff below, that the defendants were to carry for him four hundred shares of the stock of the Pennsylvania Railroad Company until the 11th of November, 1872, and six hundred of the same shares until the 14th of the same month. He complains that they "slaughtered" these shares on the morning of the 11th of November; that is, if we understand the term, sold them before the time for which they had agreed to carry them had expired. Hence arises his claim for damages.

Phillips himself, says: "On receiving that note" (the one informing him of the sale), "I went to the office of Messrs. North & Co., on the morning of the 11th of November, 1872. I saw Mr. George North. I said to Mr. North, I had received notice of the sale of my one thousand shares of Pennsylvania Railroad stock; what does it mean? He replied he was called on, or something of the kind. Then I asked him why he did not notify me. I think he made no response to that. Then I told him I would not accept the sale. . . . Then North, pulling out his watch, said, I call on you for $5000 margin in five minutes, or he would sell my stock. Then I said to him, you notified me you had sold the stock; then I told him I would hold him responsible for the stock he held of mine." So the matter rested until the bringing of this suit. From the above testimony, one would naturally conclude that Phillips was the actual owner of one thousand shares of stock which his brokers had, without authority, disposed of. But there was nothing of the kind. These stock shares belonged to the defendants. Phillips neither had paid for, nor intended to pay for, any of them. They were worth, at this time, some $52,000, and Phillips (himself being judge) was not worth half that amount. According to the statement above referred to, North & Co. were only to carry them for him for a certain length of time, for a consideration, technically called a "shave." In other words, they agreed to hold this stock in his name for thirty or sixty days, as the case might be, in order that he might have the advantage of any rise in price that might happen in the mean time, it being also understood that he must make good any fall in such price. Thus the dealings of the parties were in "differences" and "margins," and the purchase and sale of the stock was a mere pretence. Hence it was, that when North was challenged about the disposition of these stocks, he made no demand for their price, but for margin. So Phillips, on the other hand, never pretends that he paid for any of the shares which the defendants from time to time professed to sell to him, but, he says, "I settled margins from time to time as they called for them by their notes, that is, notifications of Messrs. North." Now, as is said in Maxton *v.* Gheen (25 P. F. S. 168), transactions in stocks by way of margins, settlement of differences, and payment of the gain or loss, without any intention to deliver the stocks, are mere wagers. Nothing, however, could better describe the transaction in hand than the above language. It is conceded that an optional contract may be valid and binding upon the parties to it, as in the case of Kirkpatrick *v.* Bonsall (22 P. F. S. 155), where the agreement was to deliver oil within a given time, at buyer's option, and at a fixed price; but there was nothing in the transaction which indicated an intent to gamble on the fluctuation of prices. Had any such intent been apparent, the result would have been different, for the doctrine above stated is in that case emphatically recognized and approved. In the case in hand, however, the very proofs adduced by the plaintiff to establish his several contracts with the defendants, reveal the fact that they were mere gam-

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bling devices, such as the Courts will not help the parties to enforce.

Judgment reversed.

Opinion by GORDON, J.

[See Fareira *v.* Gabell, 6 WEEKLY NOTES, 490; Sawyer *v.* Taggart, 18 Am. Law Reg. 222; Thacker *v.* Hardy, Ibid. 254.]

Oct. & Nov. '78, 101. Nov. 29, 1878.

Bolton v. The Pennsylvania Company.

Attachment—Wages due in Pennsylvania can be attached by process from another State where there is no law exempting wages from attachment—Payment by garnishee in the attachment a good defence to an action against him by his creditor in this State—Notice by garnishee to his creditor the defendant—Object of such notice—Effect of omission to give such notice—In suit by creditor against garnishee such notice need not be averred in affidavit of defence.

Wages of labor earned and due to a citizen of Pennsylvania may be attached for a debt in another State where no law exists prohibiting the attachment of wages.

Morgan *v.* Neville, 24 Sm. 52, followed.

In a suit in Pennsylvania by the defendant in the attachment against the garnishee, it is not necessary that the affidavit of defence should allege notice by the garnishee to the defendant in the attachment.

Error to the Common Pleas of Mercer County.

This was, in the Court below, an appeal by the Pennsylvania Company, operating the Erie & Pittsburgh Railroad, from the judgment of a justice of the peace, recovered by John Bolton against them. The facts were as follows:—

There was due John Bolton, the plaintiff below, for services or wages as brakeman in the employ of the Pennsylvania Company, the sum of $45 for the month of September. Prior to pay-day the wages due Bolton were attached at the suit of D. Patton against John Bolton, in Ashtabula County, Ohio, and the Pennsylvania Company, a corporation under the laws of Ohio as well as of Pennsylvania, were summoned as garnishees in the said attachment. Judgment was duly obtained under the laws of Ohio, against Bolton, defendant, and the Pennsylvania Company, garnishee, and the said amount due Bolton was paid by the company in pursuance of the judgment. After these proceedings in Ohio, Bolton brought suit before a justice of the peace in Mercer County, Pennsylvania, against the Pennsylvania Company aforesaid, to recover the amount due him for wages for the month of September, 1876, which had been attached and paid as above stated, and obtained a judgment therefor. The defendants appealed from this judgment to the Common Pleas of Mercer County. The plaintiff filed his copy of claim, to which the defendants filed an affidavit of defence, setting forth the fact of the attachment in Ohio, with judgment against them as garnishees, and after due notice by publication, and agreeably to the laws of Ohio, the payment of the same.

The Court held the affidavit of defence to be insufficient, and directed judgment against the defendants to the full amount of the claim, on the ground that since wages cannot be attached by a creditor in this State, they cannot be attached by a creditor in a sister State. The defendants took this writ, assigning for error the entry of judgment for want of a sufficient affidavit of defence.

J. Ross Thompson, for plaintiff in error.

Wages due in Pennsylvania can be attached in Ohio.

Morgan *v.* Neville, 24 Sm. 52.
Jones *v.* N. Y. & E. R. R. 1 Grant, 457.
Mineral Point R. R. Co. *v.* Barron, 83 Ill. 365.

The payment of a judgment by a garnishee in foreign attachment in another State is a good defence to a suit against him in Pennsylvania.

Noble *v.* Thompson Oil Co. 19 Sm. 415.

The plaintiff in the attachment, as a citizen of Pennsylvania, had a right to all the privileges of a citizen of Ohio, and could sue in that State. The Courts of that State had jurisdiction, because the debt follows the debtor. The remedy there was by the laws of Ohio, since the Act of Pennsylvania exempting wages from attachment is not part of the contract, and is not carried with the debt into the Ohio forum. The affidavit of defence was, therefore, sufficient.

Morgan *v.* Neville, *supra*.
Speed *v.* May, 5 Harris, 95.

S. H. Miller, contra.

The affidavit of defence does not set forth that the defendant, Bolton, had any legal or actual notice of the suit, either from the plaintiff Patton or the garnishee, or even that the garnishee made any effort to give him notice, or that he could not be found to be notified. A garnishee, who pays an attached debt without notice to his own creditor, is not protected from its repayment.

Morgan *v.* Neville, *supra*.
Steele *v.* Smith, 7 W. & S. 447.
Campbell *v.* Steele, 1 Jones, 394.

The Court is requested to reconsider and reverse Morgan *v.* Neville, *supra*, in so far as it rules that a debtor's choses in action are the subject of a foreign attachment in a State into the jurisdiction of which he has not voluntarily carried or sent them. To make a debtor's property so subject, he must have voluntarily sent it into the State where it is claimed to have been attached.

Steele *v.* Smith, *supra*, per GIBSON, C. J.

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January 6, 1879. THE COURT. The main question in this case was solemnly decided by this Court in Morgan *v.* Neville (24 P. F. Smith, 52), that wages of labor earned and due to a citizen of this State may be attached for a debt in another State where no law exists prohibiting the attachment of wages of labor. We are now asked by the counsel of the defendant in error to review and overrule that case. We see no reason for doing so. The non-attachability of wages of labor for debt no more enters into the contract than does the exemption from execution of certain articles, or a certain amount. The laws for process of attachment and execution are part of the remedy, governed entirely by the *lex fori*. It is said, however, that the affidavit of defence did not allege notice by the garnishee to the defendant in the attachment. But the sole object of such notice is to enable the defendant to take defence against the plaintiff in the attachment. When, therefore, the defendant comes to sue the garnishee, if the attachment is pleaded in bar, he may reply that he was not indebted to the plaintiff, to which the garnishee may answer that he gave notice. The only effect of not giving notice is that the garnishee takes upon himself the risk of its appearing that his creditor had a just defence to the claim. It was not necessary that the affidavit of defence should anticipate such defence by averring notice.

Judgment reversed, and *procedendo* awarded.

Opinion by SHARSWOOD, J. MERCUR and WOODWARD, JJ., absent.

May, '79, 135. May 12, 1879.

Rigler v. Light.

Mortgages—Priority of lien—Agreement that one of two mortgages executed at same time shall have priority—When enforced, irrespective of the dates of record.

An agreement between the parties to a transaction that one of two mortgages executed at the same time shall be prior in lien to the other will be enforced upon a distribution, as between the parties, although the mortgage agreed to be postponed was first recorded.

A. executed at the same time, and upon the same premises, two mortgages, one (a purchase money mortgage) to B., and the other to C. (A.'s wife), with the understanding between B. and C. that C.'s mortgage was to have the prior lien upon the land. B.'s mortgage was first recorded, and under proceedings thereon, the mortgaged premises were sold. Upon a distribution of the fund arising from the sheriff's sale, there being no other creditors or claimants:

Held (affirming the judgment of the Court below), that C.'s mortgage should be preferred, and first paid out of the fund.

Appeal from the Common Pleas of Perry County.

This was an appeal by George Rigler and Henry Gingerich, administrators of Felix Gingerich, deceased, from the decree of the Court distributing the proceeds of a sheriff's sale of the real estate of one Godlieb Light. The case was heard in the Court below upon petition and answer, and testimony taken by an examiner, from which the Court found the material facts to be substantially as follows:—

Felix Gingerich, deceased, owned a farm in Perry County, which he sold and conveyed on March 31, 1875, to Godlieb Light, receiving as payment, a conveyance from said Godlieb Light, and Sarah, his wife, of a tract of land in Lebanon County, the property of the said Sarah, value $1500, and a purchase-money mortgage from Godlieb Light for $4083, upon the said farm in Perry County. This mortgage was executed and recorded on the same day as the date of the deed, March 31, 1875. On that day Godlieb Light executed another mortgage upon the same premises to his wife, Sarah Light, for $1500, being the consideration for her said tract in Lebanon County, conveyed to Gingerich as above stated. This latter mortgage was not recorded until May 19, 1875. Under proceedings upon the Gingerich mortgage for $4083, the said farm in Perry County was sold at sheriff's sale as the property of Godlieb Light for $3400.

The Court found as a fact, that it was understood and agreed by the said Gingerich, Godlieb Light, and Sarah Light, at the time of the transaction of March 31, 1875, "that Mrs. Light's mortgage was to be the prior lien," in consideration of her conveying her separate estate to Gingerich. There being no other parties interested in the fund, the Court held that, as between the original parties to the transaction, Sarah Light had a prior equity to the payment of her mortgage out of the fund, and decreed accordingly.

Gingerich's administrators took this appeal, assigning the decree as error.

Josiah Funk and *W. A. Sponsler*, for the appellants.

Charles A. Barnett (with him *W. M. Derr*), contra.

May 26, 1879. THE COURT. We must give to the finding of the Court below upon the question of fact all the effect which the report of an auditor would have had. To reverse we must convict of palpable error. There was evidence from which the conclusion arrived at might very reasonably be drawn. A witness present testified that Light said, in the presence of Gingerich, that his wife must be secured, or she would not release or sign off. If a second mortgage only was meant, Gingreich's assent was unnecessary. Something more was intended. His conversation with Rigler subsequently shows that he

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understood it was to be a first mortgage. No objection has been raised to the decree that the fund was not in Court.

Decree affirmed, and appeal dismissed at the costs of the appellant.

PER CURIAM. PAXSON, WOODWARD, and STERRETT, J.J., absent.

Jan. '78, 263. Feb. 19, 1879.

Hess v. Gourley.

Evidence—Act of April 15, 1869—Competency of witnesses—Incompetency when the assignor of the thing or contract in action is dead—Assignor of the thing or contract in action, defined—Judgment, when not improperly entered—Assignment of error, when not considered.

In the statutory sense the assignor of the thing or contract is he whose right therein or thereunder, at or before the time of decease, passed by his own act, or by law, to a party in the action.

In an action of ejectment by G. against H., G. claimed title under B., an intestate, as one of his four heirs. H., the devisee of B.'s wife, offered to prove that the property in controversy had been paid for by B. with his wife's money both before and after marriage; and also admissions by B. of the fact that the property belon ed to his wife.

Held (sustaining the ruling of the Court below) that the assignor of the thing in action being dead, and his right having passed to G., the statutory rule of evidence could not apply except as to matters which had occurred since his decease, and the offer was properly rejected.

Held, further, that the entry of judgment in favor of the plaintiff, who appeared to be one of four heirs, for the whole of the premises in dispute, was not error, since admissions or other matters might have justified a general verdict, and no point was made or exception taken in reference to the matter.

Per TRUNKEY, J. The statute should be liberally construed in favor of competency, but not so as to embrace actions or persons expressly excepted.

Legislation on competency of witnesses reviewed.

Craig *v.* Brendel, 19 Sm. 153, *doubted.*

Error to the Common Pleas No. 3, of Philadelphia County.

Ejectment, by John Gourley and Annie Gourley, his wife, in right of the said Annie Gourley, against Peter Hess and Maria Hess, his wife, and Catharine Farren, for certain premises at the northeast corner of Thirteenth and Filbert Streets, in the city of Philadelphia. Plea "not guilty." Upon the trial, before FINLETTER, J., the following facts appeared:—

In 1836 Ann Harlan, a widow, kept a boarding house; among her boarders was Alexander Barber, a shoemaker. The relations between these parties were of a friendly character, and Mrs. Harlan, who owned a considerable amount of real estate, but was somewhat illiterate, depended largely for guidance in business transactions upon Mr. Barber.

In 1848 the property in dispute was purchased from Waln & Leaming by Barber, for the consideration of $4000; $500 being paid in cash, and $3500 remaining on mortgage. Mrs. Harlan moved to this property in 1849, where she continued to take boarders, and among them Mr. Barber. In 1850 Mrs. Harlan and Mr. Barber were married. In 1851 the second payment of $500 was made on the mortgage. The deed was recorded in 1855. In 1857 Mr. Barber died intestate, and in 1870 Mrs. Barber died, devising the premises in question to Maria Hess, by will dated March 4, 1869. In 1874 this suit was brought by Annie Gourley, claiming the property as one of the four heirs of Alexander Barber.

It was contended on the part of the defendants that the property was bought by Barber with the money of Mrs. Harlan, and for her benefit; that the payment on account of the mortgage was made with her money; that Barber never had that amount of money, and that neither his business, nor any other source at his command, was capable of producing it.

The defendants offered the deposition of Maria Hess to prove a payment by Mrs. Barber, through her husband, Alexander Barber, after their marriage, upon the property in dispute; that Alexander Barber, himself, was a dealer in lottery policies, and was a person of extremely limited means and business (to show his pecuniary inability to make the payment referred to), and that he uniformly, during his lifetime, declared, both in the presence of his wife and out of it, that the property belonged to her; and that the witness saw the $500 payment referred to made by Mrs. Barber to her husband for the purpose. And also the deposition of Peter Hess, another of the defendants, to prove a payment of $500 by Mrs. Harlan to Alexander Barber, prior to their marriage, upon the property in question; also Mr. Barber's declaration as to his wife's ownership of the property; also, Mr. Barber's pecuniary inability to purchase the same himself, and Mrs. Barber's ability to do so.

This offer was objected to, on account of the incompetency of the witnesses. Objection sustained. Exception. (1st and 2d assignments of error.)

Verdict for plaintiffs, and judgment thereon. The defendants took this writ, assigning for error the rejection of their offers, and the entry of judgment in favor of the plaintiffs for the whole amount of the property in dispute.

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Michael Arnold (with whom was *O. P. Cornman*), for the plaintiffs in error.

This suit is between parties living at the time the cause of action occurred. They stand upon the same plane. Neither were parties to the transaction which is in review here. The offer should have been received under the Act of 1869, as interpreted in Karns *v.* Tanner (16 Sm. 297).

The competency of Peter Hess is affirmed in Craig *v.* Brendel (19 Sm. 153). In Taylor *v.* Kelly (30 Sm. 95) the action was against an executor, and the evidence was, therefore, properly rejected.

The plaintiff proved that she was one of four heirs of Barber, the other three living in Ireland. The error in entering judgment in her favor for the entire property in dispute may be modified here.

Stephenson *v.* Richardson, 6 WEEKLY NOTES, 184.

Henry M. Dechert, for defendants in error.

The term assignor is used in its largest sense in Karns *v.* Tanner (*supra*).

In Craig *v.* Brendel (*supra*) there was no claim made either under an assignment or by devolution on the death of the owner.

The competency of a witness imparted by the enacting clause is strictly qualified by the proviso.

Diehl *v.* Emig, 15 Sm. 320.
Taylor *v.* Kelly, 30 Id. 95.
Karns *v.* Tanner, 16 Id. 297.
Pattison *v.* Armstrong, 24 Id. 476.
Ward *v.* Tyler, 2 Sm. 393.
Strawbridge *v.* Cartledge, 7 W. & S. 394.

No objection was made in the Court below to the judgment as entered. If erroneous, it should have been modified there. But as between the parties, it has been established that the title to the property in dispute was not in the plaintiffs in error, and the possession of a co-tenant will be considered the possession of all.

Galbreath *v.* Galbreath, 5 Watts, 149.

March 3, 1879. THE COURT. The Act of April 15, 1869 (P. L. 30) establishes a general rule that "no interest or policy of law shall exclude a party or person from being a witness in any civil proceeding." This abrogates the common law rules respecting the competency of parties, and interested persons, and persons on grounds of public policy; and is so comprehensive that no relation is so sacred nor interest so strong as to exempt any person, who is not taken out by the proviso, from testifying in a civil proceeding which is not withdrawn from its operation.

The first section declares that "this Act shall not apply to actions by or against executors, administrators or guardians nor where the assignor of the thing or contract in action may be dead, excepting in issues and inquiries *devisavit vel non*, and others, respecting the right of such deceased owner, between parties claiming such right by devolution, on the death of such owner." It would seem difficult to misapprehend the intendment of this provision. It withdraws the specified actions from the operation of the rule. To these actions, not special persons, the Act shall not apply. Therefore, such actions remain within the rules of the common law, and in the trial thereof, husband and wife cannot testify for each other, nor are parties and interested persons competent witnesses. Legislation since the Act of 1869, supplying its defects, has been in continuous recognition of the plain meaning of its words. There was no good reason for excluding from the operation of the statutory rule testimony of matters occurring after the death of the assignor of the thing or contract in action, and hence the passage of the Act of 9th April, 1870 (P. L. 44), extending the rule to these actions as to matters occurring since the death. For obvious reasons the Act of 8 June, 1874 (P. L. 279), excluded from the rule "actions by or against committees of lunatics, except as to matters occurring after the appointment of said committee." The Act of May 25, 1878 (P. L. 153), permits surviving partners to testify to matters having occurred between the surviving partners and adverse party on the record. Throughout the statutes is the spirit of equality, which forbids the application of the statutory rule in actions where one of the parties represents the rights of a decedent or a lunatic, except as to matters since the death or lunacy, and matters between a surviving partner and his adversary.

In determining the competency of a witness to prove a matter which occurred during the life of a decedent, the inquiry is whether the action is within the statute. This is not difficult when the suit is by or against an executor, administrator, or guardian in his representative capacity. Nor is it in other cases, if the spirit of the statute be kept in view and the persons intended by the word assignor be learned from the context rather than its technical definition. Soon after its enactment a clear exposition of several parts of the statute was given by AGNEW, J., in Karns *v.* Tanner (16 P. F. Smith, 297). He says, "Evidently it was the true purpose of the statute to close the mouth of him who is adversary to the deceased assignor." Again, "The true spirit of the proviso, then, seems to be that when a party to a thing or contract in action is dead, and his rights have passed, either by his own act or by that of the law, to another who represents his interest in the subject of controversy, the surviving party to that subject shall not testify to matters occurring in the lifetime of the adverse party whose lips are now closed." (See Pattison *v.* Armstrong, 24 P. F. Smith, 476; Gardner *v.* McLal-

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len, 29 Ibid. 398.) In the statutory sense the assignor of the thing or contract is he whose right therein or thereunder, at or before the time of his decease, passed by his own act, or by law, to a party in the action. The defendant, Maria Hess, claims title under the will of Ann Barber. Alexander Barber died intestate, and the plaintiff, one of his four nephews and nieces, avers that he was owner of the land in controversy which passed to them by operation of law. The assignor of the thing in action is dead, his right has passed to the plaintiff, and the statutory rule of evidence does not apply except to matters which have occurred since his decease. It follows that the learned Judge was right in rejecting the depositions of Maria Hess, and her husband, Peter Hess. (Diehl *v.* Emig, 15 P. F. Smith, 220; Taylor *v.* Kelley, 30 Ibid. 95.) In the latter MERCUR, J., said: "We see nothing in the letter, nor in the spirit of the Act, so far as it applies to husband and wife, to make one competent when the other was incompetent." An executor was a party, and the opinion and judgment are based upon the reason that the Act of 1869 does not apply to actions against executors. That the full force of the reason was considered, is evident from the reference to Dellinger's Appeal (21 P. F. Smith, 425). Inasmuch as Craig *v.* Brendel (19 P. F. Smith, 153) was not alluded to, it is suggested that, upon its authority, Peter Hess was a competent witness for his wife, and it seems to support the position, but, if such be its bearing, it is at variance with the doctrine in Taylor *v.* Young. That doctrine rests upon the very letter and spirit of the proviso which took out all actions therein described, instead of particular persons, from the operation of the Act of 1869. By supplements the Act has been somewhat extended. The statutes should be liberally construed in favor of competency, but not so as to embrace actions or persons expressly excepted. The power which in 1878 made surviving partners competent in certain cases, can make husband and wife competent to any extent deemed expedient, as to matters which took place before the death of the assignor of the thing or contract in suit.

The third assignment is not sustained. While it is true that the plaintiff as one of four heirs was entitled to one-fourth of the premises, there may have been ample grounds, by admission or otherwise, for the verdict. No point was made or exception taken in reference to this matter. The record does not show error. Stephenson *v.* Richardson (6 W. N. C. 184), cited by counsel, was a case-stated, the facts were agreed upon and submitted for judgment, making it very different from a general verdict.

Judgment affirmed.

Opinion by TRUNKEY, J.

Jan. '78, 214. Jan. 15, 1879.

Vidal's Appeal.
Whipper's Estate.

Executors and administrators—Evidence—Competency of witness—Acts of April 15, 1869, and March 27, 1865—Decedents' estates.

An executor is a competent witness to disprove a claim against the estate of his testator, though the claimant be dead, and the testator, if living, would have been incompetent.

The Act of April 15, 1869 (P. L. 30), is an enabling statute, and renders no one incompetent to testify who before its passage was competent.

Appeal from the Orphans' Court of Philadelphia County.

Upon the audit of the account of the executors of William Whipper, deceased, a claim of E. C. Vidal, administrator *d. b. n.* of Annie M. Vidal, deceased, upon a note given by the decedent, Whipper, was presented. Counsel for the executors offered Isaac C. Wears, one of Whipper's executors, as a witness to prove that Mrs. Vidal in her lifetime had admitted that the note had been paid. The auditing Judge, HANNA, P. J., held that Wears was incompetent to testify as to conversations between himself and Mrs. Vidal, she being deceased. The executors excepted, the Court in banc sustained the exceptions, and recommitted the account. The adjudication was then amended so as to disallow the claim. Whereupon the claimant appealed, assigning as error the action of the Court.

B. Sharkey, for appellant.

Whipper, if living, would have been incompetent to testify as to conversations with Mrs. Vidal, she being dead. His executors stand exactly in his position.

Charles F. Corson (*John Goforth* with him), for appellee.

The executor was a competent witness under the Act of March 27, 1865 (P. L. 38), he having no interest in the controversy.

Leckey *v.* Cunningham, 6 Sm. 370.
Cox *v.* McKean, Id. 243.
Richter *v.* Cummings, 10 Id. 441.

The Act of April 15, 1869, is an enabling statute, and no person competent to testify before that Act was passed, was thereafter rendered incompetent.

Scheetz *v.* Hanbest's Exrs., 31 Sm. 100.
McFerren *v.* Iron Co., 26 Id. 180.

February 3, 1879. THE COURT. There is but one assignment of error, which raises the question whether Isaiah C. Wears, one of the executors of William Whipper, was a competent witness to disprove the claim of the appellant on the estate of the testator. The witness clearly

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had no interest in the subject of controversy. Whether the appellant succeeded or failed made no difference to him, it could not even affect his commissions, and if it could the Act of March 27, 1865 (Pamph. L. 38), removed all objection on that source. He was a competent witness then before the passage of the Act of April 15, 1869 (Pamph. L. 30), and it is now well settled that no person competent before the passage of that Act was thereby rendered incompetent. (Sheetz *v.* Hanbest's Exrs., 31 P. F. Smith, 100.)

Decree affirmed, and appeal dismissed at the costs of the appellant.

PER CURIAM.

Common Pleas—Equity.

C. P. No. 2. April 26, 1879.

Assay v. Baldwin, Chief Commissioner of Highways.

Special injunction—Sewer connections—Authority of chief commissioner of highways to sever them when illegally made.

Motion to continue special injunction.

Hearing on bill and answer.

The bill set forth that the complainant had caused to be erected in the Twenty-eighth Ward sixteen houses, and that he obtained from the Department of Surveys of the city of Philadelphia two licenses allowing him to make connection with the sewer in Twenty-second Street for "carrying into said sewer the contents *of surface.*" This connection, made under the above licenses, was used for carrying off *all* the drainage of the aforesaid houses, including that from the water-closets. On December 15, 1878, Baldwin, the chief commissioner of highways, caused the connection to be severed; on March 28, 1879, the petitioner caused the connection to be relaid, and on April 21, 1879, filed this bill, praying that the chief commissioner be enjoined from disconnecting the newly made connection.

Benjamin H. Lowry, for complainant.

Osborne, contra.

The license was for surface drainage only. The use of it for other drainage was illegal. By the city ordinance of May 12, 1866 (City Ord. p. 144), a permit must be procured from the highway department. And by ordinance of May 9, 1867, section 9, a connection made without a permit may be severed.

Lowry, in reply: The ordinance of 1867 does not say by whom the connection is to be severed; whoever has the power of cutting off sewer connections cannot exercise it in this arbitrary manner without notice to any one.

THE COURT. We will not enter into the question whether the chief commissioner could arbitrarily sever a connection properly and legally made; but this connection, we think, was never legally made, and therefore the special injunction must be dissolved.

Common Pleas—Law.

C. P. No. 2. June 11, 1879.

Conrad v. Smith.

Ground-rent—Personal liability of the holder of legal title to land, subject to arrears of ground-rent—Liability for, of holder of legal title subject to resulting trusts.

A., being seised of land in fee, conveyed it to B., reserving a ground-rent which B. covenanted to pay. The premises were subsequently, in 1871, sold under a judgment rendered on a claim filed by the City for unpaid taxes, and conveyed by the sheriff to the defendant, who was an executor, and purchased it with the trust money of the estate, but took title in his own name. The defendant, after suit brought, conveyed the land to a stranger, to get rid of any further personal liability:

Held, that the owner of the land was personally liable for the arrears.

Held, further, that in the absence of evidence of the consent of the cestui que trust to the purchase by defendant, the beneficial ownership was in the defendant, subject only to a resulting trust, which might be asserted at the pleasure of the cestui que trust. The defendant, therefore, had such a beneficial interest as made him liable for the payment of the rent.

Conrad *v.* Smith, 5 WEEKLY NOTES, 402, followed.

Rule for a new trial, and motion for judgment for defendant on point reserved.

Covenant for arrears of ground-rent.

In a former report of this case, on demurrer, (5 WEEKLY NOTES, 402), the defendant's pleas were set forth. On the trial, before MITCHELL, J., under the general issue and the pleas there reported, the following facts appeared: Elizabeth Jones, the plaintiff's devisor, being seised of the premises in question, conveyed them in fee to one Sheppard, reserving a yearly ground-rent of $204⅓, with the usual express covenants by Sheppard to pay the rent, as and when the same fell due. After this conveyance, judgment was obtained by the City of Philadelphia, for unpaid taxes due on the lot, against one Conrad, as reputed owner, and the lot, under this judgment, was sold to James D. Smith, the defendant.

The defendant offered in evidence a deed of

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William Bingham to Cooper and King, dated May 15, 1783, for a larger lot (including the land in question), by which a ground-rent of $140 per annum, with the usual express covenants, was created; also a deed from Cooper and King to Nicholson, dated March 21, 1789, creating a second ground-rent, binding this land, with similar covenants, for $20 per annum. The defendant then testified that he had been one of the executors of William S. Smith, deceased, who had owned the premises adjoining the lot in question. The then executors purchased the lot to prevent the erection thereon of any building, and paid for it with money of the estate. The defendant had taken title in his own name. The lot had always been vacant; the taxes were sometimes paid directly by the estate, and sometimes by the defendant, who was, however, always reimbursed out of the estate. Some small repairs to the fence had been paid for by the life tenant. The Pennsylvania Company for Insurances on Lives had since become administrators *c. t. a.*, and the defendant had been duly discharged. On cross-examination the defendant stated that, since this suit had been brought to charge him personally for the arrears, he had conveyed the premises to one Walker, who was worth nothing, to avoid further responsibility.

By the will of William S. Smith, which was offered in evidence, it appeared that the defendant had a remainder for life in the whole of William S. Smith's estate, after the death of the present life tenant, in the event of his surviving his mother. The will gave the executors no power to invest in real estate.

The plaintiff having proven a devise of the ground-rent to himself, and the amount in arrear, MITCHELL, J., directed a verdict for the plaintiff, reserving the point whether, under the evidence, the plaintiff was entitled to recover at all.

Hood Gilpin (with whom was *Charles Gilpin*), for the motions.

The defendant's liability under the facts proven has already been determined in the preliminary argument on the demurrer (*supra*); but it did not then appear that there were two prior ground-rents covering this property, nor that the defendant was a mere dry trustee for the cestui que trust under the will of William S. Smith, with whose money the lot was bought. A trustee having no beneficial interest cannot be held liable.

Wickersham *v.* Irwin, 2 Harris, 108.
Wetherell *v.* Hamilton, 3 Harris, 195.
Girard Ins. Co. *v.* Addicks, 5 WEEKLY NOTES, 75.
Same *v.* Stewart, Ibid. 87.

[HARE, P. J. Does the doctrine of those cases apply to a trust by operation of law, as well as an express trust?]

Wherever the beneficial title is in a person other than the trustee the latter cannot be held personally liable.

Girard Ins. Co. *v.* Addicks (*supra*) decided that in the case of a mortgage the person who takes title cannot be held responsible if he is merely a trustee; and there is no difference between that and where a person takes title to property subject to a covenant running with the land, because in both cases the promise is an implied promise to pay. So it has always been held that an assignee for the benefit of creditors cannot be made liable for covenants running with the land; otherwise no one would accept such an assignment. There is no difference between that case and this.

The Act of 1878, passed since bringing this suit, takes away the remedy against defendant. This still leaves two remedies, one against the covenantor, the other against the land. Such acts have been held constitutional, although they took away a remedy which plaintiff had prior to bringing suit.

Couch *v.* Jeffries, 4 Burroughs, 2460.
Evans *v.* Montgomery, 4 W. & S. 218.

A sale for taxes is a proceeding *in rem*. It works a forfeiture, and the purchaser takes title against all the world.

Salter *v.* Read, 3 Harris, 260.
Heckerman *v.* Hummel, 7 Harris, 64.
Delaney *v.* Gault, 6 Casey, 63.
Irwin *v.* Bank of U. S., 1 Barr, 349.

[HARE, P. J. That may be true against an outstanding title in another, but not against incumbrances subject to which the defendant held.]

George Biddle, contra.

In Wickersham *v.* Irwin (2 H. 108) the defendant was trustee of land, the ownership of which was proven to be in another; though no conveyance in writing in that case, from the person holding the beneficial title, was proven on the trial. But no exception was there taken on the ground of the Statute of Frauds. (See 2 Har. at p. 110.) It has, however, been expressly ruled in Pennsylvania, that an express trust may be proven by parol; hence that was the case of an express trust. In Wetherell *v.* Hamilton (*supra*) the real estate subject to the ground-rent was conveyed to Wetherell to secure advances, and was really a mortgage, and a trust to reconvey on repayment of the loan was there shown, contemporaneous with the execution of the original conveyance. This was, therefore, also an express trust, though proven by parol. The cases of the Girard Co. against Addicks, and against Stewart (cited *supra*), were purchases "under and subject" to a mortgage, where there is no express contract, but where one is generally implied on the part of the purchaser to bind himself for the mortgage debt, because it is part of the consideration for the conveyance. In Girard Co. *v.* Stewart, no such contract could, it was held, be implied against a trustee, where "by the agency of others who were the beneficiaries," or, by act of law, the title was cast on him.

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Now the defendant here had no authority to use the trust funds of the estate to purchase the lot. The cestuis que trustent might elect to treat the defendant as a trustee; but could, on the other hand, surcharge him in the Orphans' Court.

[MITCHELL, J. The purchase was in 1871, more than five years ago; are not the cestuis que trustent barred in any case by the Act of 22 April, 1856?]

In any view, the cestuis que trustent cannot now be held liable for the performance of the covenant, because they clearly have now no right of possession or enjoyment. Now, the ground of decision in the cases in 2d and 3d Harris is, that where the equitable owner is himself personally liable, because of his beneficial interest, the ground landlord cannot hold the trustee liable besides. But the defendant himself exercised an act of individual ownership inconsistent with the trust set up, by conveying it to Walker after suit brought, and after he had ceased to be executor or trustee. In addition, the will of William S. Smith shows that the defendant is himself a life tenant in remainder after the estate of the present life tenant expires.

Hood Gilpin, in reply.

The doctrine of personal liability by reason of privity of estate cannot apply to a second or third ground-rent, such as this. This doctrine is founded on the feudal law, which contemplates the reversioner as the owner of the rent. There can only be one reversion, while, on the plaintiff's theory, every successive owner can create a reversion sufficient to establish privity of estate between himself and the subsequent owners of the land. Here the defendant would be liable by privity of estate for three different ground-rents to three different landlords.

THE COURT. Rule for a new trial discharged, and judgment for plaintiff on the point of law reserved.

C. P. No. 2. March 15, 1879.

Haldorn v. Hassitt.

Judgment bonds between counsel and client—A judgment entered on such bond will be opened, and the case sent to a jury to liquidate amount reasonably due for services.

Rule to open judgment and let defendant into a defence.

The judgment had been entered upon a bond for $125.00. It appeared from depositions that this bond had been given under the following circumstances:—

Hassitt, the defendant, had been arrested on a criminal charge, and while awaiting the action of the grand jury, in Moyamensing Jail, the plaintiff, Haldorn, his attorney in the case, came to the prison, and told him that if he (Hassitt) would sign a judgment bond, he (Haldorn) would have him released at once. Hassitt consented, and was taken accordingly out of prison to a drinking saloon, where he signed the bond in suit. Then Haldorn informed him that his case had been ignored by the grand jury.

Depositions taken for the plaintiff partly contradicted these facts.

[HARE, P. J. The burden of proof is on the plaintiff here to show that he gave consideration for this bond. This ought to go to a jury. I do not think counsel can fix the value of their services in this way. A jury must liquidate the amount due for counsel's services in this case.]

Rule absolute.

Orphans' Court.

March 9, 1879.

Hart's Estate.

Contracts of decedent—Conditional subscription—Mutuality of consideration, what constitutes—Separate estate of wife—Liability of husband to account for rents collected as agent of wife, and after revocation of agency—Election of widow to take against will—Equitable conversion.

Sur exceptions to adjudication.

At the audit of the account of William H. Lee and Burdett Hart, executors of Norman L. Hart, deceased, the following facts appeared:—

The testator died in 1875, and by his will directed his executors, as soon as reasonably might be, to convert into cash all his estate, real and personal, and then, after providing for various debts and legacies, to give to his wife "such portion of his personal property as the law demands, and the use and interest of such real estate as the law requires;" the balance to be invested in first mortgages in the city of Philadelphia, the interest to be paid to his two children until they reach twenty-one, when the principal should be equally divided between them.

Before the auditing Judge the following points of contention arose: (1) The claim of the "Plymouth Church" and the "Congregational Union" of New York, as creditors and legatees. (2) The allowance of the claim of Mrs. Winchester (formerly Hart) to the rent of Chestnut Hill property collected by the testator. (3) The amount and extent of allowances for expenses and commissions to the executors, and salary and wages to employés; and finally (4), the allowing

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of the widow to make her election against the will, and the effect of that allowance.

All the facts relating to these items, and the finding of the auditing Judge thereon, are fully set out in the opinion of the Court, *infra*.

Exceptions to the adjudication were filed on behalf of the accountants, certain legatees and creditors, and the Plymouth Congregational Society and Congregational Union of New York.

J. B. Colahan, Jr., for the Plymouth Congregational Society and Congregational Union of New York, cited—

As to the liability of the estate under the written contract of the decedent for the balance of the subscription.

Edinboro Academy *v.* Robinson, 1 Wr. 210.
Shober's Admr. *v.* Lancaster Co. Park Association, 18 Sm. 429.
Caul *v.* Gibson, 3 Barr, 416.
Good *v.* Dean, 1 WEEKLY NOTES, 519.
Chambers *v.* Calhoun, 18 Sm. 13.

Samuel C. Perkins, for the accountants; also Burdett Hart and others, creditors, cited—

As to allowance of commissions to executors—

Sterrett's Appeal, 2 Pa. R. 419.
Duval's Appeal, 2 Wr. 112.
Gaule's Appeal, 12 Casey, 395.
Hopkinson *v.* Roe, 1 Beavan, 180.
Heckert's Appeal, 12 Harris, 482.
Cairns *v.* Chaubert, 9 Paige, 164.

As to wife's claim against her husband's estate for income of her separate estate received by him in his lifetime—

Johnson *v.* Johnson's Adm'r, 7 Cases, 450.
Act April 11, 1856, Purd. Dig. 1009, pl. 31.
May *v.* May, 12 Sm. 206.
Miller *v.* Miller, 6 Wr. 170.
2 Bishop's Law of Married Women, § 157.

As to election of widow to take under the will—

Rhoad's Est., 2 WEEKLY NOTES, and authorities cited in argument.
Bard's Est., 8 Sm. 393.
Bradford *v.* Stents, 7 Wr. 474.
Sandford's App., 15 Sm. 314.

Benj. H. Brewster and *James Otterson*, for the widow, presented no paper-book.

April 26, 1879. THE COURT. The decedent, in his lifetime, was one of the signers of a subscription paper, the material parts of which were as follows: "The undersigned, being desirous of placing the Plymouth Congregational Society of Philadelphia on a sure and firm basis by the payment of the present indebtedness, being the sum of $6065 (except the ground-rent of $460 per annum), with the understanding that the said society is to be kept from encumbered debt, mortgage, or lien, agree to pay the amount set opposite our respective names, upon the express condition that the amount of $6065 shall be subscribed on or before January 1, 1876, and that all the money subscribed shall be used for the sole purpose of extinguishing the above named debt, and that in case the said Society shall at any time hereafter change its present faith and worship, or make any mortgage debt or lien, then the amount of these subscriptions shall revert to the American Congregational Union of New York."

Subscriptions to the full amount named having been secured before the time fixed by the agreement, the testator paid $200; being a part of the first instalment. The balance of the first and the whole of the second instalment were paid after his death by his executors. Exceptions were filed to the allowance by the auditing Judge of the credits asked for these payments, and to the award of $937.50, being the pro rata balance of decedent's subscription.

It was urged that in every case founded upon mutual promises, it is essential that the promises, to be binding, shall be made at one and the same time, and that, in this instance, the evidence showed that they were not so made.

It is true that in pleading upon mutual promises, it will not do to aver that one was made *after* the other, because such promise would be upon a consideration which had been already executed. (Livingston *v.* Rogers, 1 Caines' Rep. 583). Here the agreement expressly disposes of the objection by providing that no promise shall be binding until the full amount to be made up shall have been subscribed. Even without this clause the objection would have no force. In Stewart *v.* Hamilton College (2 Denio, 416), Chancellor WALWORTH says: "Every member of society has an interest in supporting the institutions of religion and of learning in the community where he resides. And when he consents to become a subscriber with others, to raise a fund for the purpose, the real consideration for his promise is the promise which others have already made, or which he expects them to make, to contribute to the same object. For this purpose also the subscriptions to the same paper, and for the same object, although in fact made at different times, may in legal contemplation be considered as having been made simultaneously."

The case just cited is an authority for the position that mutual promises are in themselves a sufficient consideration to uphold an agreement. The consideration for the promise of each subscriber is the corresponding promise which is made by other subscribers. (2 Kent's Com. 465.) A mutual agreement to give time to a debtor is good for the same reason. (Bright *v.* Murray, 1 Leg. Ch. 22.) There are, however, cases which hold that the party for whose benefit the promises are made, in order to recover, must show that a request moved to him from the promissors, to do or to forbear to do a certain act; and that on failure of such proof, the subscriptions will take the form of a mere donation, which can operate

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only at the will of each subscriber. (Bridgewater Academy *v.* Gilbert, 2 Pick. 579; Limerick Academy *v.* Davis, 11 Mass. 113.) But where a part of the subscription has been paid (Farmington Academy *v.* Allen, 14 Mass. 172), or the promisee has begun to execute the purpose contemplated by the subscription, the promise will be enforced. (Amherst Academy *v.* Cowls, 6 Pick. 427.) In Pennsylvania, however, the courts have not hesitated to give effect to voluntary subscriptions in aid of a charity. In Caul *v.* Gibson (3 Barr, 416), the paper sued on was in all essentials identical with the present, and the Court held that the moral obligation was sufficient to sustain the express promise of the defendant. In Chambers *v.* Calhoun, 6 Har. 13), the joint engagement was to pay to a committee a certain sum towards the building of a church, and the promise was sustained, although when the suit was brought the building had been completed, and the committee discharged. An individual promise to contribute to a similar object was held good in Ryerss *v.* Congregation of Blossburg (9 Cas. 114). In Edinboro Academy *v.* Robinson (1 Wr. 210), and Shober *v.* Park Association, 8 P. F. Sm. 429) no doubt was entertained of the binding force of a promise like the present, and the only question was as to the proper parties to the suit.

It was alleged on the argument, although no proof of the fact seems to have been presented at the audit, that the claimants, after the date of the agreement, had executed a mortgage upon the church property, and had thereby forfeited their right to recover under the instrument. But the condition that no new lien should be created was clearly a condition subsequent, and in no way affected the liability of the subscribers. The party to take advantage of the breach is the American Congregational Union of New York, to whom the fund in such case is made over, and as to whom the money will be held by the Plymouth Society in trust. The objection was made that the New York Society was a pure donee, upon whom no obligation was cast, and respecting whom the contributors assumed no legal liability. But the principle is too well settled to be disputed, that a party for whose benefit a promise is made may sue in assumpsit upon such promise, although the consideration therefor was a consideration between the promissor and a third person. (Schermerhorn *v.* Vanderheyden, 1 Johns. 139; Barker *v.* Bucklin, 2 Denio, 45.) The exceptions to the adjudication upon this point are dismissed.

The wife of the testator owned in her own right a property at Chestnut Hill, on which she and her husband and children at one time resided. The family afterwards moved to the city, under an agreement that the husband should collect the rents of the Chestnut Hill property, and use them towards defraying the expenses of the new home. At a later date, the wife left her husband, and notified the tenant not to pay him. The husband, however, continued to receive the rents, and paid thereout for various repairs to the premises. The auditing Judge was clearly right in admitting the claim of the wife for the rents collected after notice. Her separation from her husband, whether with or without cause, cannot enter as an element into the question of his liability to account to her for moneys collected as her agent after she had revoked his authority to act. A credit was allowed to the husband, at the rate of $100 per annum, as the value of a strip of ground, forming part of the leased premises. It appeared that he was the owner in his lifetime of this strip, and that after his death it was purchased by his wife for $250. It was shown that its use added greatly to the convenience of the tenant and to the value of the property. Objection was made that the credit allowed bore no proportion to the intrinsic value of the ground. But the proof in the case amply justified the finding of the auditing Judge. The exceptions to his rulings on these points, and to his refusal to allow for repairs, as to which the tenant was clearly liable, are dismissed. It may be remarked that if, under the evidence, any of these repairs could be held to be improvements, there was still no proof that they were authorized by the wife, or were necessary, and that she therefore could not be charged with their cost. (Kuhns and Wife *v.* Turney, 36 Leg. Int. 37.)

The exceptions to the rate of commissions allowed to the accountants, and to the wages paid by them to two of the employés of the decedent, are dismissed. The auditing Judge has found as a fact that the services of these employés were indispensable to the proper settlement of decedent's estate, and that the amount paid them therefor was a reasonable compensation. The fact that the involved condition of the business of decedent at the date of his death necessitated the employment for a short time of a clerk and workman, should not deprive the accountants of the commissions which were due to them for their own labor and responsibility.

The attention of the auditing Judge was not called to the matter complained of in the exceptions filed to the widow's share in distribution. The widow elected to take against the will, which contained a direction to sell the real estate. The property was sold, and the proceeds were distributed as personalty. The sale worked no conversion as against the widow, the fund as to her bearing the character of real estate. Instead of the absolute interest awarded her, she was entitled only to a life estate in one-third of the sum. The exceptions to this point are sustained, and the adjudication will be reformed accordingly.

Opinion by ASHMAN, J.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, JULY 10, 1879.* [NO. 11.

Supreme Court.

July, '78, 70. March 12, 1879.

Borough of Pittston v. Hart.

Negligence—Roads, highways, and bridges—Failure of borough authorities to provide proper guards in the streets—Contributory negligence.

When borough authorities fail to protect by guards a place of unusual danger on a much travelled road, the question of their negligence is to be left to the jury.

The plaintiff's son was driving along the principal street of the Borough of Pittston; at a point where the road was only thirty-six feet wide, and where the Lehigh Valley Railroad passes twelve feet below the level of the street, a train came suddenly in view, and frightened his horses. There being no barrier at the side of the street, the horses and wagon fell over the side, and the plaintiff's son was seriously injured. In an action by the plaintiff against the borough, to recover damages for the loss of the services of his son:

Held, that although the accident would not have happened but for the frightening of the horses, yet that persons in charge of public highways ought to make reasonable provision for a matter so common and so likely to happen, and that the direct cause of the injury was the want of a proper barrier at the side of the street.

Per GORDON, J. "We can readily understand the want of precautions in wild and sparsely-settled portions of the State, for the finances of a township are exhausted in making roads even of an inferior character; but we can neither understand nor excuse the motive of a borough of 10,000 inhabitants in refusing to guard a place on its main thoroughfare so dangerous as that under consideration, especially when the expense of so doing would be but trifling."

Error to the Common Pleas of Luzerne County.

Case for negligence, by Hugh Hart against the Borough of Pittston, to recover damages for injury to his minor son.

On the trial, before HANDLEY, J., the following facts appeared: On May 7, 1875, the plaintiff sent his team, in charge of his son eighteen years of age, to a certain mill known as Brown's mill. His way was along the main street of Pittston (a borough of 10,000 inhabitants), which, for most of the distance, was sixty-six feet wide; at one point it narrows to the width of thirty-six feet; at this point is a perpendicular stone-wall, variously estimated at from twelve to twenty feet high, and immediately beneath the Lehigh Valley Railroad passes. Just as young Hart reached this point a train came suddenly in view, and the horses became frightened, and, though Hart kept his seat and endeavored to control them, they made a sudden turn and fell over the wall, and Hart was seriously injured. The street at this point is much used, and contains a line of street railway. There was, however, no guard at the top of the wall.

The defendant's counsel requested the Court to charge: (1) That the Borough of Pittston is not responsible for an accident caused by a runaway team of horses in its streets, such as the accident for which plaintiff claims damages. *Refused.* (2) That the Borough of Pittston is not bound to erect at the point of the accident, a railing or barrier strong enough to stop a running team of horses, if she is bound to erect any railing or barrier at all. *Answer.* This point we cannot affirm. It was the duty of the Borough of Pittston, through her proper officers, to keep the approaches to this wall so guarded as to protect travellers. A highway must be kept in such order that even "skittish" animals may be employed without risk of danger.

In the general charge his Honor said: "The Borough of Pittston is an incorporated body, and it is her duty to keep her streets, roads, and bridges in good order and repair; and that duty is performed when travellers are protected in the ordinary exercise of their duties when on the public highway. [Now, it is safe to say to you that if there had been a fence or a barrier placed upon the top of this wall, and young Hart was driving along this street in the borough and this engine came along, in the manner testified to by the witness, he would, bearing in mind the condition of this place, have had more control over his team, and would have felt much safer in handling the team than he did knowing that there was no guard whatever upon this wall. It was very natural for him, the moment he discovered there was danger, instead of attempting to take care of his team and his wagon, to take care of his own life. Whereas, if the road there had such a guard as the law requires, then, of course, he might, under the circumstances, have controlled his team and prevented them from passing over the wall.] Now, it is for you to take up the evidence in this case, . . . and say whether the Borough of Pittston has performed her duty in keeping this portion of the public highway in good order and repair."

Verdict and judgment for plaintiff, $237. Defendant took this writ, assigning as error the answer to his first and second points, and the portion of the charge inclosed in brackets.

C. S. Stark, for plaintiff in error.

The borough is not liable for accidents caused

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by horses that have broken away from their drivers.

Titus *v.* Northbridge, 97 Mass. 258.
Fogg *v.* Nahant, 98 Id. 578.
Bobson *v.* Rockfort, 101 Id. 93.
R. R. *v.* Stinger, 28 Sm. 219.

The negligence of the borough was not the immediate cause of the injury.

Penna. R. R. *v.* Kerr, 12 Sm. 353.

S. J. Strauss (*H. W. Palmer* with him), for defendant in error.

Where a rail or barrier is necessary for the proper security of travellers on the road which from its nature would be otherwise unsafe, and the maintenance of which would have prevented the injury, it is negligence not to construct and properly maintain such barrier.

Lower Macungie *v.* Merkhoffer, 21 Sm. 276.
Newlin Twp. *v.* Davis, 27 Id. 317.
Scranton City *v.* Dean, 2 WEEKLY NOTES, 467.
Shearman and Red. Negligence, § 391.
Alger *v.* Lowell, 3 Allen (Mass.), 402.
Hey *v.* Philadelphia, 31 Sm. 44.
Wharton on Negligence, § 968.

May 7, 1879. THE COURT. The verdict and evidence in this case establish the following facts: Pittston is a large borough, having a population of some 8000 or 10,000. The street upon which this runaway happened is the main one of the town, and whilst its general width is some sixty-six feet, it narrows to a width of thirty-six feet, including the sidewalk, at the place of the accident. On the west side, and at the point mentioned, some twelve feet lower than the street, is the Lehigh Valley Railroad, from the track of which, up to a level with said street, is a perpendicular stone wall, built, no doubt, for the protection of the railroad. Notwithstanding the circumstances, as above narrated, made this a notoriously dangerous place, yet this part of the street was protected by neither fence, guard, wall, nor curb. On the 7th of May, 1875, the plaintiff's two-horse team in charge of his son, a boy of eighteen years of age, was quietly, and under full control of the driver, passing along the way above described, when the horses took fright from an approaching locomotive, which, as the boy said, by reason of the curve in the road, seemed to be coming down the street, and, in spite of the efforts of the driver, the horses rushed across the street and over the wall above described. The result was one horse killed, the other hurt, the wagon and harness broken, and the boy badly injured. Complaint is made that the Court below suffered the jury to pass upon the question whether the borough officers were negligent in permitting this precipice to remain unfenced, and whether the plaintiff's loss resulted from that neglect. But we do not see how the Court could have refused so to do. The accident happened directly from the want of a barrier between the street and the cut. The driver was not in fault, he managed his team as well as he could under the circumstances, but he had so little of either time or space in which to control and quiet his horses, that his efforts were unavailing. It is true, that without the frightening of the horses there would have been no accident, but the horse is naturally a timid animal, and is so liable to fright, that those having charge of the public highways ought to make reasonable provision for a matter so common and so likely to happen at any time. Horses abound, but horses that never frighten or are never fractious are exceedingly rare, and if roads were to be constructed only for such animals, there must need be but little travelling upon them. We think it was well said, in the case of Lower Macungie Township *v.* Merkhoffer (21 P. F. S. 276), that it was no defence that by careful driving the accident might have been avoided, since that would fall far short of the purpose of a public highway. In the case of Newlin Township *v.* Davis (27 P. F. S. 317), the accident occurred through the fright of a horse upon a bridge unprotected by side railings; but it was not in that case pretended that the omission of such railing was not *per se* neglect, or that the fright of the horse relieved the township of liability. Now, it is hard to understand why a precipice at the side of a narrow street does not require fencing quite as much as the sides of a bridge. Such, in fact, is the very point in Macungie *v.* Merkhoffer, for there it was held that the township was bound to fill up or fence off a dangerous excavation at the side of a public road. We can readily understand and excuse the want of precautions of this kind in wild and sparsely-settled portions of the State, for the finances of a township are exhausted in the making of roads even of an inferior character; but we can neither understand nor excuse the motive of a borough of 10,000 inhabitants in refusing to properly guard a place on its main thoroughfare so dangerous as that now under consideration, especially when the expense of so doing would be but trifling. In Hey *v.* Philadelphia City (31 P. F. S. 44), we have a much stronger case for the defence than the one in hand, for there the roadway was of good width, and at least partially protected by the sidewalk and curb; besides this, the driver had left his seat by jumping from the buggy, the horse had torn away from him, and it was whilst in its undirected flight that it went over the river-bank. Here, on the other hand, we have not only the proximity of the railroad, but a very narrow and wholly unprotected street, and we have, also, the driver maintaining his seat and endeavoring to guide his team to the very last moment. There is certainly then but little, if

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any, doubt that the negligence of the borough authorities was the direct cause of the accident complained of, with its resulting damages.

Judgment affirmed.

Opinion by GORDON, J.

Jan. '79, 170. March 5, 1879.

First National Bank of Allentown v. Rex.

National banks—Bailees without reward—Negligence—Gross negligence; definition of; burden of proof of; special deposit—Degree of responsibility of national bank to special depositor—When bailee without reward is responsible for embezzlement of deposit by its officers.

A national bank receiving a special deposit for safe-keeping without reward is not responsible for a breach of ordinary care and negligence, but is liable only for gross negligence.

The burden of proving gross negligence rests upon the plaintiff.

Gross negligence is the failure to take that care which the most inattentive person takes.

A bailee without reward transferring deposits in good faith to a place out of its own custody, considered more safe than that of the original deposit, does not thereby increase its liability. Per GORDON, J.

Bank *v.* Graham, 29 Sm. 106, followed.

Error to the Common Pleas of Lehigh County.

Assumpsit, by George Rex against the First National Bank of Allentown. Plea: "Non assumpsit." Upon the trial, before ALBRIGHT, P. J., the following facts appeared:—

The defendant is a corporation chartered under the Act of Congress of Jan. 3, 1864, known as the National Bank Act. On March 31, 1869, the plaintiff made a special deposit with the defendant of certain United States bonds, receiving the following certificate from Wm. H. Blumer, who was, and had been since the organization of the bank in 1863, its President, viz:—

I certify that George Rex has on deposit for safe-keeping at the First National Bank of Allentown, Eight Hundred and Fifty Dollars in 5-20 United States bonds.

WM. H. BLUMER, *President.*

Allentown, March 31, 1869.

The bonds were kept by the bank without compensation therefor, and were placed in a vault with bonds and valuable securities belonging to the bank and to other depositors. It appeared that the bank was in the habit of receiving bonds from various people for safe keeping, and that the same care was exercised over all bonds so received as over the property of the bank itself. The interest on the bonds in question was duly paid to Rex by the Cashier of the bank, who was the son of the President. In the spring of 1877 the firm of Wm. H. Blumer & Co., of which Wm. H. Blumer was a member, became financially embarrassed, and the bonds were taken from the vault and hypothecated for and the money used by that firm. Wm. H. Blumer, while denying positive recollection on the subject, left but little ground for inference from his testimony other than that the hypothecation had been effected by himself. Jacob A. Blumer, the Cashier, stated, when demand was made upon him for the bonds, that they had been sent to Philadelphia, with all their other property of value, for safe-keeping; but upon trial, denied that such had been the case.

Upon this evidence, the Court refused a motion for a non-suit.

The defendant offered no evidence, but presented the following points:—

(1) Under all the evidence the verdict must be for the defendant. *Answer.* This instruction is refused. (1st assignment of error.)

(2) The defendant being a bailee without reward, and there being no evidence of gross negligence resulting in the loss, the verdict must be for the defendant. *Answer.* Before plaintiff can recover he must satisfy you that the bonds were lost through the gross negligence of the defendant; the question of the degree of negligence is for the jury. (2d assignment of error.)

(3) It appearing in this case that the bonds were abstracted by the President for his own purposes, and there being no proof that the bank knew or had any reason to believe that the President was dishonest, the verdict should be for the defendant. *Answer.* If the bonds were abstracted by the President without the knowledge of the bank the defendant is not liable. Further answer to this point is refused, except so far as the same is answered in the general charge. (3d assignment of error.)

The Court charged the jury, *inter alia*, as follows: "When a party delivers to another goods without any reward on the part of the bailor to the bailee, or when the bailee undertakes to preserve the property thus delivered without any pay, that is what is called a 'gratuitous bailment,' and the bailee is required to exercise what is called only 'slight diligence' in taking care of the property. And in a case like the one before us, when slight care is required to be exercised on the part of the bailee the defendant is liable only in case of gross negligence. Negligence is defined to be the absence of care, or the omission by a party to exercise that diligence a prudent man ordinarily exercises in regard to his own property. Has the defendant in this case been guilty of that degree of negligence, viz., gross negligence?

"It is also alleged on the part of the plaintiff,

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that Wm. H. Blumer had used these bonds in Philadelphia to raise money for his own private purposes. This, alone, gentlemen, would not make the bank liable, if Wm. H. Blumer or any one else abstracted those bonds or stole them; but if you can find from the evidence that Wm. H. Blumer did use these bonds for his own private purposes, and that such use by him was known to the officers of the bank, and there was an assent on their part to such improper use, or no effort was made to recover the bonds, if they were recoverable, that would be negligence on their part; or if you find that the proper officers of the bank did send these bonds to Philadelphia for safe-keeping, the relation existing between Rex and the defendant would be changed from what it originally was. If the first National Bank of Allentown for its own convenience or profit selected some other depositary for these bonds, it would be liable in case of loss even if but ordinary negligence were shown." (4th, 5th, and 6th assignments of error.)

Verdict for plaintiff, and judgment thereon; whereupon the defendant took this writ, assigning for error the answers to his points, and that portion of the charge quoted *supra*.

Edward Harvey (with whom was *R. E. Wright, Jr.*), for the plaintiff in error.

The taking of a special deposit by the bank was *ultra vires*.

Wiley *v.* First Nat. Bank of Brattleboro, 47 Vt. 546.
First National Bank of Charlotte *v.* National Exchange Bank, 2 Otto, 122.
Wharton on Negligence, § 470.

There was not sufficient evidence of gross negligence to be submitted to a jury. Where the evidence is insufficient to sustain a verdict, this Court will reverse.

Cauffman *v.* Long, 1 Norris, 72.
Penna. R. R. Co. *v.* Shay, Ibid. 202.
Burford *v.* McCue, 3 Sm. 427.
Updegraff *v.* Rowland, 2 Id. 317.
Howard Express Co. *v.* Wile, 14 Id. 201.
Raby *v.* Cell, 4 Norris, 80.

The bank was a mere depositary of the bonds without profit or reward. It kept them in the same vault and with the same care that it kept all the valuables in its custody. The person who took the bonds and used them for his private purposes, was the President of the bank, and as such was privileged to go into the vaults at his pleasure. No one could deny him access to any part of the bank or could question his authority to supervise and examine the personal property owned by or in charge of the corporation. Unless, then, the bank had knowledge that the President was a dishonest or unfit person to exercise the authority of the office, and continued him in the employment or trust afterwards, it cannot be held liable. There must be gross neglect on the part of the bank, or there can be no civil liability in a case like this.

Coggs *v.* Bernard, 2 Ld. Raym. 909.
Story on Bailments, § 23.
Morse on Banking, 55.
Foster *v.* Essex Bank, 17 Mass. 479.

The bank is not liable for an embezzlement of the deposit by one of its officers, provided due care was used in selecting such officer.

Wharton on Negligence, § 469.
Scott *v.* National Bank of Chester Valley, 22 Sm. 477.
Lloyd *v.* West Branch Bank, 3 Harris, 176.
Thompkins *v.* Saltmarsh, 14 S. & R. 275.
First National Bank of Carlisle *v.* Graham, 29 Sm. 116.
Smith *v.* First National Bank of Westfield, 99 Mass. 605.

The Court below was of opinion, as appears by the charge, that gross negligence is tested by the acts of prudent men ordinarily exercised in regard to their own property. This was error.

First National Bank of Carlisle *v.* Graham, *supra*.

It is the duty of the Court to instruct the jury fully as to what constitutes negligence.

P. F. W. & C. R. R. Co. *v.* Evans, 3 Sm. 250.

John Rupp, for the defendant in error.

If it is the custom and habit of a national bank to receive bonds, or other valuable securities on deposit, for safe keeping, with the privity and knowledge of the directors and officers of the bank, a liability for safe-keeping is raised, and if the securities are afterwards lost or stolen through the gross negligence of the bank, the bank becomes liable for the value thereof.

First National Bank of Carlisle *v.* Graham, 4 Norris, 91.
First National Bank of Carlisle *v.* Graham, 29 Sm. 106.
Scott & Brother *v.* The National Bank of Chester Valley, 22 Id. 471.

Gross negligence is the want of that care which every man of common sense takes of his own property.

1 Chitty on Contracts, 662, 664.

Bailees without reward are bound to take that degree of care.

Tracy *v.* Wood, 3 Mason, 132.
Scott *v.* National Bank of Chester Valley, *supra*.
Lancaster Co. National Bank *v.* Smith, 12 Sm. 47.

This case is ruled by Bank *v.* Graham (4 Norris, 91.) The question whether or not there has been gross negligence is for the jury.

Doorman *v.* Jenkins, 2 Ad. & El. 256.

March 17, 1879. THE COURT. The learned Judge of the Court below, was accurately correct when he instructed the jury that the defendant in a case like that under consideration was held only for gross negligence, and that it rested upon the plaintiff to show affirmatively that the bank was guilty of such negligence. He errs, however, when he comes to define what the term "gross negligence" means. He says "in a case like the one before us, where slight care is required to be exercised on the part of the bailee,

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the defendant is liable only in case of gross negligence. Negligence is defined to be the absence of care, or the omission by a party to exercise that diligence which a prudent man ordinarily exercises in regard to his own property. Has the defendant in this case been guilty of that degree of negligence, viz., gross negligence?"

Had this definition been omitted it might have been presumed that the jury from the use of the terms slight care and gross negligence, would have reached a proper conclusion as to their meaning and effect, but in such case the presumption would be that the ideas of ordinary care and ordinary prudence had been excluded, but this would necessarily exclude the learned Judge's definition.

The fact is, the rule, thus laid down by the Court, is the one which our brother WOODWARD in the case of Bank *v.* Graham (29 P. F. Smith, 106), adduces as decisive of the bailee's good faith and performance of his whole duty; in other words, as is said by DUNCAN, Justice, in Thompkins *v.* Saltmarsh (14 Ser. &. R. 275), "The bailee without reward is not bound to ordinary diligence, is not responsible for that care which every attentive and diligent person takes of his own goods but only for that care which the most inattentive take." It follows that if the defendant committed only a breach of ordinary care and diligence, in the keeping of the plaintiff's bonds, the verdict should have been in its favor.

Conceding that the bank in case of gross negligence would be liable for the loss charged—and we do not stop to discuss this question as it has been definitely settled in the case of the Bank *v.* Graham, above cited—then what remains is the inquiry whether the defendant was grossly negligent in the care of the property committed to its charge. On this branch of the case the Court charged, that the mere fact that Blumer, the President, had used the bonds to raise money for his own private purposes, would not of itself make the bank liable; but if this improper use by him of the plaintiff's property was known to the bank officers, and they assented thereto, or if they had knowledge thereof, and made no effort to recover this property, if it were recoverable, that would be such negligence, on their part, as would render the bank liable. This is good, sound law, but we fail to discover the evidence which adapts it to this case. If there was any evidence showing knowledge on the part of any of the bank officers, but Blumer and his son, of or concerning these bonds, or their use, proper or improper, it does not appear in the record submitted to us.

Again the learned Judge says: "If you find the proper officers of the bank did send these bonds to Philadelphia for safe keeping, the relation existing between Rex and the defendant would be changed from what it originally was. If the first National Bank of Allentown, for its own convenience or profit, selected some other depositary for these bonds, it would be liable in case of loss, even if but ordinary negligence were shown."

The first sentence of the above quotation is not easy of comprehension; for if the bonds were in good faith transferred to a place considered more safe than that of the original deposit, we cannot see how the relations of the parties would be changed or how the liability of the bank would be thereby increased. The same objection, however, lies to this and the succeeding sentence, as to the main part of the charge as already stated, that is, there is no evidence to support them.

It is indeed true that at one time Blumer and at another his son, when applied to for the bonds, said they had been sent to Philadelphia for safe-keeping, but it is evident from the whole evidence of the case that this was a mere fabrication to gain time.

The fact is manifest and uncontradicted that Blumer had abstracted the bonds and used them for his own purposes. He himself admits and states that the bank had neither bonds nor papers of any kind in Philadelphia for safe-keeping. About the fraud of Blumer there is no doubt, but that the directors knew of that fraud, or that they had reason to doubt the previous honesty of their President, there is literally not one word of evidence. Perhaps the plaintiff may do better on another trial, but as yet he has shown nothing which ought to have prevented the Court from affirming the defendant's second point.

Judgment reversed, and new venire ordered.

Opinion by GORDON, J., PAXSON, J., absent.

Jan. '79, 79. March 3, 1879.

Carver's Appeal.

In re Assigned Estate of Gibson Johnson.

Debtor and creditor—Assignment for benefit of creditors—Sale of real estate under the Act of 17 February, 1876—Interest on liens, to what date computed—Judicial sales.

Where real estate is sold by an assignee for the benefit of creditors under the Act of 17 February, 1876, interest on the liens is to be allowed until the day when the sale is finally confirmed by the Court.

Appeal from the Common Pleas of Bucks County.

The following were the facts: Gibson Johnson, on April 2, 1877, made a general assignment of all his estate for the benefit of his creditors. The assignee obtained from the Court an order for the sale of real estate under the Act of 17

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February, 1876 (P. L. 4), enabling assignees for the benefit of creditors to make public sale of the real estate of the assignor discharged of liens. This order of Court directed that the sale should be made for cash. On December 6, 1877, the assignee under this order sold certain real estate of his assignor for $3020, upon the following terms: "Ten per cent. of the purchase-money to be paid in cash, the balance on the first day of April next following." The report of the sale was presented to the Court, and confirmed *nisi*, December 14, 1877. The balance of the purchase-money was paid, and the deed delivered March 30, 1878. It did not appear of record that the sale had been absolutely confirmed by the Court.

Before the auditor appointed to distribute the fund the creditors holding judgments which were a lien upon the fund claimed that they were entitled to interest on their judgments up to March 30, 1878. On the other hand, the general creditors contended that interest should cease December 14, 1877.

The auditor allowed interest on the liens to March 30, 1878. To his report exceptions were filed, which were dismissed by the Court (WATSON, P. J.). Elias Carver a general creditor appealed from this decree.

E. Carver, P. P., for the appellant.

A sale under the Act of February 17, 1876, is analogous to one ordered by the Orphans' Court for the payment of debts, and it also resembles a sheriff's sale of real estate. It is well established law that interest on liens upon land sold by the sheriff ceases on the day of sale.

Walton *v.* West, 4 Wh. 221.
Bachdell's Appeal, 6 Sm. 386.

It is also well settled law that when real estate is sold by order of the Orphans' Court for payment of debts, interest thereon ceases from the return day of the order of sale.

Ramsey's Appeal, 4 Watts, 71.

These authorities clearly show that the confirmation of the sale does not depend upon paying the purchase-money and delivering the deed. That act is the consummation of the sale.

(No counsel appeared contra.)

May 5, 1879. THE COURT. This is a case of distribution of the proceeds of real estate on a sale made by an assignee for the benefit of creditors. The single question presented is when the interest on the liens shall cease.

In case of a sale by the sheriff on execution, the rule is well settled that the interest on all liens discharged by the sale ceases on the day of the sale. In the case of sales made in the Orphans' Court a different rule has been recognized. Ramsey's Appeal (4 Watts, 71) was the case of a sale of real estate made by an administrator in pursuance of an order of Court for the payment of debts. The question appears to have been whether the lien creditors were entitled to interest on their claims until the distribution was made or until return of sale. The Court below held that interest ceased "at the return day of the order of sale and confirmation." That case was affirmed by this Court. From the opinion of Mr. Justice ROGERS it appears that the confirmation was had on the return day of the order of sale, and he manifestly assumed that the purchase-money was paid on that day, and thenceforth was actually in the hands of the administrator. He says, as a general rule, he can see no reason to make a distinction between a sale by the sheriff and a sale by an administrator under an order of Court. He further proceeds to say: "It is but reasonable when the money is made by sale of the property and in the hands of the officers of the law that the debt should be considered as paid to the amount of the money raised by the sale. There may be exceptions to this principle, but I see no circumstances in this case which take it out of the general rule."

In the case of a sheriff's sale the law, and not the Court, prescribes the terms of sale. It is for cash. It requires no confirmation by the Court. A sale by an administrator or by an assignee for the benefit of creditors is made by order of Court and upon cause shown. The Court prescribes whether the sale shall be for cash or on credit, and it is not complete until confirmed by the Court. Hence it was held in Jacobs's Appeal (11 Harris, 477) that a purchaser at administrator's sale who had paid no part of the purchase-money, had no equitable estate in the premises prior to confirmation. It could not therefore be bound by a judgment entered against him after it was struck down, but before confirmation. In this it is unlike the case of a purchase at sheriff's sale. A judgment against such a purchaser acquired after the sale and before the acknowledgment of the deed, if the deed be afterwards obtained, attaches as a lien at the date of its recovery (Morrison *v.* Wurtz, 7 Watts, 437; Slater's Appeal, 4 Casey, 169).

A sale by the assignee is substantially subject to the same control of a Court as one made by an administrator. The first section of the Act of 17 February, 1876 (P. L. 4), authorizes the Court of Common Pleas, on petition of the assignee of an insolvent, to order a sale of encumbered real estate, which sale, "after being confirmed by said Court, shall discharge all liens against the real estate so sold," excepting first lien mortgages, ground rents, and purchase-money due the Commonwealth.

In the present case the order was to sell for cash. The sale was made on the 6th of December, 1877. The assignee in fact sold on different

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terms, to wit, "ten per cent. of the purchase-money to be paid in cash, the balance the first day of April next following." The sale was so returned to the Court, and confirmed *nisi* 14th December, 1877. The money was paid by the purchaser and the deed delivered to him on the 30th March 1878. The confirmation of the sale as made was a ratification of its terms with like effect as if such had been the original order of the Court (Jacobs's Appeal, *supra*). The auditor appointed to distribute the fund reported that the record showed no confirmation absolute. All it did show was the *nisi* confirmation of 14th December. He therefore found the passing of the title to be tantamount to entry of final confirmation, and adopted that as the time when interest should cease. The Court below dismissed all exceptions and confirmed the report.

It is thus shown that prior to the 30th March, 1878, the purchaser was not, by the terms of his purchase, required to pay, and until that time the purchase-money, which was to take the place of the land, was not "in the hands of an officer of the law." Still further, the Court, which is the proper tribunal to determine when the sale was confirmed absolute, has decided that to be the time. Holding, as we do, that the day of final confirmation of a sale made by an assignee is the time for interest on the liens to cease, the decree is affirmed and appeal dismissed at the costs of the appellant.

Opinion by MERCUR, J.

[See Tomlinson's Appeal, next case; Herbst and Buehler's Appeal, *post*, p. 173.]

May, '79. May 9, 1879.

Tomlinson's Appeal.

Assignments for benefit of creditors — Sale of real estate by assignee under Act of 17 February, 1876—Interest, time to which computed, on liens discharged by the sale.

On a sale of real estate by an assignee for benefit of creditors under the Act of 17th February, 1876, the day of the confirmation of sale is the date when an absolute conversion of the land into money takes place; and the liens discharged by the sale must be paid out of the proceeds according to their priority, as they existed on that day.

Interest on such liens should be computed to the time of final confirmation only, and not to the date of payment of the purchase-money.

Act of 17th February, 1876 (P. L. 4) discussed by MERCUR, J.

Appeal from the decree of the Common Pleas of Lancaster County, distributing the balance in the hands of the assignee for the benefit of creditors of George Heiss and wife. The material facts were as follows:—

On January 17, 1873, the judgment bond of George Heiss to Lewis E. Harple for $1000 was entered in the Court of Common Pleas of Lancaster County, and became a lien upon his real estate. On April 7, 1877, Heiss made an assignment for the benefit of creditors to George Tomlinson. On October 15, 1877, the Court granted an order to the assignee to sell the real estate under the Act of February 17, 1876 (P. L. 4).* By the terms of the order the sale was to be made November 15, 1877; ten per cent. of the purchase-money to be paid cash, and the balance on April 1, 1878. The sale was duly made, and confirmed finally on December 4, 1877. Harple's judgment expired January 17, 1878, and no attempt was made to revive it. The real estate sold was conveyed by the assignee, and the purchase-money paid in accordance with the terms of sale, viz., on April 1, 1878.

On the distribution of the proceeds, Lewis E. Harple claimed to be allowed to participate in the fund, as a lien creditor. His claim was resisted by other judgment creditors on the ground that the five years during which his judgment was a lien on the real estate, expired on January 17, 1878; that the deed for Heiss's property was not delivered until April 1, 1878, and that as the judgment had not been revived, it could not come in upon the fund. The auditor reported that the judgment of Harple needed no revival, and allowed the balance due on his judgment as a lien, with interest to April 1, 1878, the day of the payment of the purchase-money.

Exceptions filed to the report on behalf of Tomlinson, a judgment creditor, having been dismissed by the Court, and the report having been confirmed, the exceptant took this appeal, assigning for error the decree (1) dismissing the exceptions, and (2) allowing interest on the Harple judgment to the date of payment of the purchase-money.

D. G. Eshleman (with him *E. H. Yundt*), for appellant.

All sales under an order of Court upon time are confirmed subject to the payment of the purchase-money. That is the final confirmation.

Demmy's Appeal, 7 Wright, 168.

A sale under an order of the Orphans' Court does not work a conversion.

Leshey *v.* Gardner, 3 W. & S. 314.
Demmy's Appeal, 7 Wright, 168.
Overdeer *v.* Updegraff, 19 Sm. 118.
Erb *v.* Erb, 9 W. & S. 147.
Biggert's Estate, 8 Harris, 17.
Fulton's Estate, 1 Sm. 204.
Hall *v.* Benner, 1 P. & W. 402.

All the proceedings in assignee's sales from the inception to the making of the deed, are closely assimilated to the proceedings in the Orphans'

* This Act is recited in the opinion of the Supreme Court, *infra*.

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Court. A sheriff's sale works a conversion, because, in the theory and presumption of law, it is a *cash* sale. This being a *time* sale, there is no conversion until the payment of the purchase-money.

As to the interest, if there was a conversion, the money was in the hands of the law, and could not bear or produce interest. But whether this sale follows the analogy of sheriffs' or Orphans' Court sales, interest ceases on the day of sale.

J. Hay Brown, for appellee.

The sale by the assignee was confirmed absolutely December 4, 1877, at which time Harple's judgment was a lien in full life. The confirmation discharged the lien, and out of the proceeds of the sale the "liens extinguished by virtue of such sale, according to their priority," were to be paid. Under the Act of 1876 the assignee takes the place of the sheriff, and the principles governing sheriff's sales should govern sales by an assignee. By a sheriff's sale the proceeds are substituted for the land, and no revival is necessary.

Price on Limitations and Liens, 282.
Com. *v.* Gleim, 3 P. & W. 417.
Custer *v.* Detterer, 3 W. & S. 28.

By a judicial sale *all liens* then existing, and which are by law payable out of the money produced by the sale, are discharged.

Abbott *v.* Remington, 4 Phil. 34.
Mohler's Appeal, 5 Barr, 418.

On a sheriff's sale, the date of the sale is the point of time to which all lien debts must be computed.

Walton *v.* West, 4 Wharton, 221.
Douglas's Appeal, 12 Wright, 223.
Hahn *v.* Smith, 1 P. & W. 484.
Small's Appeal, 12 Harris, 399.

After the sale was confirmed by the Court, the liens against the land were extinguished, and the lien creditors could look only to the proceeds. In allowing interest to the day of the payment of the purchase-money, the Court were following the ruling in—

Haverstick *v.* Swarr, Lancaster Bar, June 16, 1877.

June 2, 1876. THE COURT. This is a case of distribution of the proceeds of a sale of real estate made by an assignee in trust for the benefit of creditors under the Act of 17th February, 1876. The Court ordered the sale to be made on the 15th November, 1877. On the 19th of the same month the assignee made return that he had sold as directed by the order, and the sale was confirmed *nisi*. On the 4th of December following it was confirmed finally.

The first assignment presents the question whether a judgment which was a lien when the sale was made, and when it was confirmed, and was then entitled to be paid out of the proceeds, loses its right thereto by reason of the five years from its entry having expired after the confirmation, but before the payment of the purchase-money and delivery of the deed? This involves a consideration of the Act under which the sale was made. It declares "the sale or sales, after being confirmed by the said Court, shall discharge all liens against the real estate so sold, excepting that where the lien of a mortgage on real estate is or shall be *prior* to all other liens upon the same property, except other mortgages, ground-rents, and the purchase-money due the Commonwealth, the lien of such mortgages shall not be destroyed, or in any way affected by any sale made by virtue or authority of any order of sale made under the provisions of this Act, and the proceeds arising therefrom shall be appropriated to liens, extinguished by virtue of such sale according to their priority." It is conceded that the judgment held by the appellee Harple was a lien at the time of the sale and of the confirmation, and that the five years from its entry did not expire until the 17th of January following. Inasmuch, then, as the statute expressly declares that the sales, after confirmation, "shall discharge the lien," and the proceeds of the sale "shall be appropriated to liens extinguished by such sale according to their priority" the judgment in favor of Harple is clearly entitled to be paid out of the fund produced by the sale. "After being confirmed" does not mean some indefinite time in the future, but is equivalent to saying, "on confirmation." That, then, is the time at which the lien is extinguished, and its right to the proceeds of the sale attaches as to lien creditors, the land is converted, and the proceeds take the place of it. No revival of the judgment afterwards could create a new lien, either on the land sold or on the proceeds thereof. The subsequent expiration of the five years from the rendition of the judgment in nowise impaired its right to the money.

The second assignment is to the allowance of interest out of the proceeds of sale on the liens to 1st of April, 1878. The order of sale directed ten per cent. of the purchase-money should be paid on the day of sale, and the residue on the 1st of April following. The notice of sale stated that possession and deed of conveyance would be given on the 1st of April, on payment of the purchase-money. By reason of this postponement of payment, the Court allowed interest on the liens until that time. The precise question was considered and ruled in Carver's Appeal [reported *ante*, p. 169], decided at the present term. It was there held that the interest should be computed to the time of final confirmation only. It is true in that case the confirmation was postponed until payment of the purchase-money; yet we held it was the confirmation of the sale, and not the payment of the purchase-money, which determines the time when interest shall cease on liens paid out of the proceeds.

The Act of 17th of February, 1876, was not in-

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tended to unduly postpone the collection of liens on real estate. Its title is, "An Act to enable assignees for the benefit of creditors, to make sales of real estate encumbered by liens." The preamble states the evils which the Act was designed to cure in these words: "Whereas it frequently occurs in assignments for the benefit of creditors, where the assignor is the owner of a number of tracts of land encumbered to such an extent that it is impossible to ascertain definitely whether a sufficient amount can be realized to discharge all the liens, whereby the titles made by the assignee are regarded as doubtful, and the assignees are thereby unable to make advantageous sales of said real estate; therefore, *Be it enacted*, that in all assignments for the benefit of creditors it shall and may be lawful for the several Courts of Common Pleas of this Commonwealth, upon application of the assignees of insolvent debtors, setting forth that the personal estate is insufficient for the payment of the debts, and the real estate encumbered with liens to such an extent as to render it difficult to determine whether the same can be sold for enough to pay all the liens as aforesaid, to grant an order, where the said Court shall deem it for the manifest interest of all parties, authorizing and empowering the said assignees to make public sale of such real estate, or so much thereof as shall be deemed necessary, at such place and upon such terms as the said Court shall direct." The Act further provides, *inter alia*, "that the Court shall require such proof of notice of such intended application to have been given to the lien creditors or their attorneys as said Court shall deem sufficient to give said lien creditors an opportunity to be heard touching said order of sale." It is true, during the pendency of the order of sale the Act declares the Court may order a stay of execution on all liens that may be divested by such sale. There is a manifest propriety in exercising this power when the main object of a sheriff's sale may be attained by means of a sale by the assignee. While the latter is proceeding to execute the order he should not be embarrassed by the issuing of executions. Thus it is shown by this, and portions of the Act previously cited, and expressly declared in White *v.* Crawford (3 Norris, 433), "the object is to pass to the purchaser a title as free and unencumbered as if acquired by virtue of a sheriff's sale made on execution issued on a judgment lien; and to stay execution while the assignee is proceeding to sell; but not to unduly postpone the time for payment of judgment liens thereby divested." The "terms" of sale which the Court may direct must be subordinate to "the manifest interest of all parties." The Act requires notice to the lien creditors, and an opportunity for them to be heard before the sale is ordered. If it is so ordered as to postpone the payment of the liens, and deprive the owners of interest thereon for a time longer than may reasonably be required to make distribution of the fund, it cannot well be said that the sale is for the "manifest interest" of such creditors; it is not necessary for the purpose of discharging the liens, or of giving an undoubted title to the purchaser. It would, therefore, be unwarranted by the statute. The payment of so much of the purchase-money as will be sufficient to satisfy the liens divested by the sale should be required at the time of the confirmation, or soon thereafter.

It follows that the decree of distribution in this case is correct except in so far as interest was allowed on the judgment liens after the time of final confirmation of the sale. To correct this only it must be reversed.

Decree reversed, and record remanded, with instructions to decree distribution conformably with this opinion. It is further ordered that the costs of this appeal be paid out of the fund.

Opinion by MERCUR, J. PAXSON and WOODWARD, JJ., absent.

[See Carver's Appeal, *ante*, p. 169, and Herbst and Buehler's Appeal, next case.]

May '79, 80. May 21, 1879.

Herbst and Buehler's Appeal.

Assignments for benefit of creditors—Sale of real estate by assignee under Act of 17 February, 1876—Date of conversion as respects liens.

Upon a sale of real estate by an assignee for the benefit of creditors under the Act of February 17, 1876 (P. L. 4), liens which exist at the date of confirmation of the sale are discharged, and are payable out of the proceeds, according to their priority. The fact that the lien of a judgment, in force at the time of sale and confirmation, expires before the time fixed for the payment of the purchase-money, is immaterial.

Carver's Appeal, *ante* 169; Tomlinson's Appeal, *ante* 171, followed.

Appeal from the decree of the Court of Common Pleas of Adams County.

The material facts of this case were these: On December 6, 1872, a judgment was entered in the Common Pleas of Adams County by Mary Campbell against Wm. C. Statesmith. On July 13, 1877, Statesmith made an assignment for the benefit of creditors to Samuel Herbst, and on September 29, 1877, Herbst, under an order of Court, sold the real estate of Statesmith, in accordance with the Act of February 17, 1876. On October 15 the assignee made return, and the sales were confirmed, the first instalment of the purchase-money to be paid April 1, 1878. At the time of the sale and confirmation the lien of Mary Campbell's judgment was in full force.

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The five years expired December 6, 1877. The assignee refused to pay the said judgment, after the payment of the purchase-money, on the ground that its lien had expired before the conversion of the property, and was, therefore, not payable out of the fund. The Court, upon the petition of Mary Campbell, granted a rule on the assignee and judgment creditors to show cause why her judgment should not be paid in full out of the proceeds of the real estate, and upon hearing, after answer filed, made the rule absolute. Herbst, the assignee, and Buehler, a judgment creditor, took this appeal, assigning for error the above action of the Court.

R. G. McCreary, for appellants.

The lien of the judgment in question expired on the 6th of December, 1877, and the conversion did not take place, by conveyance and payment, until April 1, 1878; consequently she had no claim upon the fund except as a general creditor. The *sale* discharges the liens; and the contract of sale, although confirmed by the Court, is not perfected until a payment of the purchase-money and delivery of the deed. The equitable or constructive conversion of lands by contract of sale has never been held to affect liens on it. The contrary has been decided.

Leiper's Executors *v.* Irvine, 2 Casey, 55.
Jacobs's Appeal, 11 Har. 477.
Biggert's Estate, 8 Har. 17.

In sheriffs' sales the title is vested in the purchaser, by relation back from the day of sale, hence liens are divested on the day of sale, and lien creditors paid as they stood the day of sale.

Hoyt *v.* Koons, 7 Har. 277.

But in other judicial sales made on time, as in the Orphans' Court, there is no conversion of the estate, and the title does not pass until payment of the money and delivery of the deed.

Leshey *v.* Gardner, 3 W. & S. 319.
Hise *v.* Geiger, 7 W. & S. 273.
Erb *v.* Erb., 9 W. & S. 147.
Marys *v.* Anderson, 12 Har. 272.
Biggert's Estate, 8 Har. 17.

W. A. Duncan, for appellee.

The Act of February 17, 1876 (P. L. 4; Purd. Dig. 1973), in plain letter and intent, divests the lien of judgments upon the confirmation of the sale by the Court. The assignee becomes an officer of the Court, and executes the Court's decrees. The operation of the deed relates back to the time of the confirmation of the sale, as in sheriffs' sales.

Hahn *v.* Smith, 1 P. & W. 484.
Hoyt *v.* Koons, 7 H. 277.

This is in the nature of a sheriff's sale, converting the real estate instantly, and at the same time divesting the lien.

Reed *v.* Reed, 1 W. & S. 239.
Clarke *v.* Stanley, 10 B. 472.
Small's Appeal, 12 H. 398.
Barnes' Appeal, 10 Wr. 356.
Douglas's Appeal, 12 Wr. 223.
Girard L. Ins. Co. *v.* Bank, 7 Sm. 394.

The Courts favor conversion at the earliest practical moment.

Allison's Ex's *v.* Wilson's Ex's, 13 S. & R. 330.

In agreements between vendor and vendee there is an equitable conversion at the time of the contract; and an equitable conversion does affect liens.

Lites, James & Co.'s Appeal, 2 C. 178.
Large's Appeal, 4 Sm., 383.

June 2, 1879. THE COURT. This fund in contention was produced by a sale under the Act of 17th February, 1876. It authorizes the Court of Common Pleas to order an assignee in trust for the benefit of creditors to make sale of the assigned real estate which is encumbered by liens. The assignment of error presents the single question whether a judgment, which at the time of the sale and of confirmation is a lien, and would then be entitled to be paid out of the proceeds, is deprived of all right thereto by reason of the expiration of five years from its entry, before payment of the purchase-money and delivery of the deed? That it is not is expressly ruled in Tomlinson's Appeal just decided. The language and object of this Act of 17th February are there carefully considered. It is shown that such a construction would be contrary to the manifest purpose and spirit of the Act, as it expressly declares the judgment liens are discharged by the confirmation of the sale, the rights of the owners of the judgments then attached to the fund. The confirmation is an act separate and distinct from a payment of the purchase-money. (Carver's Appeal, *ante* 169). A right vested at the time of confirmation is not divested by a postponement of the payment of the purchase-money. It is unnecessary to repeat the reasons given in Tomlinson's Appeal. They fully sustain the learned Judge in holding that the right of the appellee was not forfeited after the confirmation of the sale. Herbst, as assignee, has no such interest in this distribution between creditors as to give him a right of appeal, and his appeal is quashed. As to the other appellant, decree affirmed, and appeal dismissed at the costs of the appellant.

Opinion by MERCUR, J. PAXSON, WOODWARD and STRRETT, JJ., absent.

May, '79, 160, 161, 162, 163. May 13, 1879.

Foulke et al. v. Commonwealth.

Forfeiture of recognizance—Liability fixed—Affidavit of defence overruled—Respite for cause, how obtained—Practice.

Where there is a formal forfeiture of a recognizance, the liability of the recognizors is absolutely fixed. Relief

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should be sought by petition to the Court to respite the recognizance for cause, under the Act of 1783.

Error to the Common Pleas of Cumberland County.

Scire facias sur recognizance from the Court of Oyer and Terminer.

Charles H. Foulke was indicted at the August session of 1878 of the Court of Oyer and Terminer of Cumberland, for arson. He was subsequently arrested, and entered into a recognizance with Peter Spahr and Stephen F. Weakley in the sum of $2000, conditioned for his appearance at the November sessions following, to answer the indictment. He failed so to appear, and his sureties made application to the Court for a continuance, asserting as the ground of the application that Foulke was confined to his bed by sickness at his home in Colorado, and was unable to travel. The application was refused, and the recognizance forfeited. Suit was brought on the forfeited recognizance in January, 1879. The sureties filed affidavits of defence, setting forth that Foulke was dangerously ill at the time fixed for his appearance, and that he had been deterred from returning to Cumberland County at a later date by letters written to him by the counsel for the Commonwealth, advising him not to do so. On these affidavits a rule was taken to show cause why judgment should not be entered, because they were insufficient, and on the 19th day of March, 1879, the Court made the rule absolute, and judgment was entered against the defendants for the amount of the recognizances, with interest and costs.

The defendants took this writ, assigning for error the above action of the Court.

J. M. Weakley, for plaintiffs in error.

The Court below, in overruling the affidavits of defence, practically decided that no equitable defence could be offered to a suit on a forfeited recognizance. The offer of evidence in this case was almost identical with that in the case of Scully *v.* Kirkpatrick (29 P. F. Smith, 331), in which the decision of the Court below was reversed, and it was held that the facts offered constituted an equitable defence to the action on the forfeited recognizance, and that the offer should have been admitted. If the facts in the present case were proved to the satisfaction of a jury, it would be conclusive that Charles H. Foulke was prevented by the act of God from appearing at the time fixed by his recognizance, and under the ruling in Scully *v.* Kirkpatrick his sureties would be discharged from their liability.

Dickey *v.* Linscott, 7 Shepley, 453.
Knight *v.* Bean, 9 Shepley, 531.
Fenton *v.* Clark, 11 Vermont, 357.
Hubbard *v.* Belen, 1 Williams, 645.
Fuller *v.* Brown, 11 Metc. 440.
Fahy *v.* North, 19 Barb. 342.
Wolfe *v.* Howes, 24 Barb. 174.
Jarrel *v.* Farris, 6 Missouri, 159.
Peoples *v.* Manning, 8 Cowen, 297.

G. S. Ewing and *S. Hepburn, Jr.*, for defendant in error.

The Court below inquired into the ground on which a continuance was asked, and it was perfectly competent for the Court to refuse the continuance, and direct the forfeiture of the recognizance. The forfeiture of a recognizance is a judicial act (Pierson *v.* Comth., 3 Grant, 314), and the liability was thereby fixed absolutely, and there was no question as to the amount forfeited.

Mishler *v.* Comth., 12 Sm. 59.
Fox *v.* Comth., 1 WEEKLY NOTES, 243.

The judgment was transferred from the Court of Oyer and Terminer to the Court of Common Pleas for collection. All the matters set forth in the affidavit of defence had been heard and passed upon in the Oyer and Terminer before the forfeiture of the recognizance, and could not be inquired of in a collateral proceeding.

Rhoads *v.* Comth., 3 Harris, 277.

If the recognizance had been respited, and the defendant tried at some subsequent term of the Court of Oyer and Terminer, it would not have released the liability of the bail.

May 26, 1879. THE COURT. In Scully *v.* Kirkpatrick (29 P. F. Smith, 331) there was no forfeiture of the bond. The very groundwork of the decision was that the Judge had no power to decree such forfeiture, or enter it of record. Here there was a regular, formal forfeiture of the recognizance. The liability of the recognizors was absolutely fixed by it. (Mishler *v.* The Commonwealth, 12 P. F. Smith, 59.) Their remedy was by petition to the Court below to respite the recognizance. They could have done this under the Act of 1783. Besides, the affidavit showed no good reason why the defendant Foulke did not appear and offer to submit himself to trial, on which alone would there be any ground to respite the recognizance. Letters written to him by the counsel for the Commonwealth certainly were no reason. Judgment affirmed.

PER CURIAM. PAXSON and WOODWARD, JJ., absent.

Jan. '79, 200. March 18, 1879.

Gay v. Waltman.

Arbitration — Parol submission and award — Partnership, when presumed — Pleading — Power of one partner to bind copartner by submission to arbitration — Evidence.

In Pennsylvania one partner may bind his copartner by submission to arbitration by any agreement not under seal.

No particular form of words is requisite for a valid parol submission; in an action upon the award the fact of

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the submission must be established to the satisfaction of the jury by a preponderance of evidence.

In a suit upon a parol award of arbitrators against J. and C., as partners, C. filed an affidavit of defence denying that he was J.'s partner in the transactions forming the subject of the submission, and afterwards pleaded to the same effect; C. and J. filed separate pleas of nil debet, etc. During the trial, the defendants asked leave to withdraw the plea of no partnership, and the Judge allowed this withdrawal, remarking that its effect was to admit the partnership; no exception was taken to this ruling:

Held (affirming the judgment of the Court below), that the pleadings, as amended, admitted the partnership.

Error to the Common Pleas of Wyoming County.

Debt on an award of arbitrators, brought by Waltman against James Gay and Calvin Gay, partners, trading as J. & C. Gay. Calvin Gay filed an affidavit of defence, alleging that as a partner of James Gay he had never agreed to make any submission to arbitrators, and that as such partner he was not indebted to the plaintiff. He afterwards pleaded that he was not a partner in this case with James Gay, and pleaded also, as did James Gay, separately, nil debet, payment with leave, etc., and no award.

At the trial, after the plaintiff had examined several witnesses to prove the partnership, the counsel for the defendants asked leave to withdraw the plea of no partnership, remarking: "Our affidavit does not deny the partnership, but only the partnership as to this transaction." The Judge allowed the withdrawal of the plea, but remarked: "Withdrawing that plea we regard as withdrawing the matter of partnership entirely from the case, and leaving it (as under the rules of Court) as though there were no affidavit to the contrary." The Judge added, in the hearing of the defendants' counsel: "We now understand that the burden of proving the partnership is taken from you [the plaintiff], and that you have only now to prove the submission and award." Subsequently offers of evidence by the plaintiff to prove the partnership were rejected by the Judge as unnecessary.

The plaintiff testified, *inter alia*, that he had leased a half interest in a saw-mill to James and Calvin Gay, that a dispute arose as to the amount due him from them for the use of the mill; that he and James Gay agreed to refer the matter in dispute to three arbitrators, who were then named; that he and the two Gays appeared before the arbitrators, as agreed; that it was at first agreed that the arbitrators should settle a previous dispute between himself and James Gay, but that at the meeting the submission was so changed as to make the only question for decision what he should have for the use of the mill from the two Gays as partners. He testified: "The arbitrators heard my statements or allegations as to the use of the mill, and Mr. Gay's accounts and statements as to the use of the mill by them, and announced the award verbally as far as I know. I did not see any writing present. They awarded me for the use of the mill from these parties one thousand and forty dollars and some cents." The defendants admitted that there had been a submission and award, but testified that the submission was agreed on between the plaintiff and Jas. Gay for himself; that Calvin Gay was not interested in the matter in dispute, did not authorize the submission, and was not present at the arbitrators' meeting. The arbitrators' testimony as to their award was wanting in clearness.

The defendants requested the Court to charge the jury: (1) That there was no evidence from which they could conclude that the defendants submitted all matters then in controversy between them and the plaintiff to three arbitrators mutually chosen and agreed upon by said plaintiff and defendants; nor that the arbitrators made an award in favor of the plaintiff and against the defendants; and that the verdict should be for the defendants. *Negatived.* (2) That one partner could not bind another by submission to arbitration, even of matters arising out of the firm business. *Negatived.* (3) That the pleadings did not admit the partnership of the defendants. *Negatived.*

The Judge remarked in his answer to this point: "As the case now stands, the existence of the partnership in relation to the subject-matter of the action must be regarded as admitted." In his general charge, the Judge said: "You, therefore, depend entirely upon the evidence of the witnesses in making up your verdict. That is, however, sufficient, if the evidence is sufficiently clear to enable you to satisfy your minds that there was a submission, what was submitted, and what was the award of the arbitrators."

Verdict and judgment for the amount awarded. The defendants took this writ, assigning for error the answers to their points and the portions of the charge as above.

Felix Ansart, for the plaintiffs in error.

Where a case is submitted to a jury upon clearly insufficient evidence, such as no Court ought to sustain a verdict upon, it should be reversed.

Cauffman *v.* Long, 1 Norris, 72.

One partner cannot bind his copartner by a submission to arbitration.

Collyer on Partnership, § 439.
3 Kent's Com., § 49.
Story on Partnership, §§ 114, 116.

The case of Taylor *v.* Coryell (12 S. & R. 243) decides that a partner may so bind his copartner by *writing*, but the law should not be extended to embrace a parol submission and a verbal award. See—

Harper *v.* Fox, 7 W. & S. 143.

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The defendants did not intend to admit the partnership of J. & C. Gay, as the plaintiff knew, and as was shown by the remark of the defendants' counsel when he withdrew the plea, and by the subsequent offers of the plaintiff to prove a partnership.

Little (with him *Sittser* and *Harding*), contra.

To have withheld from the jury Waltman's evidence would have been ground for reversal. The law that a partner may bind his copartner by submission to arbitration is, in Pennsylvania, settled by Taylor *v.* Coryell (*supra*). And that decision extends to all agreements, written or oral, not under seal. If one partner may pay a firm debt, or agree on the amount thereof, there is no reason why he should not be allowed to refer to other questions as to the amount to be paid. The withdrawal of the plea of no partnership withdrew the issue as to partnership in the controversy, and James and Calvin were presumed from the record to be partners. The defendants were warned as to the effect of their withdrawal of the plea, but took no exception to the Judge's ruling.

There is no doubt as to the validity of a parol submission and award.

McManus *v.* McCulloch, 6 Watts, 357.

May 5, 1879. THE COURT. This was an action on a parol award of arbitrators. The submission was by parol, but whether made by one or both the copartners was a question in controversy.

The general rule in England and in many of our sister States is, that one partner cannot bind his copartner by submission to arbitration. In Pennsylvania it is held that he may so bind his copartner by agreement not under seal in any partnership matter. The question was carefully considered in Taylor *et al. v.* Coryell *et al.* (12 S. & R. 243). In that case the evidence did not show either consent or dissent on the part of the copartner. The able opinion of Mr. Justice DUNCAN well states many of the practical inconveniences that would result from a denial of that power. It cannot be done by instrument under seal, because the authority to execute a deed must be by deed. That, however, applies to the manner of binding a copartner, and not to the question of implied agency. When the submission is confined to cases for settling and determining claims arising in the partnership business, it is difficult to assign any substantial reason for denying the power of one partner in good faith to bind his copartner by a parol submission. The same doctrine is held in Southard *v.* Steele (3 Munroe R. 433). The incidental dictum of Chief Justice GIBSON in Harper *v.* Fox (7 W. & S. 143) in no wise impairs the authority of Taylor *v.* Coryell.

The subject-matter of submission from which the present action arises was to determine the sum justly due from the plaintiffs in error to the defendant for their use of a saw-mill, in which he owned the undivided half. If they had used the mill in manufacturing their lumber, it was clearly within the scope of the partnership business for one partner to ascertain the sum due and pay the same. Failing to agree with the owner of the mill, one partner had the right to submit the question by parol to arbitrators to decide, and the firm was bound by the award made in pursuance of the submission. A parol award made on a parol submission is a valid award. (McManus *v.* McCulloch, 6 Watts, 357.)

It is contended that, conceding the power of one partner to bind his copartner by a submission, yet the evidence of an agreement in this case was insufficient to leave to the jury.

We think the evidence of the defendant in error was amply sufficient to justify the Court in submitting the question to the jury. He testified in substance that he leased his half of the mill to James and Calvin Gay; that he was unable to settle with them as to the sum he was entitled to receive therefor; that he and they submitted it to three men named; that at first it was also agreed that the arbitrators should determine differences between him and James Gay, but while the parties were present before the arbitrators, talking the matter over, the submission was so changed as to leave to them to decide what he should have for the use of the mill as between him and James and Calvin Gay. After stating where the arbitrators met, he proceeded to say: "They heard my statements or allegations as to the use of the mill, and Mr. Gay's accounts and statements as to the use of the mill by them, and announced the award verbally, as far as I know; I did not see any writing present. They awarded me for the use of the mill from these parties ten hundred and forty dollars and some cents—fifty-nine cents, I think."

The fact that some other evidence was in conflict with this, or threw doubt on the correctness of Waltman's evidence, was insufficient to withdraw the case from the jury. The law requires no particular form to establish a valid submission. When it is by parol, the fact must be established to the satisfaction of a jury by a preponderance of testimony. (McManus *v.* McCulloch, *supra.*) The learned Judge said to the jury that they must "depend entirely on the evidence of the witnesses in making up your verdict. That is, however, sufficient, if the evidence is sufficiently clear to enable you to satisfy your minds that there was submission, what was submitted, and what was the award of the arbitrators." In view of the manner in which the case was tried and went to the jury, the plaintiffs have no just cause of complaint with this direction.

The remaining question relates to the proof of

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partnership. The rule of Court declares that in actions by or against partners it is not necessary on the trial to prove the partnership, but it shall be taken to be admitted as alleged on the record, unless one or more of the defendants shall make and file an affidavit denying the existence of the partnership as alleged. In this case Calvin Gay filed an affidavit denying that he was a partner, and also pleaded that he was not a partner in the case with James Gay. After the jury was sworn, and the plaintiff below was proceeding to give evidence to establish the partnership, the counsel for the defendants below asked leave to withdraw the plea of no partnership, which the Court permitted to be done, but at the same time stated, in the hearing of their counsel, that this must be regarded as an admission of the partnership as fully as if no affidavit had been filed, and thereupon excluded the plaintiff below from giving further testimony of that fact. To this ruling of the Court the counsel for plaintiffs in error took no exception and made no objection. They assented to it, thereby influencing the subsequent action of the Court, and of the opposite party. Nor is the effect of it changed by the fact that the notes of the stenographer show that the counsel for the defendants below then remarked: "Our affidavit does not deny the partnership, but only the partnership as to this transaction." The existence of the partnership had been put at issue only as to the transaction in question. It was to that issue only that the affidavit and plea applied. Having been withdrawn under the circumstances stated, the Court committed no error in saying to the jury in the charge: "As the case now stands, the existence of the partnership in relation to the subject-matter of the action must be regarded as admitted."

We discover no error in the record.

Judgment affirmed.

Opinion by MERCUR, J.

Common Pleas—Law.

C. P. No. 2. April 26, 1879.

South v. Pool.

Affidavit of defence—Accommodation paper—Foreign law—Judicial notice thereof.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit, upon three promissory notes dated Harrisonburg, Va., May 20, 1876, and made payable there four months after date. The notes, which were precisely alike, were made by R. N. Pool to S. D. Karns, and were by him endorsed to Geo. B. Heil, and were then endorsed by Geo. B. Heil in blank.

The defence set up in the affidavit and supplemental affidavit was that the notes were accommodation paper, given by the defendant without consideration to S. D. Karns, to enable him to buy lands in Virginia, that the notes had never been used for this purpose, which had been agreed upon when they were given, but that after maturity they had passed into the hands of the endorsees and the present plaintiff, D. W. South, who knew these facts.

W. S. Campbell, for the rule.

It is admitted that if this contract were made in Pennsylvania, the endorsee would not be a holder for value, but this is not the rule in Virginia. This is a Virginia contract, and must be interpreted by Virginia law. The laws of one State are judicially noticed in the others.

1 Wharton's Evidence, § 311.
Dougherty *v.* Snyder, 15 S. & R. 84.
Sidwell *v.* Evans, 1 Pen. & W. 383.
Todd *v.* Ins. Co., 3 WEEKLY NOTES, 330.

[HARE, P. J. The law of Virginia is not set forth in this affidavit, and we cannot travel outside of that. It may be necessary for the defendant to set forth in his affidavit what the *lex loci contractus* is, when such *lex loci contractus* differs from the *lex fori*, and is a fact pertinent to his defence.]

T. E. Patterson, contra.

The law of Virginia upon the subject of accommodation paper is not so clear as stated by counsel for the plaintiff. But no matter what the law is there the Court cannot take notice of it in this proceeding. The law of Pennsylvania upon the subject of accommodation paper is undoubted, and that law must govern here; it is the *lex fori*.

C. A. V.

May 10, 1879. Rule discharged.

C. P. No. 2. May 3, 1879.

Barrington v. City of Philadelphia.

Courts, incidental expenses of—Supreme Court of Pennsylvania—The necessary expenses of the Supreme Court for which no statutory provision is made are to be borne by the county in which the Court is sitting at the time they are incurred.

Case stated: The plaintiff, in December, 1878, furnished to the Supreme Court of Pennsylvania, at the request and for the use of the said Court in its sessions in the Eastern District of Pennsylvania, at Philadelphia, a set of Pennsylvania State Reports, and other law books, a list whereof, with the prices, was annexed to the case stated. The total amount due for said books is $925.50. The said list of books, and of the prices therefor, was certified to by the Prothonotary of the said

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Court for the Eastern District as correct, and was approved by the Chief Justice. The said books were necessary to the proper and convenient transaction of the business of the said Court in the said district, and the prices charged for the same were just and proper.

If the Court should be of opinion that the furnishing of the said books under the circumstances above stated creates a liability on the part of the city of Philadelphia to pay for the same, judgment is to be entered for the plaintiff in the sum of nine hundred and twenty-five $\frac{80}{100}$ dollars. Otherwise judgment is to be entered for the defendant.

Geo. T. Bispham, for plaintiff.

The county in which the Supreme Court is sitting is liable for its necessary expenses during such sitting, and this without any statutory provision.

McCalmont *v.* The County of Allegheny, 5 Casey, 417.

C. H. Mathews, contra.

THE COURT entered judgment for plaintiff.

C. P. No. 3. March 12, 1879.

Gilfillan v. The Union Canal Company.

Constitutional law—Acts of Assembly affecting contracts and vested rights—Legislation to the effect that a creditor may be presumed from his silence to have assented to the modification of the rights given him by his contract—Bondholder of a public company.

Case stated, showing the following facts: The plaintiff holds a number of coupons of the corporation defendant, amounting in all to $4200, running from November 1, 1857, to May 1, 1877, for interest upon four bonds of the defendant, dated November 1, 1853, and secured by a mortgage dated August 23, 1853. An Act of Assembly relating to the Union Canal Company, the defendant, approved April 10, 1862 (P. L. 395), authorized the calling of a meeting of the stock- and bond-holders, and the adoption by them of an agreement "for carrying out the provisions of the Act and for the settlement of the affairs and liabilities of the corporation on such terms and conditions not inconsistent with the provisions of this Act as may appear to them just and equitable, which agreement shall be binding on the said corporation, and on all such of the said last mentioned bondholders as shall signify their assent in writing thereto; and in case any such bondholder shall fail to file with the president of the said corporation, his or her refusal in writing, to concur in the said agreement, within three months from the date thereof, such bondholder shall be taken to have agreed to the same," etc. etc.

Another Act was approved on May 22, 1863 (P. L. 563); these two Acts are made a part of this case stated. On June 9, 1862, in pursuance of the former Act, a meeting of the stock- and bond-holders of the corporation was held, at which, by a majority of the votes of said bodies voting separately, an agreement was entered into for the purpose of carrying out the provisions of said Act, whereby it was provided that all interest on the said bonds theretofore accrued or thereafter to accrue should be paid out of the net revenue, income, and profits of the company, and that said net income and profits should be received in full consideration for the coupons of the company. The notice specified in the proviso to the 3d section of the Act was duly published and the plaintiff had actual knowledge thereof. The plaintiff did not take part in the making of said agreement, nor did he signify his assent in writing thereto, nor did he ever file with the president of the company his refusal to assent thereto. The whole amount of bonds secured by the said mortgage, and outstanding, is $2,500,000, and the whole amount of said bonds held by persons who filed their refusal to assent to the above agreement is $85,500. Since the making of said agreement, there has not been a clear net income and profits of the business of the said corporation. If the Court should be of opinion that the plaintiff is entitled to recover, judgment shall be entered against the defendant in the sum of $, otherwise for the defendants. Each party reserves the right to take out a writ of error to the judgment of the Court.

J. D. Rodney, for the plaintiff.

T. Hart, Jr., for the defendant.

The plaintiff, by not filing his dissent, has impliedly assented to the agreement which was made. The Legislature has the power to pass such an Act.

Martin *v.* P. & Ga. R. R. Co., 8 Fla. 370.
N. C. R. R. Co. *v.* Leach, 4 Jones, L. R. (N. C.), 340
Ireland *v.* Turnpike Co., 19 Ohio St. 369.
P. W. & B. R. R. Co. *v.* Cowell, 4 Casey, 329.

C. A. V.

May 10, 1879. THE COURT. The company defendant, by reason of numerous financial difficulties, obtained certain legislation, especially the two Acts of Assembly referred to in the case stated, and made a part thereof.

The plaintiff, the holder of numerous coupons, with a knowledge of the legislation, was entirely silent upon the subject of the proposed settlements made or to be made under and by virtue of that legislation: it is now proposed to destroy his right of recovery upon the evidences of the indebtedness held by him against the company, because he has seen fit simply to remain silent. Or, in the language of a clause in Section 3, Act of 10th April, 1862, as he has failed "to file with the president of such corporation his (or

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her) refusal, in writing, to concur in said agreement, within three months from the date thereof, such bondholder," that is, this plaintiff, "shall be taken to have agreed to the same."

The question to be settled here, is not like the ordinary questions which arise whenever a corporation, intending to extend its legitimate business, obtains legislation enlarging its powers, and compelling its members to raise the necessary funds. This legislation endeavors to destroy the right of a creditor, simply because he remains silent. That this cannot be done appears to be certain: (1) Because the bondholder is a creditor of the corporation, and as a creditor holds a contract with the company, for the payment of money, which contract is protected by the laws of this State and the Federal Constitution. (2) While there may be cases in which silence may, by a jury, be interpreted to mean consent, this is not one of them, for the debtor has no right by legislation to impose terms upon a creditor not within the intent and meaning of the original contract.

These points seem to us to be so clear as to require little if any argument to sustain them.

That the claim of the plaintiff is based upon a contract is not denied; to declare that he shall by any legislation lose the fruit of it, is to break the contract, and when an attempt is made in that direction, the creditor simply points to his bond. He may be very foolish to act thus, or he may be very wise; that is nothing to us, he simply clings to his bargain, and that he has a legal right to do.

Can a debtor impose terms upon a creditor, or compel him to speak if he chooses to remain silent? Such has not yet been determined to be the law as between private persons, and the most powerful corporation has not yet obtained greater rights.

This contract declared that upon such a sum of money, such an amount of interest shall be paid. This Act of Assembly, after providing how the debts of this corporation shall be consolidated or reduced, at a joint meeting of directors, stockholders, and bondholders, provides, that any creditor who does not dissent within three months, "shall be taken to have agreed to the same."

Between private individuals the proposition involved in the section of the Act now under consideration would be so absurd as to be unworthy of consideration. I owe A. a debt, and inform my creditor that in one week I will pay fifty per cent. thereof in full payment and satisfaction thereof, and if he does not object he will be taken to have agreed to my proposition. Would my creditor be bound by his silence. We think not. Is the case different because a corporation is the debtor? In answer to this inquiry, it may be contended that public interests may require another construction of the law. That may be the case where the questions arise between the directors and the stock- and bondholders of a concern, and involve methods of management, and of finance, additional and extensive corporate powers, and the legitimate exercise thereof. All such questions may be settled by a majority vote; but where the issue is between the corporation and a creditor who desires to be paid his debt, we find no difference between a private debtor and a corporation, and as by his contract the creditor has a legal right to demand the payment of his money, no legislation can destroy this right, because it cannot compel him to speak.

Judgment for plaintiff on case stated.

Opinion by LUDLOW, P. J.

C. P. No. 3. June 7, 1876.

Flanigan v. Rossiter.

Affidavit of defence—Suit against surety for rent—Averment—Subsequent agreement diminishing the rent.

Rule for judgment for want of a sufficient affidavit of defence.

Appeal by defendant from the judgment of a Magistrate's Court against him as security for $38.02 due plaintiff for rent.

Plaintiff filed a copy of the lease.

The affidavit of defence set forth that the copy of the lease filed was not such an instrument as to entitle plaintiff to judgment for want of an affidavit of defence, as there was no averment or statement accompanying it of the amount claimed, and that after the making of the lease plaintiff entered into a new contract with the tenant without defendant's knowledge or consent, under which the premises were rented under different terms, and a less rental exacted, whereby defendant was relieved of any liability under the lease.

Smithers, for rule.

No statement of amount due is necessary to obtain judgment, as it relates to the assessment of damages. The appeal conveys a sufficient statement.

Holden *v.* Wiggins, 3 P. & W. 469.
1 Troubat & Haly, 371.
Bunting *v.* Allan, 6 WEEKLY NOTES, 157.
Blackburn *v.* Boker, 1 Clark, 15.

The alleged new agreement, being beneficial to the surety, would not discharge him from liability.

Dickson *v.* Wolf, 5 WEEKLY NOTES, 37.

The alleged new agreement was without consideration, and was therefore insufficient to discharge the surety.

Zane *v.* Kennedy, 23 Sm. 182.

THE COURT. Rule absolute.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, JULY 17, 1879.* [No. 12.

Supreme Court.

Jan. '79, 180. March 25, 1879.

Bradley's Appeal.

Domestic attachment—Act of June 13, 1836—Discretionary powers of trustees—Priority of lien—Whether trustees acting bona fide and under the advice of counsel are responsible for loss.

Trustees in domestic attachment are not mere ministerial officers but are clothed with extraordinary discretionary powers.

McCready *v.* The Guardians of the Poor (9 S. & R. 94) explained.

It is well settled that trustees who have acted in good faith, and under the advice of counsel, are not responsible for an error of judgment or a mistake of law.

A domestic attachment was issued against S. & Co. and was placed in the sheriff's hands at 2.10 P.M.; a fieri facias was issued against S. by an individual creditor and placed in the sheriff's hands at 3 P.M.; proceedings were begun to test the ownership by means of sheriff's interpleader; the trustees in the attachment were advised, however, by their counsel that there was grave doubt whether the attachment had not been improvidently issued, and under his advice effected a compromise with the execution creditor whereby certain items of property were released by each in favor of the other:

Held, that although the property was *in gremio legis* at the time the fi. fa. issued, and the levy thereunder was therefore void, yet the trustees had ample discretion to make the compromise, and inasmuch as they had acted in good faith and under the advice of counsel, they could not be surcharged.

Appeal from a decree of the Common Pleas of Chester County.

The facts were as follows: On the 23d of July, 1875, Daniel Gilbert issued a domestic attachment against John J. Shallcross & Co., alleging in his affidavit that John J. Shallcross & Co. were indebted to him, and that John J. Shallcross had absconded, etc. This writ was received by the sheriff at 2.10 P.M., and at 3 P.M. of the same day the sheriff received a fi. fa. for a debt of $2000, issued by Henry G. Thomas, on a judgment which had previously been confessed by John J. Shallcross. A store at Coatesville, Chester County, was conducted in the firm name of John J. Shallcross & Co., and a farm of 22 acres near that borough was conducted by John J. Shallcross individually. John J. Shallcross had absconded and no one would admit being a partner, hence the issuing of a domestic attachment. Daniel Gilbert, the plaintiff in the domestic attachment, had furnished flour and feed to the store, and held promissory notes signed John J. Shallcross *& Co.*, hence the *firm* was made defendant.

The title to the farm was in John J. Shallcross and Frederick Schulemeister as tenants in common; but the latter denied any partnership whatever in the store business, and alleged that he was only an employé on the farm, and that he had no interest in the business. The sheriff attached (under the attachment) and levied upon (under the fi. fa.) all the personal property both at the farm and in the store.

Caleb S. Bradley, Benj. R. Hatfield, and Horner A. Beale were appointed trustees in the attachment.

It was contended by the counsel for the execution-creditor that the fi. fa. was necessarily the first lien, because if Shallcross had any partner he had not in law absconded, and the writ had been improvidently issued; and if he had none, the writ, being against "John J. Shallcross & Co.," was void. As to the farm property especially, he contended that inasmuch as the farm was carried on by Shallcross exclusively, an attachment issued against a firm of which he was a member could not bind his individual property.

Proceedings for a sheriff's interpleader were begun; and it seeming doubtful whether or not Schulemeister was a partner, and the trustees being fearful lest this should be found to be the case and they should lose everything, under advice of counsel, made a compromise with the execution-creditor by which they released the lien of the attachment from the property on the farm and he released the store property from the lien of his fi. fa.

The property on the farm was sold by the sheriff and realized $1516.58.

The trustees filed their account in which they did not charge themselves with this fund, whereupon certain of the creditors filed exceptions, and the same were referred to an auditor for consideration.

The auditor (P. F. Smith, Esq.) in a lengthy report, after finding the facts as above, found that: "The apparent relations of Shallcross & Schulemeister were such as to make it uncertain to the public whether they were partners or not; many of the circumstances might reasonably lead to the belief that they were partners," but that if the sheriff had sold under the fi. fa. improperly the trustees would have had a remedy against him.

"How do these trustees claim to relieve themselves for not accounting for the goods sold by the sheriff? They say they acted in good faith,

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under the advice of counsel, and under circumstances which would cause a prudent man to pause—circumstances which justified them in entertaining the fear that, if they pursued the controversy, instead of recovering the goods which the sheriff sold, they would lose those which the execution-creditor was willing, by way of compromise, that they should retain.

"But (under the authority of McCready *v.* Guardians of the Poor, 9 S. & R. 94) they were ministerial officers without any discretion to settle controversies; they were bound to know the law, that the goods were in their custody, and therefore, if the sheriff withheld them on their demand, they were bound to apply to the Court to compel him to deliver them. At all events, being such officers, they could not act of themselves even in a doubtful matter; they were bound to have their rights determined by a judicial decision.

"They had no more authority to compromise a dispute as to the right of property, because they thought it would be for the benefit of the creditors, than would the sheriff have had whilst the goods were in his custody if he had been of the same opinion; or as to goods taken in execution if he thought it for the benefit of the execution. The auditor is, therefore, of the opinion that the trustees are chargeable with the portion of the goods seized by the sheriff which they gave up to him to be sold under Thomas's execution. The sale of the sheriff amounted to $1516.58."

He further found that they had acted in perfect good faith under the advice of counsel and in accordance with what they believed to the best interest of the estate; he therefore declined to charge them with the *costs of the audit.*

The trustees filed exceptions, which, after argument, were overruled by the Court (BUTLER, P. J), whereupon they took this appeal, assigning as error the action of the Court.

No opinion was filed in the Court below.

Wm. B. Waddell and *Wm. M. Hayes* (*Wm. E. Barber*, with them), for appellants.

The auditor's conclusion that the trustees are ministerial officers cannot be justified. An examination of the Act of June 13, 1836 (P. L. 606), shows them to be clothed with ample discretionary powers. They are authorized to summon before them all persons supposed to be indebted to the defendant and examine them touching his estate; to "settle" accounts; issue warrants to seize property and even cause houses to be broken open, commit witnesses who refuse to answer, and receive proofs. Surely these are not ministerial duties. Again: the Court is empowered to appoint three honest and *discreet* men, who are required to take an oath to execute the *trust*, according to the best of their skill and *understanding*, and a majority are authorized to exercise all the powers and perform all the duties required. If they are but the agents of the Court, then it was unnecessary to confer such powers upon them, or why appoint so many as *three?*

There is no instance where trustees who have acted under the advice of counsel have been surcharged.

During *et al.* Ap., 1 H. 234.
King *v.* Morrison, 1 P. & W. 196.
Neff's Ap., 7 Sm. 91.
Chambersburg Association's Ap., 26 Id. 203.

R. Jones Monaghan (*Charles H. Pennypacker* with him), for appellees.

The authority of trustees in domestic attachment is wholly statutory. Anything done by them outside of their express statutory powers is *ultra vires* and null and void. These trustees cannot, under the Act of 1836, even sell perishable property except after an order of the Court. If they could not sell, surely they could not give away.

May 7, 1879. THE COURT. This was an appeal by trustees under a writ of domestic attachment from the decree of the Court below dismissing the exceptions and confirming the report of the auditor appointed to make distribution of the assets in the hands of said trustees. The auditor and the Court below surcharged the appellants with the sum of $1516.58, being the entire proceeds of a sheriff's sale of certain personal property of the defendant in said attachment, which had been levied upon and sold under a writ of fieri facias. It appeared that the writ of domestic attachment was issued against John J. Shallcross & Co. upon an affidavit charging that John J. Shallcross had absconded, etc. This writ was received by the sheriff at 2.10 P.M. on the 23d of July, 1875, and at 3 P.M. of the same day the sheriff received the writ of fieri facias above-mentioned which was issued by Henry G. Thomas upon a judgment which had been previously confessed by Shallcross. The sheriff attached and levied under both writs the stock of goods in a store at Coatesville conducted under the firm name of John J. Shallcross & Co., and also all the personal property on a farm near Coatesville conducted in the name of John J. Shallcross individually but the title to which was alleged to be in the said Shallcross and one Frederick Schulemeister. A dispute arose between the trustees and the execution-creditor in regard to the legal effect of the seizure of the said property upon their respective writs, and under the advice of counsel a compromise was effected and an agreement entered into between the counsel of the trustees and the counsel of the execution-creditor whereby it was agreed that the trustees should take the store property, and the execution-creditors should take the farm and the

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personal property belonging thereto. The auditor distinctly finds the fact that in making this arrangement the trustees acted under the advice of counsel in the most perfect good faith, and did what they believed was not only for the best interests of the estate, but also what was in accordance with the law. Yet he has surcharged them with the entire proceeds of the sheriff's sale, not even allowing for the necessary expenses thereof, which ruling upon exceptions filed by the trustees was confirmed by the Court below.

No opinion was filed by the learned Judge, and we are therefore obliged to look to the report of the auditor alone for the reasons upon which this ruling is based. Briefly stated they are that trustees under a domestic attachment are purely ministerial officers; that they have no discretionary powers, no right to make compromises and settle controversies; the learned auditor says: "They had no more authority to compromise a dispute as to the right of property because they thought it would be for the benefit of creditors than would the sheriff have had whilst the goods were in his custody if he had been of the same opinion, or as to goods taken in execution if he thought it for the benefit of the execution. The auditor is therefore of the opinion that the trustees are chargeable with the portions of the goods seized by the sheriff which they gave up to him to be sold under Thomas's execution. The sale of the sheriff amounted to $1516.58."

We think the auditor was clearly right in holding that the trustees made a mistake in relinquishing their claim to the property sold under the fieri facias. It is true there was no duty upon them to give a bond under the sheriff's interpleader. Nor do I see how the Court could have compelled them to do so. But they might and ought to have applied to the Court for relief. The attachment being prior in point of time, the property was *in gremio legis*, and in a proper case the Court would make such order as might be necessary for the protection of all the interests involved (Robinson *v.* Atlantic and Great Western Railway Co., 16 P. F. S. 160), but the conclusion of the learned auditor that the trustees are necessarily liable to be surcharged with the proceeds of the sheriff's sale is not so satisfactory. His argument that trustees under a domestic attachment are ministerial officers without discretion, like a sheriff, rests in a great measure upon the case of McCready *v.* The Guardians of the Poor (9 S. & R. 94). That case, however, is not authority for such a doctrine. It is true it was said by Justice DUNCAN in delivering the opinion of the Court, referring to trustees under a domestic attachment, "These men are not judicial officers, but are ministerial officers of justice."

The point decided in that case was, that in an action of trespass or trover by two of three trustees under such attachment, the Court after verdict will presume that all three were appointed and qualified, and that one is since dead. As this case wholly fails to sustain the position assumed and no other has been cited which does, we must look to the Domestic Attachment Act of 13th June, 1836 (P. L. 616, Purdon, 518), as our guide. It requires but a cursory examination of said Act to see that trustees appointed under it are clothed with extraordinary powers. To enumerate them all would be tedious and unprofitable. It is sufficient for present purposes to say that from and after their appointment such trustees shall be deemed to be vested with all the estate of the debtor at the time of issuing the attachment, and are required to take into their possession all of said estate, and all books, papers, and vouchers relating to the same; they may sue for and recover in their own names all the said estate, and all debts and things in action belonging to the debtor; they may summon before them and examine on oath or affirmation, all persons residing within the county *supposed* to be indebted to the defendant, and such other persons residing as aforesaid *as they shall think fit* touching the real and personal estate of the defendant, and in case any person so summoned shall refuse to attend, or to be sworn or to make answer, the trustee *may commit such person to the prison of the county*, there to be confined until he shall submit to be examined; they may issue their warrants, under their hands and seals, to break open in the daytime, houses, chambers, shops, stores or warehouses of the defendant, or any doors therein, and any trunks or chests of the defendant, in which his goods and effects, books of account or papers relating to his estate shall be or *shall be reputed to be*, and so to seize the same for the benefit of creditors; they may redeem property that has been pawned or pledged; they may sell the personal estate of the debtor, without any application to the Court, at any time after the term next succeeding that to which the writ is returnable, and the real estate at any time after the third term, and to grant, assign, or *sell* the debts due to or to become due the defendant.

An argument is not needed to show that trustees clothed with such powers as I have enumerated are something more than ministerial officers. There is no possible analogy between their duties and those of a sheriff. The oath which the trustees take implies discretion. They are "to execute the trust reposed in them, according to the best of their skill and understanding," etc. No other class of trustees have such delicate, hazardous and responsible duties to perform. To say that a trustee who may send a man to prison for his refusal to answer is a mere ministerial officer,

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is a proposition the mere statement of which carries with it its own swift refutation.

There is a line of authorities which hold that trustees who have acted in good faith and under the advice of counsel are not responsible for a mere error of judgment or a mistake of law. It is sufficient to refer to King *v.* Morrison (1 Pen. & Watts, 188); During, King and Miller's Appeal (1 Harris, 224); Neff's Appeal (7 P. F. S. 91); and the Savings Fund's Appeal (26 P. F. S. 203). Trustees must of necessity seek the advice of counsel in the performance of their duties. Not to do so would in many instances be gross negligence. It would be a harsh rule to require trustees to seek legal advice and then hold them responsible for an error of law committed by their counsel. In the language of Chief Justice GIBSON (1 Harris, 235) it "would throw the execution of trusts into the hands of knaves or fools."

We are of opinion that the case in hand comes within the principle laid down in the authorities referred to, and that it was error to surcharge the appellants with the proceeds of the sheriff's sale. It is easy now to see how the mistake in question might have been avoided. It might not have been so easy at the time it occurred. It certainly was not so to the trustees. Acting in good faith and in the strict line of their duty, they sought the advice of respectable and experienced counsel. It would be harsh as well as unjust to hold them responsible for his error of judgment, and the law does not require us to do so.

The decree is reversed at the costs of the appellees, and distribution ordered in accordance with the principles of this opinion.

Opinion by PAXSON, J.

Jan. '79, 185. March 13, 1879.

Early and Lane's Appeal.
Blood's Appeal.
Barron's Appeal.

Execution—Acts of 29 March, 1819, and 16 June, 1836—Stock assigned as collateral—When not liable to sale by fi. fa.—Equities of assignor—Attachment.

The assignment of the stock of a corporation to itself as collateral security for a loan, divests the title of the assignor so far as to prevent a sale of it under a fi. fa. against the assignor.

A shareholder in a building association, who has assigned his stock as collateral security for a loan, which is also secured by a judgment against him, may elect, upon a sheriff's sale of his real estate, to have the actual value of his stock deducted from the amount of the judgment before the latter is allowed to participate in the fund arising from the sale.

An attachment of the stock, after such an election, binds nothing but the defendant's interest, if any remains after the stock has been applied to the payment of the judgment.

Appeal from the Common Pleas of Luzerne County.

This was an appeal from an order dismissing the exceptions filed by the appellants to the report of an auditor distributing the proceeds arising from the sale of real estate of Leopold Schlessinger, and confirming the report.

The facts were these: The real estate in question, belonging to Schlessinger, was sold under a judgment of O. H. Blood, and realized a fund for distribution of $784.57. There were twelve judgments against Schlessinger, the first for $1000 in favor of the Wyoming Building Association; the second in favor of Mrs. R. Silverbach, for over $600, and the eighth, tenth, and eleventh respectively in favor of O. H. Blood, Barron & Co., and Early & Lane, the appellants.

Before the auditor appointed to distribute the fund, the following facts appeared: Schlessinger was the owner of five shares of stock in the Wyoming Building Association, and had borrowed on them $1000, for which he gave the association the judgment above mentioned, and, in addition, had assigned the stock to the association as collateral security for the loan. He paid his dues regularly, and at the time of the filing of the auditor's report the amount paid by him on account of this loan amounted to over $900.

After the assignment of this stock to the association it was seized under a *fi. fa.* issued on the judgment of Barron & Co., and sold to the plaintiff's attorney for $20, which was applied to the payment of the costs on the writ.

At the first meeting before the auditor, on November 22, 1877, a claim was made on behalf of Schlessinger to have applied towards the satisfaction of the building association's judgment the actual value of the stock previously assigned to it by him as collateral.

Subsequently, on December 1, 1877, attachment executions were issued by each of the appellants, on their judgments, against this stock in the building association.

A number of questions were raised before the auditor, the principal of which were these: (1) That the auditor had no jurisdiction to inquire into the validity of the sheriff's sale of the stock under the *fi. fa.* (2) That the claim of Schlessinger to have the value of the stock applied to the judgment of the building association should not be recognized, as his title to the stock had passed out of him by the sale under the *fi. fa.* (3) That the judgment of the building association should be paid out of the fund for distribution, there having been no legal election by Schlessinger to have the stock applied to its satisfaction.

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The auditor (J. Vaughan Darling, assumed jurisdiction of the question of the validity of the sale of the stock under the *fi. fa.*, and held that it passed no title to the purchaser. (Exception.) Upon this point he said:—

"The Act of March 29th, 1819, section 2 (Acts of 1819, pp. 226–7, Laws of Pa., Vol. 7, p. 217), is undoubtedly in force notwithstanding the Act of 1836; and, under its provisions, stock standing in the name of the defendant and not claimed by another, may still be sold under a *fi. fa.* (Lex *v.* Potters, 4 Harris, 295). The scope of the Act is in terms limited to cases 'of stock *owned by any individual or individuals*,' etc., 'in his or their own names.' And it is not the exclusive remedy—attachment execution lies also (Weaver *v.* The Huntingdon R. R. Co., 14 Wr. 314). The stock in the case under discussion was assigned to the association *as collateral*, it is true, but none the less assigned. . . . Whilst in a certain sense the borrower, Schlessinger, owned the stock in his own name, yet this is not the sense intended by the Act. In all cases where the stock is subject to a charge or lien, and much more so where the stock has been assigned as collateral, it is essential, in the words of the present Chief Justice in Weaver *v.* R. R. (*supra*), to the interest of all parties and to save litigation 'that the proceedings by attachment should be resorted to, and the precise extent and character of the claim of the corporation ascertained before final execution.' The machinery provided by the second section of the Act of 1819 is wholly insufficient to effect justice in a case like the present, and it is only by a strained construction of the section itself that it can be made to appear applicable at all. . . . In Mulford *v.* Weisgerber (3 Luz. Leg. Reg. 99) the stock had been assigned to and held by the association as collateral to its loan. The Court held that the stock was 'held in another name than that of the real owner thereof,' and therefore within the 32d section of the Act of 1836, requiring an affidavit and recognizance."

In disposing of the other questions the auditor reported: "Is the value of the stock at the time of the sheriff's sale to be applied in reduction of the judgment of the association? It would seem to be tolerably well settled that without an 'election' on the part of either the borrowing stockholder or the association, to have dues, etc., applied on account of the judgment, or rather the debt for which both the judgment and the stock are collateral, payments on stock will not be so applied. Such payments are not *ipso facto* payments on the lien. (North Am. Build. Ass. *v.* Sutton, 11 Cas. 463.) The rule is thus stated by AGNEW, C. J., in Spring Garden Asso. *v.* Tradesman's Loan Association (10Wright, 493): 'Payments to stock are not *ipso facto* payments to the mortgage (judgment) debt or loan. It is true, according to former decisions, the mortgagor may apply his payments on the stock to the mortgage-debt, a license to do so being implied in the nature of these building and loan transactions. The building association may also apply them by virtue of the terms of the assignment of the stock which is taken as a collateral security. But in order to effectuate application of payments on stock to the debt, it requires an act of appropriation by one or the other of the parties. Strangers to the transaction stand upon a different footing. They can require nothing which the parties do not.' If this be a correct statement of the law, it follows that any election or appropriation on the part of Schlessinger would be valid and binding, not only as against the association itself, but as against all creditors holding liens upon the stock. It is true that no appropriation was made by Schlessinger until after the sale; but is this necessarily fatal to his right to make such appropriation? It was strenuously argued by the counsel for the purchasers of the stock at the sale upon the *fi. fa.*, and the creditors who subsequently attached the stock, that the sale of the land concluded the debtor's right of election, and the principle was invoked that the course of distribution cannot be interfered with by the debtor. (Thomas's Appeal, 19 Sm. 120, and cognate cases.) In the view of the auditor this principle does not apply to the case in hand. The auditor finds a judgment in favor of the building association in the sum of a thousand dollars. It is the first lien, and prima facie entitled to the fund. But the debtor sets up the defence of *payment*, a defence clearly cognizable by an auditor. (Borland's Appeal, 16 Sm. 470.) It is immaterial to the building association from which of the two sources, the stock or the judgment, the payment is made to them, if, in point of fact, they realize their debt. And the only objecting creditors, unless the building association can be considered as such, are those who by reason of the position of their several judgments cannot by any possibility take the fund; the whole contention on their behalf being that the fund should be applied to the judgment of the building association, so as to free the stock for their benefit. It is urged in support of this position that the association having two funds to look to should, in accordance with the equitable rule as to marshalling assets, be compelled to go upon that fund upon which these creditors have only postponed liens, and, in this distribution, liens that as such cannot be reached. This argument assumes as its premise the existence of liens upon the stock. Suppose for a moment that no such liens exist. What is there to limit the right of the debtor to have payments on his stock applied to the judgment? If the association had

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brought suit, he could have treated the payments on stock as payments on the debt. In this case the sale having been made upon another judgment, the debtor does what is practically the same thing, viz., appropriates the payments to the judgment. This is no more 'interference with the course of distribution' than is every attempt to let in a junior by establishing the payment of a senior judgment. The building association must, of course, be paid in full whatever is owing to it; and the other judgment creditors cannot complain, for the effect of the election is to increase, not to decrease, the fund for distribution. Nor is this in any sense a case for the invocation of the doctrine as to marshalling assets. The three judgment creditors, apart from their position as *attaching* creditors, have no equity above the other lien holders who are not reached by the fund. And, moreover, the right to use the stock payments in liquidation of the judgment, does not extend to strangers. 'They,' says AGNEW, Justice, 'can require nothing which the parties do not.' (10 Wr. *supra*.) If there be a lien on the stock existing before the election, then the holder might with great show of reason claim to confine the association to the fund. Possibly even a demand for subrogation would be sufficient to conclude the debtor's right of election. But the auditor is of opinion that until some such step is taken, until a definite right in, or a lien upon, the stock is obtained, the right of election continues in the debtor up to the period of distribution. The only question of importance remaining is, whether the attachments of Messrs. Barron & Co., Early & Lane, and O. Howard Blood are operative as against the election of the debtor Schlessinger. The auditor has already found as a matter of fact that the election or appropriation by Schlessinger was made at the first meeting of the audit Nov. 22d, 1877, by a verbal notice from Mr. Strauss, acting for Mr. Brundage, counsel for Schlessinger, and that this notice was repeated in a modified form and in writing by Mr. Brundage on the second meeting of the audit, November 26, 1877.

"The attachments are all tested December 1, 1877. Under the rulings of the auditor, if they be correct, it follows logically that these attachments bound nothing but the interest in the five shares of stock attached, after the application of their value, at the time of the sheriff's sale, to the judgment of the association, or in other words, the balance, if any, that might exist after the stock had paid the debt."

In accordance with these rulings, the auditor refused to distribute the real estate fund to the payment of the judgment of the building association, but first applied to the satisfaction of its judgment the value of the stock, and awarded payment of the balance remaining due on it, out of this fund; the balance of the fund he awarded to the lien creditors (Mrs. Silverbach and others) in the order of their judgments. (Exception.) Under this scheme of distribution the appellants got nothing.

The Court below (HARDING, P. J.) subsequently confirmed the auditor's report, and dismissed the exceptions in the following opinion: "The important question in this whole case is—did the assignment of the building association stock as collateral divest the title of Schlessinger so far as to prevent sale on execution? We are of the opinion that such an assignment does divest, for the time being, title in the original owner.

"Where a customer, by indenture, assigned a number of shares in a life insurance company, then standing in the name of the customer on the books of the company, subject to redemption on payment of a sum of money therein mentioned, and with a power of sale, an entry of this assignment was made in the insurance company's ledger, which company afterwards refused to recognize this transfer. It was held that the notice of assignment was sufficient, and that the circumstances sufficiently showed the bankrupt not to be the reputed owner of the shares at the time of bankruptcy. (*Ex parte* Masterman, 2 M. & A. 209; Grant on Banking, 154.) So where A. insured the life of B., payable to A. on the death of B., immediately afterward A. assigned the policy to his banker as security for a loan or advance, which was also secured by a mortgage of real property, it was held that the company had no right to call upon A. and the bankers to interplead, and the bill was dismissed with costs. (Dessborough *v.* Harris, 3 Eq. Reports, 1058. See also Butchart *v.* Dresser, 10 Hare, 453; 4 De G. M. & G. 542; *Ex parte* Dobson, 2 M. D. & D. G. 685.)

"The English doctrine here explained is fully sustained in our courts. In the case of Hanna *v.* Holton (28 P. F. Smith, 334) it was held that the assignment of a collateral security to a creditor, to hold for the security of his debt, establishes a privity of contract which invests him with the ownership of the collateral for all purposes of dominion of the debt assigned. Where one was indebted to a bank in a sum much larger than the value of some stock of the bank he owned, and it was verbally agreed that he should transfer the stock as collateral security for his indebtedness, and a power of attorney was accordingly drawn up for that purpose, it was held that this agreement operated as an assignment of the stock in equity. (Lightner's Appeal, 1 Norris, 301.) But where a creditor takes a mortgage, note, or other chose in action, only as security for a pre-existing indebtedness, and not for money advanced at the time, he is not a pur-

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chaser for value. (Petrie *v.* Clark, 11 S. & R. 377; Irwin *v.* Tabb, 17 Ibid. 419; Hartman *v.* Dowdel, 1 Rawle, 282; Twelves *v.* Williams, 3 Wharton, 485; Depeau *v.* Waddington, Ibid. 220; Trotter *v.* Shippen, 2 Barr, 358; Ludwig *v.* Highly, 5 Barr, 139; Kirkpatrick *v.* Muirhead, 4 Harris, 123; Ashton's Appeal, 23 P. F. Smith, 162.)

"It was the duty of the creditors here to have strictly pursued the mode pointed out by the Statute when they originally proceeded against the stock held in the name of Schlessinger, notwithstanding it was assigned to the building association as collateral security. There was an equity of redemption in Schlessinger, sleeping, it is true, but nevertheless ready to tap at the conscience of a chancellor sitting in equity at the moment the loan to the association was paid. (1 Purd. Dig. 639, §§ 20, 30, and 31; Com. *v.* Watmough, 6 Wharton, 117; Lex *v.* Potters, 4 Harris, 295; Weaver *v.* Huntingdon R. R. Co., 14 Wr. 314.)

"The fund in Court represents all that Schlessinger's real estate sold for. Here, therefore, is a creditor stripped of all his tangible or valuable property, save only his equity in the stock of the association in question. It is to this fund the jurisdiction of this Court has attached. Jurisdiction having attached, equity comprehends within its grasp all incidental matters necessary to enable it to make a full and final distribution, and, therefore, to terminate litigation while it affords a perfect remedy. (Souder's Appeal, 7 P. F. Smith, 502; Rice's Appeal, 29 P. F. Smith, 182.)

"Subsequent to the assignment of this stock as collateral security, and subsequent to the sale of the same on the Barron & Co. execution, Barron & Co. sued out their execution on the first day of December, 1877, and attached these five shares of stock according to law. Several other creditors did the same prior to the filing of the report of the auditor in Court. How far this estopped these creditors from denying that this stock was yet the property of Schlessinger need not be decided under our present views of this question.

"We must, therefore, overrule the exceptions in this case, and direct the fund in Court to be distributed as directed by the auditor."

Early & Lane, O. H. Blood, and Barron & Co. then took this appeal, assigning as error the rulings above excepted to.

C. D. Foster (with him *John McGahrren*), for appellants.

The auditor possessed no supervisory power by which he could determine the validity of a sheriff's sale of stock, and this upon the principle that an execution like a judgment can only be impeached for fraud or want of jurisdiction in the Court awarding it.

Stewart *v.* Stocker, 13 S. & R. 204.
Lowber's Appeal, 8 W. & S. 387.
Wilkinson's Appeal, 15 Sm. 190.

The stock in question at the time of its sale under the *fi. fa.* did not stand in "the name of another" within the purview of the Act of 16 June, 1836. Schlessinger was the real owner of the stock, and its assignment was only an hypothecation of it, for the payment of the loan, and the association had no greater interest in it after the assignment than before. Stock may be sold by *fi. fa.*

Act of 29 March, 1819, Purdon, 642, pl. 40.

By the equitable doctrine of the marshalling of assets, the building association, which had a lien on both these funds—the stock and real estate—should have been compelled to seek satisfaction out of the real estate fund, as the appellants had only the stock to look to to realize their claims.

Ramsey's Appeal, 2 Watts, 228.
Bruner's Appeal, 7 W. & S. 269.
Findlay *v.* U. S. Bank, 2 McLean, 44.

There was no evidence of any election on the part of Schlessinger that this fund should be applied to the payment of the building association's judgment—nothing but a letter from a person purporting to represent him, without any evidence of his authority so to act.

S. J. Strauss, contra.

Applying the doctrine of marshalling to the case, the equities of Mrs. Silverbach were superior to those of the appellants. She was the second judgment creditor, and the distribution of the balance of the fund to her was entirely in accord with the ruling in Ramsay's Appeal (2 Watts, 228), a case almost on all fours with the present. The auditor had the right to work out the equities of all the parties before him, and to complete the distribution upon the principles of subrogation. This was done in Ramsay's Appeal (*supra*). And see—

Souder's Appeal, 7 Sm. 502.
Rice's Appeal, 29 Sm. 182.

No title to the stock passed by the sale under the *fi. fa.* Stock not standing in the name of the *real owner* cannot be sold under a *fi. fa.* The sale having been made under the wrong writ is void.

Act of 16 June, 1836, Purdon, 635, pl.
Lex *v.* Potters, 4 Harris, 295.
Herman on Executions, § 258, n.

March 31, 1879. THE COURT. We affirm this decree on the able report of the learned auditor in the Court below, and the opinion of the learned President confirming it.

Decree affirmed and appeal dismissed at the cost of the appellants.

PER CURIAM.

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Jan. '79, 70. Feb. 3, 1879.

Breuckmann v. Twibill.

Landlord and tenant—Surrender of term—Acceptance—Acts of landlord not amounting to—Affidavit of defence—Insufficiency of.

In an action by landlord against tenant for rent, the tenant, in his affidavit of defence, averred removal before the end of his term, surrender of the lease and entry by the landlord, who made such repairs as could not have been made while the tenant was in possession, but did not allege acceptance by the landlord of the surrender:

Held (affirming the judgment of the Court below), that taking possession, repairing, and advertising the house to rent were all acts in the interest and for the benefit of the tenant, and did not discharge him from his covenant to pay rent.

Error to the Common Pleas No. 1 of Philadelphia County.

Covenant on a lease, by George A. Twibill against Reinhard Breuckmann, to recover the sum of $59.44, being the amount of rent for two months and a bill for gas. The facts were these:—

Twibill leased a dwelling-house to Breuckmann for the term of one year from August 1, 1873, at a rental of $25 per month, the lessee covenanting, *inter alia*, to pay for all gas consumed during his possession. Breuckmann continued in possession until April 30, 1878, when he removed, having paid rent up to the day of removal. The landlord then entered, made certain repairs, and having let the house on July 1, 1878, brought this action to recover for rent due June 1, and July 1, 1878, two months of the unexpired term, and for an unpaid gas bill. The defendant in his affidavit of defence admitted renting the house under the covenants set forth in the lease, and his removal on April 30, 1878, averring that he had surrendered the term to the plaintiff, having paid him the rent in full to that date; that the plaintiff immediately took possession and proceeded to repair the house by building a new bath-room, a new porch, putting in a new range, and making such general repairs as could not have been made while the house was occupied by a tenant; that the defendant saw the house repeatedly during the time for which rent is claimed in this suit, when the plaintiff was in possession and repairs were being made; that, in regard to the gas bill charged in the statement, he had not used gas upon the premises for over two years before the surrender; that the pipes leaked so that an employé of the gas office, upon examination, declared it to be dangerous to use the gas with the pipes in such a condition, and that the gas ought either to be turned off or the pipes repaired; that the plaintiff, although notified, neglected and refused to repair or supply new pipes, whereupon the gas was turned off over two years ago, since which time no gas had been used upon the premises, and finally that the defendant was in no way indebted to the plaintiff.

The plaintiff took a rule for judgment for want of a sufficient affidavit of defence, which the Court made absolute. The defendant took this writ assigning for error the entry of judgment.

Edward D. McLoughlin and *Wm. Knight Shryock* for plaintiff in error.

In an action for rent, founded upon a lease under seal, the defendant can be discharged from his obligation by proving a surrender, a release, or an eviction by the lessor.

Snyder *v.* Middleton, 4 Phila. 343.

The facts tending to establish the rescission of a lease are for the jury.

Kiester *v.* Miller, 1 Casey, 481.

Here the landlord received the key left with him by the tenant, took possession of the premises and proceeded to repair the house. These acts of the landlord, amounting to an acceptance of the surrender of the term, are for the jury.

Dos Santos *v.* Hollinshead, 4 Phila. 57.
Pier *v.* Carr, 19 Sm. 326.
Tiley *v.* Moyers, 7 Wr. 404.

The act of the landlord in making such repairs as could not be made during the tenant's possession is evidence of an acceptance.

William Gorman, for the defendant in error.

The tenant avers a surrender, but not that the landlord *accepted* the surrender, which is vital to his case and essential to make a good surrender. The mere fact of surrender by the tenant is not enough to deprive the landlord of his right to rent. An affidavit of defence averring surrender without alleging acceptance is insufficient.

Bradley *v.* Brown, 6 WEEKLY NOTES, 282.
B——— *v.* H———, 3 Id. 132.
Phila. Fire Extinguisher Co. *v.* Brainerd, 2 Id. 473.

After abandonment of the premises by the tenant the landlord was not bound to sit idly by and allow the house to go to ruin. The repairs were not an interference with the tenant's possession, but made the house more readily rentable.

Marseilles *v.* Kerr, 6 Whar. 500.

The cases of Pier *v.* Carr (19 Sm. 326) and Dos Santos *v.* Hollinshead (4 Phila. Rep. 57) do not sustain the plaintiff in error's propositions; for in the former the tenant was not discharged from payment of rent before the end of the term, and in the latter, the landlord accepted the key without demur, after the repairs were made by the tenant at the landlord's suggestion.

March 3, 1879. THE COURT. The plaintiff in error in his affidavit of defence very carefully avoided alleging that there was a surrender of the lease accepted by the landlord. Certain facts are averred which, standing by themselves, would be evidence from which a jury might infer a sur-

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render, but yet entirely consistent with a distinct refusal. Taking possession, repairing, advertising the house to rent, are all acts in the interest and for the benefit of the tenant, and do not discharge him from his covenant to pay the rent.

Judgment affirmed.

PER CURIAM.

Jan. '79, 159. March 13, 1879.

Lamb's Appeal.

Errors and appeals—Judgments—Refusal to open—When subject of appeal—Act 4 April, 1877—Amicable sci. fa. to revive, effect of.

The Act of 4 April, 1877, allowing an appeal from the refusal to open a judgment entered by warrant of attorney or confessed by note, does not apply where the judgment so entered is afterwards revived by agreement of the parties.

A judgment of revival entered by agreement of the parties, upon an amicable scire facias, is not a judgment entered by virtue of a warrant of attorney, and no appeal lies from the refusal of a Court to open such a judgment.

Walter *v.* Breisch, 5 WEEKLY NOTES, 358, distinguished.

Appeal from the Common Pleas of Bradford County.

A judgment was entered November 9, 1864, at the suit of J. P. Kirby against Harrison Lamb, for $510.30 upon a promissory note given by the defendant to the plaintiff, confessing judgment for that sum and with waiver of inquisition and exemption. This judgment was subsequently, on January 4, 1870, revived by agreement of the parties; and again on the 10th of December, 1874, by amicable *sci. fa.* wherein it was agreed that there was due on the judgment, the sum of $510, with interest from January 9, 1874. This agreement was signed by Kirby and Lamb personally.

Execution having been issued upon this judgment the defendant took a rule to show cause why the original judgment and its subsequent revivals should not be opened and the defendant let into a defence. The depositions in support of the rule disclosed, that in November, 1864, the defendant Lamb borrowed of the plaintiff $490, and gave therefor a note for $510 in one year, with the understanding that he could have the loan for a series of years, at the rate of ten per cent. per annum, in advance. That at the end of the first year Lamb paid fifty-one dollars interest on the note, which was then cancelled, and the note in suit given in lieu of it. Fifty-one dollars was paid yearly as interest on this note until May 20, 1876, when the sum of two hundred and fifteen dollars and fifty-three cents and the costs of suit were paid by Lamb.

This sum, the defendant claimed, with the sums paid by him to the plaintiff annually from the date of the first transaction between them paid the plaintiff in full the amount of his loan with legal interest.

The Court below (MORROW, P. J.) discharged the rule in the following opinion: "The law as applied in the case of Pomeroy *v.* McClelland, controls this case. The defendant has had his day in Court. The judgments were not revived until the liens were about to expire. The agreements to revive were in good faith and with a full knowledge on the part of the defendant of all the facts and circumstances of the case. He did not avail himself of his rights under the Act of 28 May, 1858, and cannot now ask us to do for him what he had the time, right, and opportunity to do for himself. But he has had no day in Court as to the usury included in the notes, and unless the plaintiff will remit . . . . . dollars . . . as of April 13, 1875, the judgment must be opened as to such excess. If these sums are remitted, rule discharged."

The plaintiff filed a remittitur as required by the order, whereupon the defendant appealed, assigning as error the ruling of the Court and the discharge of his rule.

H. N. Williams (with him *E. J. Angle* and *W. H. Thompson*), for the appellant.

The appellant was entitled to the relief craved by him under the general powers of the Court to prevent injustice as well as by the Act of 4 April, 1877 (P. L. 53; Purd. Dig. Sup. 2115). Usury is the sum of all reasons for granting relief to an injured party, and it has been held that the original taint of usury attaches to all consecutive securities growing out of the original transaction and none of them, however remote, can be free from it if the descent can be traced.

Building Assn. *v.* McKnight, 11 Casey, 473.
Campbell *v.* Sloan, 12 Sm. 481.
Overholt *v.* Bank, 1 Nor. 490.

The position of the Court below is an inconsistent one. The note was a written admission of the defendant that a certain sum was due the plaintiff and for this he agreed that judgment should be entered; this judgment was opened by the Court as to part because the note was false and contained usurious interest while the agreement to revive which was just as false was sustained, and the judgment made binding upon him.

In Walter *v.* Breisch (5 WEEKLY NOTES, 358), a judgment which had been revived, as here, was opened and the defendant allowed to defend upon the ground of usury.

John F. Sanderson and *E. Overton, Jr.* (with them *N. C. Elsbree*), contra.

No appeal lies in cases of this character. The Act of 4 April, 1877, confines appeals from re-

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fusals of Courts to open judgment to those cases where the judgment is entered by warrant of attorney or on judgment notes. This case falls within neither of these classes but is a mere promissory note with an order to the prothonotary to enter judgment upon it. An amicable action entered by the parties themselves, and containing a confession of judgment by the defendant, is not a warrant of attorney.

Cook *v.* Gilbert, 8 S. & R. 567.

The defendant was estopped by the judgments entered in pursuance of his own agreement, from setting up this defence. The maxim *res adjudicata*, etc., was properly applied to the judgment upon the amicable *sci. fa.* Hopkins *v.* West (2 Norris, 109), rules that there is no difference in legal effect between a judgment confessed, or for want of an appearance or plea, and a judgment on a verdict.

May 7, 1879. THE COURT. This is an appeal from a decision of the Court refusing to open a series of judgments on the ground of usury. The original judgment was entered to December term, 1866. It was first revived by amicable scire facias to February term, 1870, and again in like manner to February term, 1875.

Prior to the Act of 4th April, 1877, it was well settled that the question of opening a judgment rested in the discretion of the Court in which it was rendered. No appeal from its action would lie to this Court; nor could we review it on writ of error, unless the opening in the particular case was in excess of the power of the Court. (Catlin *v.* Robinson, 2 Watts, 373). A refusal to open is simply a refusal to disturb the judgment, and is not the exercise of an illegal power (Henry *v.* Brothers, 12 Wright, 70; McClelland *v.* Pomeroy, 25 P. F. Smith, 410). It is claimed by the counsel for the appellant that the right of appeal is given by said Act of 4th April. This Act declares that "in all cases of application made to any Court of this Commonwealth to have any judgment, which has been entered by virtue of a warrant of attorney or on judgment note, opened, and defendant or defendants let into a defence, the party or parties aggrieved by the decision of the Court thereon, may have the same reviewed in the Supreme Court, by appeal, in like manner and proceedings as equity cases are now appealed." Thus this Act authorizes an appeal only in case the judgment has been entered by virtue of a warrant of attorney or by virtue of a note in which judgment is confessed, under the 28th section of the Act of 24th February, 1806 (1 Purd. Dig. 825, pl. 32). In either case the judgment is entered without notice to the defendant, and without his having any opportunity of being heard. A judgment of revival, entered by agreement of parties, called an amicable scire facias, is not entered by virtue of a warrant of attorney authorizing any person to appear and confess judgment, nor upon a judgment note. It is a power or authority to the prothonotary to enter judgment, but no warrant to confess it. As was well said by Mr. Chief Justice TILGHMAN, in Cook *v.* Gilbert (8 S. & R. 568), in speaking of the power under which the prothonotary acted, "it is a mistake to call this a warrant of attorney." It is a confession of judgment by the party defendant himself, without substituting any person to confess it for him.

From a refusal to open either of the revived judgments, it is very clear the Act of Assembly gives no appeal. The remaining question is whether the refusal to open the original judgment after the revivals comes within the true meaning of the Act?

Judgment of revival on a writ of scire facias *post annum et diem*, not only continues a former lien, but may also create a new one on lands not before bound thereby. It has all the conclusive effect of an original judgment in determining the amount due. (Irwin *v.* Nixon, 1 Jones, 426). For many purposes, it has an effect separate from the original. Thus the reversal of a judgment entered on a sci. fa. does not affect the original judgment, yet a reversal of the original judgment is a reversal of the revived one which was based upon it. Ranck et al. *v.* Becker (12 S. & R. 426). As a judgment is the end of the law in settling a controversy, there is no reason why one of revival on the agreement of the parties shall not be as conclusive as one taken on a writ of sci. fa. regularly issued, unless impeached for fraud.

As was said by the present Chief Justice, in Hopkins *v.* West (2 Norris, 109), "had the judgment confessed by the plaintiff below in favor of the defendants, been an adversary judgment upon the verdict of a jury, it cannot be questioned but that it would have been conclusive as between the parties, even though it should manifestly appear that it included usurious interest. There is no difference in legal effect between a judgment confessed, or for want of an appearance or plea, and a judgment on the verdict of a jury." It is true, this case recognizes the power of a Court to open a judgment in a proper case: but the power is not the question which we are now considering. The question is whether an appeal lies for refusing to exercise that power. That case was one of usury, and the opinion proceeds to say "no substantial difference can be shown between this and any other illegality entering into its consideration."

It is well settled that the mere payment of interest in excess of six per cent. since the Act of

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28th May, 1858, is not necessarily fraudulent, even as to creditors (Good *v.* Grant, 26 P. F. Smith, 54; Bank *v.* Roseberry, 31 Id. 309; Appeal of Second National Bank of Titusville, 4 Norris, 528). Sections 1 and 3 of the Act of 4th April, 1798 (Purd. Dig. 820, pl. 5 & 6), expressly authorize judgments to be revived by agreement of the parties, and give to such revived judgment the same effect for all purposes of lien as if taken on a writ of scire facias sued out.

The Courts have favored the practice of reviving judgments in this manner by giving full effect to the agreement. Hence a judgment confessed in an amicable scire facias upon a supposed former judgment, which did not legally exist, was held valid against incumbrancers, and all others claiming under the defendant by title subsequent to the confession (Ramsey *v.* Linn, 2 Rawle, 229). So a revival by agreement of the parties is valid, although several original judgments are therein consolidated, and one judgment entered for the amount due on all. (Reed's Appeal, 7 Barr, 65.)

The statute which authorizes an appeal, as in equity, on the refusal of a Court to open a judgment entered by virtue of a warrant of attorney, or on a judgment note, manifestly intended a judgment remaining in that form unchanged by subsequent judicial proceedings. It applied to a case in which the defendant never had his day in Court. It was not intended to disturb a judgment ratified and confirmed by successive revivals with a full knowledge of the original consideration. A party may be estopped in equity as well as at law. It would be a strange application of equitable principles to hold, that no appeal will lie for a refusal to open the revived judgments, yet that it will, to a refusal to open the original judgment on which the later judgments rest.

We must not lose sight of the fact that the Act of 4th April, 1877, makes no special reference to usury. It is general in its terms, and we must, therefore, consider it in its application to all cases in which the equitable powers of the Court are invoked under the Act.

The case of Walter *v.* Breisch (Leg. Int. of 1878, 324; S. C., 5 WEEKLY NOTES, 358) is not in conflict with the conclusion we have reached. It is true that was a case in which judgment had once been revived, and the Court, on proof of the payment of interest at the rate of 36 per cent. per annum, did open the original judgment. We affirmed the discretionary power of the Court so to do, without any aid from the Act of 4th April, 1877. We could have held that we would not review the action of the Court at that stage of the proceeding, and have affirmed it (People's Fire Insurance Co. *v.* Hartshorne et al., 3 Norris, 455). The present case presents no such gross imposition. The Court required the appellee to remit so much of the interest as it thought had been improperly taken. Whether it reached the true amount, or gave a correct reason therefor, we will not now consider. We merely decide that it exercised a discretion, which, under all the facts and circumstances, the statute in question does not authorize us to review.

Order discharging the rule affirmed, and appeal quashed.

Opinion by MERCUR, J.

May, '79, 30. May 9, 1879.

Farmers' Mutual Insurance Company v. Wenger.

Mutual insurance companies—Surrender of policy by insured—Cancellation of contract—Formal erasure on the company's books unnecessary.

A mutual insurance company is relieved from liability for loss occasioned by fire, after a voluntary surrender and acceptance of the policy, and payment of assessments then due. No formal cancellation of the same, or erasure of the name of the insured from the books of the company is necessary, notwithstanding the by-laws provided that the liability of the members should continue until such cancellation and erasure should have been made.

Error to the Court of Common Pleas of Lancaster County.

Covenant, on a policy of fire insurance, by Wenger against the Farmers' Mutual Insurance Co. Pleas, *non est factum*, covenants performed *absque hoc*.

On the trial, before PATTERSON, J., the following facts appeared: The company defendant issued, in 1870, a policy of fire insurance to John Wenger, on certain premises in Lancaster County. Wenger paid the assessments due on said policy regularly until about May, 1876. Shortly prior to that time the board of directors decided to reduce the risk on a portion of the insured property from $525 to $300, in accordance with a provision of the by-laws of the company. Of this fact Wenger was informed on May 26, 1876, by the secretary of the company, one Strohm, whereupon he expressed himself as dissatisfied with the action of the board and said he would leave the company. Strohm replied he could do so at any time by paying up the arrears due and surrendering his policy. It was then agreed that Wenger should leave the money and the policy with one Hoffman, the surrender to Hoffman to be considered a surrender to the secretary, Strohm. In accordance with this understanding the money and policy were left with Hoffman

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about the beginning of June, 1876. The property was burned on the 4th of July, 1876. The policy and money still remained in the hands of Hoffman, and the name of Wenger had not been removed from the books of the company.

The by-laws of the company contained, *inter alia*, the following provisions:—

SECTION 1. . . . . The insurance shall be considered perpetual, unless a limited time is specified in the policy, subject to adjustment when either the managers or the owner shall desire it; any one may withdraw from the company at the end of the year, not being in arrears.

SECTION 5. The directors shall provide suitable books, wherein the secretary shall write the names of the members, with a specification of their property. . . . *An entry of the withdrawal or expulsion of a member shall also be made on the books.* The secretary shall furnish each member with a transcript of his entry, if demanded.

SECTION 6. *The liabilities of members shall commence and terminate at 12 o'clock, on the day on which their names are entered, withdrawn, or erased.*

The plaintiff requested the Court to charge: If the jury believe that the plaintiff's policy had not been cancelled and his name erased from the books of the company before his property was destroyed by fire, the company was liable at the time of the destruction of the property, and their verdict must be for the plaintiff. *Answer.* If you believe that the plaintiff's policy had not been cancelled, and his name erased from the books of the company before his property was destroyed by fire, and believe also, that it was the understanding between Mr. Strohm and the plaintiff, that if he left the policy and assessment money with Mr. Hoffman, and he, Mr. Strohm, getting the same from Hoffman, would then result in the surrender or cancellation of the policy; then your verdict must be for the plaintiff.

In the general charge the Court said: "The fifth and sixth sections of the by-laws of course are part of the laws of this company, and very properly designate the distinct time at which the liability of a party insured, or his policy, would terminate, and the exact moment of time of day at which the company itself would incur or be relieved from any liability, and when the liability of the insured shall terminate by their names being withdrawn or erased. Those sections show that there is a very considerable significance to be put upon the condition of the books of the company, the names of the persons entered there, and also whether those names are erased or withdrawn, and when. The evidence is indisputable that the plaintiff's name was on the books when this fire occurred, and that it is on the books yet; and that, being so, according to the terms of their charter and by-laws, he was liable to any assessment yet, so long as his name remained there. . . . . Therefore the surrender should be enforced against the insured, when seeking to recover the amount insured and contained on the policy, only when there is the clearest evidence that the policy was actually surrendered according to the understanding or stipulations of both parties."

Verdict for plaintiff in the sum of $586.31, and judgment thereon.

The defendants took this writ, assigning for error the portions of the charge above given.

The case was submitted on paper-books, without oral arguments.

S. H. Reynolds, for plaintiff in error.

D. G. Eshleman, for defendant in error.

June 2, 1879. THE COURT. According to the testimony of John Strohm, the secretary of the defendant company, he called on Wenger, the plaintiff below, on the 26th of May, 1876, for the purpose of collecting an assessment then due, and he then informed him that the company had inaugurated measures for the reduction of the valuation of certain properties, among which was his own, upon which the company held risks; that it was desired that the risk on his barn should be reduced from five hundred and twenty-five to three hundred dollars. Wenger expressed his dissatisfaction with this, and the conduct of the directors generally, and said he would go out of the company. Strohm then told him he could do so at any time by surrendering his policy and paying up the assessments due. It was then arranged, in order to save Wenger a trip to Strohm's place of residence, that he, Wenger, should leave the money necessary to meet the assessments, and the policy, with Jacob Hoffman. A few days afterwards, in the latter part of May or beginning of June, if the evidence of Hoffman be true, the plaintiff handed the money and policy to him, with directions to hand them over to Strohm. As both parties had previously agreed that this deposit should be made with Hoffman for the company, there is no question but that it was equivalent to a payment and surrender to the secretary himself.

Now one would suppose from this statement of facts, that this was the end of this contract of insurance, and so doubtless it would have been had not the plaintiff's barn burned in the month of July following. Certainly there was no reason why this should not be so; the company proposed to reduce the amount of the risk; the plaintiff refused to continue his insurance if this were done; the result was the agreement to surrender the policy. The parties were competent to contract, the consideration was good and sufficient, and surrender was made according to the agreement.

To this, however, the Court objected section 6th of the company's by-laws, which reads: "The liabilities of members shall commence and terminate at twelve o'clock on the day on which their names are entered, withdrawn, or erased;"

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and held that as the plaintiff's name was not erased from the defendant's books, his liability for future assessments continued, and if he were not released neither was the company. In other words, the contract for the surrender of the policy was of no force until the plaintiff's name was withdrawn from the books. This was a mistake; Wenger had nothing to do with the books. If he complied with his part of the contract by a surrender of his policy, which of course meant a release of the company, he had nothing more to do, and he was as effectually released from all future obligations to the company as though his name had never been on its books. Certainly in such case the defendant could not set up, as against him, that it had neglected that which it had agreed to do. If, as in the case of the Columbia Ins. Co. *v.* Masonheimer (26 P. F. Smith, 138), the letter of the secretary of the company informing the insured that his policy had been cancelled, when, in fact, such was not the case, sufficed to release him, much more would the solemn contract of the parties, fully executed except as to the mere formality on part of the company, have the effect to produce that result. Furthermore, the Court made a mistake in supposing there was anything resembling a forfeiture in this case. The transaction between the parties was one of contract, and by the terms of that contract their several rights are to be tried; hence there is no room for the interposition of a forfeiture. It follows that the first five assignments of error must be sustained. The others are dismissed as being without merit.

The judgment is reversed and a *venire facias de novo* ordered.

Opinion by GORDON, J. WOODWARD and STERRETT, JJ., absent.

Jan. '77, 132. Feb. 27, 1879.

Peabody Building Association v. Houseman.

Principal and Agent—Notice to agent when binding upon principal—Scope of agent's authority—Recorder of Deeds—Searches—Recorder's liability therefor—Contract, to whose benefit it enures.

A solicitor employed to draw the papers in relation to a loan of money on mortgage, cannot delegate his authority to obtain searches against the property so far as to bind his principal by his agent's knowledge of the omission of material facts in a search.

A., employed as solicitor by a building and loan association to prepare the papers for a loan upon a mortgage, in order to hasten the settlement employed B., the mortgagor, to order and obtain the mortgage search from the Recorder's office. B., who was aware of the existence of a prior unsatisfied mortgage, requested the Recorder's deputy to omit it on the search, stating that he intended to pay it off with the money about to be loaned; and it was omitted. In an action for damages by the association against the Recorder for the loss occasioned by such omission:

Held (reversing the judgment of the Court below), that the association was not bound by B.'s knowledge in the premises, and that the Recorder was liable.

Error to the Common Pleas No. 4, of Philadelphia County.

Case, by the George Peabody Building and Loan Association, against John A. Houseman. The facts, as they appeared upon the trial, are stated in the opinion of the Supreme Court as follows:—

"In 1872, Charles M. S. Leslie, a conveyancer of good standing in the city of Philadelphia, applied to the plaintiffs for the loan of some money, to be secured by mortgages upon his real estate. The application was favorably considered, the necessary papers were prepared, and mortgage searches obtained from the Recorder of Deeds. From each of the three searches thus obtained, a mortgage was omitted; the mortgaged premises were sold under the omitted mortgages, and the money loaned by the plaintiffs was wholly lost. This suit was brought against the Recorder of Deeds to recover the loss.

"Upon the trial in the Court below, it appeared that the searches were ordered by Mr. Leslie with the consent of the plaintiffs' solicitor, James H. Stevenson, Esq. In his testimony, Mr. Stevenson tells how this occurred. He says, 'I drew the mortgage for $1600, referred to in this record. Mr. Leslie got this search with my permission. After producing it, and seeing that my mortgage was properly recorded, I paid him the money. Mr. Leslie said he was in a hurry to get his money, and that with my permission he would prepare an order for the search. He did, and I compared it with the description in the mortgage, and the dates occurring in the title. He then, with my request, obtained the certificate from the Recorder; he said he could obtain it more quickly than I could. I agreed to let him do it, and I paid him the money on the Recorder's certificate.'

"It also appeared that the omitted mortgages were purposely left off the search by the clerk, and that this was done at the request of Mr. Leslie, and upon his assurance that the mortgages would be paid. Mr. Myers, the search clerk, said, in his examination-in-chief: 'I knew Leslie. I issued these searches. I knew these encumbrances were not on the search. I told Leslie to be sure and have them satisfied; he said he would. I did not certify the mortgages on record to Alexander Smith, because Mr.

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Leslie requested me not to, and told me it was all right; that he intended to pay them, and have them satisfied out of the money he was to receive from the association.'"

Frank W. Tait, who was Leslie's clerk in 1872, was called by defendant, and, under objection and an exception for plaintiff, testified, (the original of the searches being shown witness): "The writing in these is mine, except the signature of the deputy recorder. I recollect at the time of writing these, that there were other encumbrances on these properties, and I asked Leslie what he meant to do with these other encumbrances, and he told me that he intended to have them satisfied, or place them on other properties." Upon cross-examination, he said: "I knew Mr. Stevenson. I knew he was making the loans to Leslie. I did not mention to him these omitted encumbrances."

The defendant requested the Court to charge: (4) If the jury believe that during Leslie's employment by the plaintiff to procure the searches, he (Leslie) was informed that the premises in question were then subject to mortgages, whose lien was prior to that of the mortgage of the plaintiff at that time under negotiation, then such information having been acquired in the transaction in which Leslie was employed, it affected the plaintiff with notice thereof, and their verdict should be for the defendant.—*Affirmed.* (5) If the jury believe that Leslie's attention was called to the fact of the omission of the search to disclose the prior mortgages, and Leslie said he knew of the existence of the prior liens, but intended to satisfy them, and that such conversation took place while Leslie was employed by the plaintiff in said transaction, then the plaintiff was affected, *in due time*, with notice of the prior mortgages, and the verdict of the jury should be for the defendant.—*Affirmed.* (6) If the jury believe the defendant's testimony in connection with the searches, the notice to Leslie of the lien of the prior mortgages must have been given to him during his (Leslie's) employment by the plaintiff in the said transaction, and such notice affected the plaintiff, and their verdict should be for the defendant.—*Affirmed.*

The Court, BRIGGS, J., further charged the jury as follows: "I instruct you, gentlemen, if Mr. Stevenson, the solicitor of the association, employed or permitted Leslie to procure the searches, he thereby made Leslie his agent. And if Leslie's previous knowledge with reference to these encumbrances was brought home to him in the transaction, or if he had notice in this transaction that these encumbrances were on the properties, such was constructive and legal notice to the association."

Verdict for defendant, and judgment thereon. The plaintiff took this writ of error, assigning for error the admission of the evidence to which an exception was taken, the affirmance of defendant's points as stated, and that portion of the charge above quoted.

David W. Sellers, for the plaintiff in error.

The plaintiff employed Leslie merely as a messenger to obtain the search from the Recorder, but it was the Recorder who made the search, under his official seal. The negligence for which the Recorder is liable, was complete when his clerk handed the search to Leslie, and the latter was merely an agent, without discretion, to transmit that paper to his principal. This case was practically settled by—

Houseman *v.* Building Ass., 2 WEEKLY NOTES, 573; S. C., 31 Sm. 256.

[SHARSWOOD, C. J. We did not consider the agency of Leslie in that case; we said: "Assuming that he was agent, the question was, whether they were bound by his knowledge obtained in another transaction."]

See also, 16 Am. Law Reg., N. S., 11.

I. Newton Brown and *Geo. W. Biddle* (with whom was *A. Sydney Biddle*), contra.

Leslie was far more than a messenger for Stevenson; he was quite as much the agent for the procurement of a search for the building association, as Stevenson was or could have been. They were both conveyancers or solicitors, and Stevenson employed him to obtain the search instead of doing it himself. There is no doubt that Stevenson's knowledge, acquired in the same way, would have bound his principal; why should not Leslie's, who occupied the same position relatively? There was nothing to show the Recorder any limit to Leslie's authority, and the principal is bound not by what he intended to be, but what to persons, dealing with the agent, *appeared* to be his authority.

Hovey *v.* Blanchard, 13 N. H. 145.

March 24, 1879. THE COURT (after stating the facts as above). Out of the foregoing condition of facts, the learned counsel for the defendant constructed the somewhat ingenious defence, first, that Leslie was the agent of the plaintiffs to procure the search; and second, that having notice or knowledge of the omitted mortgages during the course of his procurement of the searches, his knowledge was the knowledge of the plaintiffs, and they could not recover. This view of the case was substantially sustained by the Court below, and forms the subject of the second and third specifications of error.

In Houseman *v.* The Girard Mutual Building and Loan Association (31 P. F. S. 256), the question whether Leslie was the agent of the building association, or merely the servant or clerk of the conveyancer, was left undecided. It was not essential to the decision of that case, for the reason that, granted the agency, there

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was no proof that the agent acquired his knowledge of the omitted searches in the transaction in which he was employed. "There was not only no evidence of this," said Justice SHARSWOOD, "but it was plain that it had been gained before, and in an entirely different transaction." In the case in hand, it is equally clear that Leslie's knowledge of the omitted encumbrances was not acquired in the course of the particular transaction. It is, however, attempted to take the case out of the ruling in Houseman *v.* The Building Association (*supra*), for the reason that Mr. Leslie's attention was called to the omitted mortgages whilst procuring the searches.

We do not think it important to discuss the question how far Leslie's knowledge would have affected the plaintiffs had he been their agent. It would be carrying the doctrine of agency beyond any recognized limits, were we to hold that Leslie was the agent of the plaintiffs for any purpose. The most that can be said, is that Mr. Stevenson, the plaintiffs' solicitor, permitted him to procure the searches in order that he (Leslie) might the sooner obtain the money. If an agent at all, he was the agent of Stevenson, and for the mere purpose of procuring a search. Neither Stevenson nor Leslie had anything to do with making the searches. Stevenson was employed as plaintiffs' conveyancer for the purpose of preparing the papers and ordering the necessary searches. It is not pretended that Stevenson had any authority from the company to employ any one under him. It needs no authority to show that an agent employed for a special purpose cannot, without express authority, employ one or more agents under him, so as to bind his principal. The defendant's search clerk knew, when he issued the searches, that the plaintiffs were about to loan money upon the faith of them. He omitted the mortgages in question, upon Leslie's assurance that he would "have them satisfied out of the money he was to receive from the association." The Recorder had no right to throw the disastrous results of the misplaced confidence of his clerk upon those who loaned their money upon the faith of his official certificate.

The judgment is reversed, and a *venire facias de novo* awarded.

Opinion by PAXSON, J.

Common Pleas—Law.

C. P. No. 3. June 7, 1879.

Bailey v. Vehmeier.

Affidavit of defence law—Practice—Judgment against two of three defendants, on promissory note—Alias summons as to the third after the lapse of twenty years—Judgment against the latter upon copy of book entries filed—Opening judgment—Striking off judgment.

Sur rules to strike off judgment, and to open judgment.

Suit was brought to June Term, 1857, on a promissory note made by C. Vehmeier, Joseph Hoener, and Theodore Lillagore, in favor of Samuel Bailey and H. Bailey, trading as Samuel B. Bailey & Son. Service was at that time had on Hoener and Lillagore, and a judgment taken against them for $265.23.

On September 14, 1878, an alias summons case was issued against C. Vehmeier, and service made upon him, plaintiffs then filing a copy of the book entry on account of which the promissory note formerly filed was made. Judgment was taken against Vehmeier for want of an affidavit of defence, and damages assessed at $1548.54.

John M. Williamson, for rule.

The judgment is irregular, because the original suit was brought and its character fixed by the filing of a copy of a promissory note, while a copy of a book account is now filed.

The copy whereon judgment is taken was not filed within two weeks of the return day of the original process, as required by Act of Assembly. The cause of action accrued more than twenty years before the party defendant was served with process.

No judgment can be entered for want of an affidavit of defence upon a claim arising more than twenty years before the same is prayed. A presumption of payment has attached, and a complete prima facie defence exists upon the face of the record.

Summerville *v.* Holliday, 1 Watts, 507.
Foulk *v.* Brown, 2 Id. 209.
Power *v.* Hollman, 2 Id. 218.
Eby *v.* Eby's Assignees, 5 Barr, 435.
Ankeny *v.* Penrose, 6 Harris, 190.
King's Ex'rs *v.* Coulter's Ex'rs, 2 Grant, 77.
Shepherd's Appeal, 2 Grant, 402.
Brock *v.* Savage, 10 Wr. 83.
Reed *v.* Reed, 10 Wr. 239.
Hughes *v.* Hughes, 4 Sm. 240.
Commonwealth *v.* Snyder, 12 Sm. 153.
McLaughlin *v.* Kain, 9 Wr. 113.
Norris's Appeal, 21 Sm. 106.
Beales' Ex'rs *v.* Kirk's Adm'rs, 3 Norris, 415.

Nor will this presumption be rebutted by pro-

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ceedings against other parties who were originally joint debtors.

Cope *v.* Humphreys, 14 S. & R. 15.

Nor will the mere issuance of a writ against the defendant, not prosecuted within the twenty years, rebut the presumption.

Cope *v.* Humphreys, *supra.*
James *v.* Jarrett, 5 Harris, 370.

M. J. Mitcheson, contra.

The Act of 1877 (P. L. 52) allows a subsequent recovery against any copartner not originally served.

No laches are attributable to us for not having proceeded sooner, since defendant could not be served, he having become insolvent, changed the spelling of his name, and lived in obscurity.

The action is the same, for the notes originally filed were given on account of plaintiff's claim on the book of original entries now filed.

C. A. V.

June 12, 1879. THE COURT. Rule to open judgment discharged. Rule to strike off judgment made absolute.

C. P. No. 3. June 21, 1879.

Van Roden v. Sterrett.

Mechanics' lien—Practice—Grounds for striking off lien—Lien entered against married woman without joining husband—Wrong name—No bill of particulars—No averment that wife is owner of the land.

Rule to show cause why a mechanic's lien should not be stricken from the record.

This lien was filed by a subcontractor against a married woman as owner, without joining her husband, for materials furnished in making alterations on a building. The body of the claim contained, *inter alia*, these words:—

"The said sum of three hundred and two dollars ($302) being a debt contracted for work and materials furnished, to wit, plastering work and lime, hair and plaster, by the said claimants, for and about the alterations, additions, and repairs to the said building, under and by virtue of a certain parol agreement or contract, between the said Jonas W. Moyer, architect, builder, and contractor, employed by the said owner, Harriet M. Skerrett (*sic*), and at her request, on her authority, the said work was done and materials furnished, which were *necessary* and convenient to the *preservation* and enjoyment of the *said property* and estate."

Snare, for the rule, argued that the claim was entitled Sterrett, defendant, while Skerrett was the name in the body of the claim; that there being no averment that the materials were furnished under a contract for a stipulated sum, and no bill of particulars and measurement, the claim was bad.

Act of March 24, 1849, Purd. Dig. 1034, pl. 45.

There was no averment that the claim was against the separate estate of the wife, or that she was the owner of the land on which the building stood, and besides, it was filed by a subcontractor for a lumping charge.

Kuhns *v.* Turney, 36 Leg. Int. 37.
Shannon *v.* Shultz, Id. 125.
Shields *v.* Garrett, 5 WEEKLY NOTES, 120.
Van Roden *v.* Campbell, Id. 126.
Russell *v.* Bell, 8 Wr. 47.
Lee *v.* Burke, 16 Sm. 336.

L. R. Fletcher, contra.

Rule absolute.

C. P. No. 3. June 28, 1879.

City, to use, etc., v. Coulston, owner, etc., et al.

Practice—Amendment of sheriff's return.

Rule to show cause why the sheriff should not have leave to amend a return of 'nihil habet' indorsed upon a scire facias sur city claim to use, by signing the same. The affidavit of the sheriff's appearance clerk set forth that the writ had, through an inadvertence, been returned unsigned.

Winship, for the rule.

Graham *v.* Furey, 6 WEEKLY NOTES, 56.
Dewar *v.* Spence, 2 Wharton, 211.

Lucas Hirst, contra.

Rule absolute.

C. P. No. 3 June 2, 1879.

Parrish v. Philadelphia & Reading Coal and Iron Company.

Debt—Affidavit of defence—Suit on coupons undetached, and belonging to the owner of the bond.

Rule for judgment for want of a sufficient affidavit of defence.

Debt, upon two hundred coupons of the corporation defendant, of which plaintiff filed copies in the following form:—

The Philadelphia & Reading Coal and Iron Company will pay to bearer at the office of the company in the city of Philadelphia, on March 1, 1879, thirty-five dollars, being six months' interest on bond No. 1173.
$35.00. D. PALMER, Treasurer.

The affidavit of defence, by the Secretary of the Company, set forth, *inter alia*, that the coupons sued on were still attached to their bonds, and that copies of the bonds had not been filed.

Hannis, for the rule, relied on—

Gilmer *v.* P. & R. R. Co. 7 WEEKLY NOTES, 15.
Copeland *v.* P. & R. C. & I. Co., Ibid.

T. Hart, contra.

The coupons being held by the same person who owns the bonds, and being still attached to the bonds, suit should have been brought on the bonds.

Thomson *v.* Lee County, 3 Wallace, 327.
City *v.* Lamson, 9 Wall. 477.
County *v.* Armstrong, 8 Wr. 63.
McCoy *v.* Washington Co., 3 Wallace, Jr, C. C. 385.

C. A. V.

June 12, 1879. THE COURT. Rule absolute.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, JULY 24, 1879.* [NO. 13.

Supreme Court.

May, '79, 167. May 27, 1879.

Crozier's Appeal.

Decedent's estates—Widow's election under her husband's will—Right to elect purely personal to the widow.

The statutory right of a widow to elect not to take under her husband's will is purely personal, and if she dies without having exercised it, her heirs or personal representatives cannot make such election.

Appeal from the Orphans' Court of Juniata County.

The petition of B. F. Crozier, administrator, and S. Valentine, *et al.*, heirs and next of kin of Mary Oles, deceased, late widow of Everard Oles, set forth: that the said Everard Oles died March 30, 1877, having by his will made certain bequests to his widow, the said Mary Oles, and directed that she should have "the net annual proceeds arising from my real and personal estate . . . . so long as she lives;" that the said Mary Oles died May 7, 1877, intestate, without having exercised her right of election to take under her husband's will or under the intestate laws; further, that by reason of unsoundness of mind she had been incompetent to make such an election; that the petitioners, as her personal representatives and next of kin, elected not to accept the devise or bequest to Mary Oles under said will, but to waive the same, and take her share of the personal estate under the intestate laws. The petition prayed that a record of such election should be made by the Court.

A citation having been issued to the executors of Everard Oles, deceased, they filed an answer, averring that Mary Oles had, by her competent acts, *in pais*, during her lifetime, elected to accept the said bequests; and if she had not, denying the right of the petitioners after her death to make such election. Subsequently an issue was awarded to try the questions, (1) whether she had accepted under the will; (2) whether she was mentally competent to make any election; and both these questions were decided in the negative.

After hearing, the Court entered a decree dismissing the petition, JUNKIN, P. J., delivering the following opinion:—

The first question is, have the heirs and next of kin of Mary Oles, the right, either for her or themselves, to waive the provisions of her husband's will, and elect to take a distributive share of his estate under the statutes? The right claimed is of first impression in this State; no reported case of similar claim is found in Pennsylvania, and many widows must have died within the year without having made an election.

The statute of wills of 8th April, 1833, sec. 11 (Purd. Dig. 1476, pl. 12), makes a devise or bequest by a husband to his wife a bar of her dower, unless the will declares otherwise, but provides that nothing therein contained shall deprive the widow of her choice, either of dower or of the estate or property so devised or bequeathed; and the Act of 11 April, 1848, construing this section, admits her to a share of the personal estate of her husband under the intestate laws as well as his real estate, where she waives the provisions of the will, and repeats that the said widow may take her choice; and the Act of 29 March, 1832, provides that at any time after twelve months from the death of the testator, the Orphans' Court, on the application of any person interested, in the estate of decedent, shall issue a citation to any such widow to appear, etc., and make her election, etc., and if she neglects or refuse to appear, such neglect or refusal shall be deemed an acceptance of the devise or bequest, and a bar of dower.

Dower at the common law was a provision for a widow out of the lands or tenements of her husband for her support, and the nurture of her children, and were it not for the statute giving her a share of his personal estate, there could be no controversy in this case; she had all the income of the real estate of her deceased husband while she lived.

Now, the statute (Act of 11 April, 1848) which admits her to a share of his personal estate, only does so "in case she elects not to take under the last will and testament of her husband." The right of election is personal to her; it is not given to her heir or administrator. Her title comes by election, "it is the election that hath obtained it." There are no inheritable qualities in this right of election vested in the widow; it dies with her. It must have been known to the lawmaker that widows often die within a year, or even within a few days after the decease of their husbands, and had it been intended that this right of election should continue after the death of the widow, it would have been easy to have said so. The intent of the law being to favor, comfort, and provide for her, when she died there was no more need. If she died without electing, no choice was necessary, there would be no purpose to subserve. When a right grows out of an election, it cannot arise or come into existence until

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an election is actually made. (United States *v.* Grundy, 3 Cranch, 337.)

There is some authority on this point in other States. In Missouri, in Welch *v.* Anderson (7 Jones, or 28 Mo. 300), under a statute substantially like our own (R. Code, 1845, p. 430), it was held that the right of a widow was strictly personal, and not transmissible by descent; and in Hamilton *v.* O'Neil (9 Mo. 10) the same thing was held. In the former case the widow died without having made an election, and her heirs sought to make it as heirs, but SCOTT, J. said there was no right or estate in her capable of descending on her heir. In Sherman *v.* Newton's Exrs. (6 Gray, 307), under a statute which declares: "When any man shall die, having lawfully disposed of his estate by his will, and leaving a widow, the widow may, at any time within six months after the probate of the will waive the provision made for her in the will, and she shall in such case be entitled to such portion of the real and personal estate as she would have been entitled to if her husband had died intestate;" it was held in the case that although the widow had died within seven days after her husband, and before the probate of the will, and her heirs had made the application within six months, that the right of election must be exercised personally by the widow, and that the statute did not contemplate any advantage should be derived by the heirs from the privilege; and accordingly there was no provision or direction as to the time or manner in which, in any contingency, they should be allowed to avail themselves of it. To the same effect is Pinkerton's Adm'r *v.* Sargent's Ex'r (102 Mass. 568), under the same statute, but with these additional features, namely, that the widow had long been a lunatic, and confined in a hospital, and her right of election had been exercised by her guardian, as well as by herself, and the decision rests upon the ground that the privilege is so rigidly personal, that no one could exercise it for her, and being insane she could not intelligently do so for herself. Then there is Atherton *v.* Corlis (102 Mass. 44) to same effect; and also Merrill's Adm'r *v.* Emery's Ex'r (10 Pickering, 507); Boone's Rep. *v.* Boone (3 Harris & McHenry's Rep. Md. 95); Collin's Adm'r *v.* Carman's Ex. (5 Maryland Rep. 504); all coming to the same result, namely, that the right is personal to the widow.

On both reason and authority it seems clear that the claimants in this case are not clothed with the personal privileges of their relative, Mary Oles, and cannot be permitted to exercise the right of election, and decline the provisions of her husband's will.

But the jury in the Common Pleas have found that Mary Oles was incapable of exercising her privilege of election for want of mental capacity, and how is the case affected by this fact? It is not to be doubted that in this State, under the authority of Kennedy *v.* Johnson (15 Sm. 451), whilst the Court hold that the right is personal to the widow, yet if she be incompetent to exercise it, it is not lost, nor shall it fail her, but the Court of Common Pleas will advise with her Committee, elect for her, and then record the election in the Orphans' Court. But where she dies before such election is made, how then? Is the case changed so that the same reasons which exclude the heir from exercising the right after the widow's decease, will not also exclude a Court from doing the same thing? Is there a survivorship of the right in the one any more than in the other? Clearly not. The argument which excludes the heir is that the right of election does not survive the life of the elector. So long as the lunatic elector lives, the Court, as guardian, is invested with the power of choice; but when the fountain dries up in death, all that has life in it dies also. In short, if no election is made by the widow during life when she is competent to act for herself, or by the Court when she is not, the right is defeated in either case, the time and opportunity are past, and it never was intended that any election should be made after her death. It could do her no good, and the good of others was not in the view of the lawmaker. That the law has been so understood and practised without challenge for the last century, is apparent from the fact that a similar claim has never been made with sufficient zeal to establish a precedent.

The petitioners took this appeal, assigning for error the decree dismissing the petition.

Louis E. Atkinson (with him *E. D. Parker*), for appellants.

The law having provided for an election by the widow within a given time, if she die within that period without having made any election, it is reasonable that such right should be exercised by her representatives. Had she elected against the will, the share she would have derived under the intestate laws would have passed to her representatives; in default of any election by the widow, why should they not be equally entitled to such share by virtue of their own election, made within the prescribed time. It has been held in England, that where the widow had made no election, her next of kin might elect separately, some for and some against the will.

Fytche *v.* Fytche, L. R., 7 Eq. 494, cited in 2 Story's Eq. (11th ed.) 376.

4 Desau. (S. C.), 143.

Lucien W. Doty (with him *E. S. Doty*), for appellees.

The letter and spirit of the Act of April 11, 1848, indicate a personal privilege in favor of the widow, and if she does not or cannot avail herself of it, no reasonable construction can be

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made to include other parties. The object of the Act was to benefit the *widow*, not her representatives after her death. The right to elect is a creature of positive law, and can only be made in the exact manner prescribed by law; "it is a personal right, and not transmissible by descent."

2 Redfield on Wills, 3d. ed. 367, and cases cited in opinion of Court below.

The same principle has been decided in Pennsylvania, although arising under other statutes. The widow's exemption of $300 is a personal privilege.

Davis's App., 10 Cass. 256.
Frances's Estate, 25 Sm. 222.
Hufman's App., 31 Sm. 329.

So, also, a widow's right of quarantine is personal, and does not extend to the family.

Acor's Est., 4 Luzerne Leg. Reg. 88.

And the remedy by distress for widow's annuity in partition in the Orphans' Court under the intestate laws.

Shouffler *v.* Coover, 1 W. & S. 400.

That the Court can, in the event of the widow's lunacy, make or sanction an election for her (Kennedy *v.* Johnson, 15 Sm. 454) is not opposed to the principle contended for, as such election is for the personal benefit of the widow, and not for her representatives.

June 9, 1879. THE COURT. We affirm this decree upon the opinion of the learned President of the Court below.

Decree affirmed, and appeal dismissed.

PER CURIAM.

Jan. '79, 240. April 4, 1879.

Rush v. Able.

Mechanic's lien—Act of June 13, 1836—Claim for extra work—Where a lien is filed for contract work, a lien for "extra work" connected therewith allowed—Kind of extra work must be specifically stated—Architect's fees not the subject of a mechanic's lien.

Extra work and materials done and furnished by a contractor during the performance of his agreement, though outside the contract, are so closely connected with it that they have always been allowed to be included with those done and furnished under the contract, in filing the claim.

A claim for extra work should set forth distinctly the kind of extra work.

All that is required to validate a mechanic's lien, is such certainty as will enable those interested to discover during what period the materials were delivered or the work done, so as to individuate the transaction.

A mechanic's lien, filed Dec. 27, 1873, set forth work done by a contractor under a special contract; following this were items of "extra work," the first of which was dated February 19, 1873; to the remaining items no date was affixed; appended to the entire claim was an averment that the work was all done and the materials furnished between June 14, 1872, and June 28, 1873:

Held, that even if all the extra work was done on Feb. 19, 1873, still, the extra work being intimately connected with contract work, and the latter having been done within six months, the lien for extra work was well filed.

A lien for "architect's charges and fees" will be stricken off.

Bank *v.* Gries, 11 Cas. 423, distinguished; Price *v.* Kirk, 7 WEEKLY NOTES, 107, followed.

Error to the Common Pleas of Northampton County.

S. P. Rush & Son, house carpenters, filed a mechanic's lien against Edward Able, owner or reputed owner and contractor, and a building known as the Easton Opera House.

The following bill of particulars was filed with the claim, and made part thereof:—

1873.
June 28.
To building Opera House in the Borough of Easton, Northampton County, Pennsylvania, and furnishing the said materials for the same, including excavations, stone, mason-work, marble, marble work, bricks, brick-work, iron-work, carpenter-work, lumber, slate and roofing, plastering, plastering materials, hardware, painting, painting materials, glass, glazing, sky-lights, gas-fitting, plumbing, seats, upholstering, upholstering materials, oil-cloth, turning, carving, mouldings, tin-work, scenery, drop curtain, cordage and cartage, as per agreement dated June 14, 1872, and the supplement thereto, . . $53,644 77

Bill for Extra Work and Materials.

1873.
Feb. 19.

Bill of coal and carting same, . .	$389 50
Extra carting by Bercaw, . . .	18 00
Jacob Rafferty, mason-work, . .	2 50
P. Correll, lime bill, ...	43 93
Bill of Phillipsburg Iron Co., .	794 30
Three feet of brick-work over ball-room, extra, @ $15.50 per M.,	369 76
60 yards of plastering to same, .	21 00
3 window frames on Wagoner's line, ...	80 00
Extra door on clothing store, . .	30 00
Large windows on Wagoner's line,	53 00
24 lights of glass, 18 x 34, @ $1.08, ...	25 92
Trimming, fitting, and hanging sash, ...	20 00
Sash-weights, cord, and hardware,	11 95
Painting and glazing, ...	15 00
Carpenter work and lumber, sky-lights in floor, etc., setting glass,	50 00
Glass in floor, ...	130 00
etc. etc.	etc.

Extra Work on Stage.

23 days, by G. Householder, making traps, extra scenery, set pieces and paint frames, and getting stage ready for night performances, @ $3.75, . . .	86 25

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1 day by Householder, 2 days by men, @ $5.00,	15 00	
63 hours night-work,	31 50	
72 papers of tacks, @ 8 cts.,	5 76	
70 feet poplar boards for profiles, @ 7 cts.,	4 90	
3 pounds of nails, @ 7 cts.,	21	
1 gross of 1½ in. screws,	75	
2 papers 2 in. clout nails,	60	
9 sheaves for traps, etc.,	9 00	
15 counter-weights for traps, and 6 for paint frames,	43 25	
16 pounds of nails, @ 7 cts.,	70	
Extra boarding for Householder for extra time,	19 60	
Cordage for traps and paint frame,	12 44	
Smith work by W. Thatcher,	47 78	
1151 feet of lumber for traps and paint frame, @ 7 cts.,	80 57	
Philip Stern, paper muslin,	35 49	
700 yards plastering on stage, @ 35 cts.,	245 00	
T. M. Lesher & Bro.'s extra bill,	3701 12	
Plush for rolls,	100 00	
Extra glass in bulks,	101 00	
		7944 40
Architect's charges and fees,		3617 65
Aggregate price,		$65,206 82

The work was commenced on or about the 14th day of June, 1872, and finished on the 28th day of June, 1873, on which day the last work was done, in which time said materials also were furnished.

The lien was filed Dec. 27, 1873.

Upon petition of the Merchants' Bank of Easton, a judgment-creditor, the Court granted a rule to show cause why the lien should not be stricken off.

After argument, the Court, MEYER, P. J., made the rule absolute in the following opinion: . . . The question is, have the plaintiffs complied, in respect to said extra work and materials, with the Act of 1836?

This Act provides, *inter alia*, "that every claim must set forth the amount or sums claimed to be due, and the nature and kind of the work done, or the kind and amount of materials furnished, and the time when the materials were furnished, or the work was done, as the case may be." On reading the statute, it would seem that the meaning of the language would scarcely admit of any doubt that nothing less than a full, precise, and distinct statement of the nature or kind of work done, and the kind and amount of materials furnished, and the year, month, and date when so done and furnished, would be a full compliance with the statute. On the question of the construction, the books are full of cases. Many of them are apparently conflicting, and some of them difficult if not impossible to be reconciled with each other. It must be observed, however, that some of the decisions are under the Act of 1845; others are raised on the trial, such trial being held a waiver of all defects; others on a motion to strike off the lien, or on demurrer, and still others on a special Act of Assembly applicable only to certain localities. . . . In some of them, reasons are given at considerable length and with great force as to the necessity for such certainty, viz., to individuate the work and materials, by description, quantity and dates, so as to protect the owners of property and others interested against error and imposition. SERGEANT, J., in Witman *v.* Walker (9 W. & S. 186), in speaking of this provision of the statute, says "that the amount or sum claimed to be due, and the nature or kind of work done, or the kind and amount of materials furnished, and the *time* when the materials were furnished or the work was done, are or ought to be within the peculiar knowledge of the claimant from his books or otherwise, and must be furnished by him when filing his claim. When dispute arises they are essential to the owner of the building, the purchaser, and lien creditor, to enable them to trace out the truth of the claim and guard against error or imposition. . . . Where, as often is the case, a contractor carries on several dispersed buildings, and work is done and materials furnished for them by the same mechanic or material man, the enumeration in the claim of these items furnishes the best means of ascertaining how far the particular building in question is liable." This language is specially applicable to this lien. Considering that here is a special contract for $53,644.77 for work done and materials furnished, and while in the process of its erection extra work is done and materials furnished in and about the erection of the same building for $11,562.05, it will be seen at a glance how necessary it is that there should be strict compliance with the statute in specifying, as to said extra work and materials, the nature and kind of said work, the kind and amount of materials, and the time the same was done and furnished. If in an ordinary case the law requires this to be done to prevent error or imposition, how much more is it necessary where a special contract for work and materials is in process of erection concurrently with extra work done and materials furnished outside of the special contract in the erection of the same building? How easily could a claimant introduce in his bill for extra work and materials, such work and materials which properly belongs to the special contract, if not compelled to keep an accurate account of the extra work and materials, the nature, kind, and amount thereof, and the time when done and furnished. Even that might fail to protect the owner and parties interested against error and imposition, but it is the best which the law affords. It is true that many of the items, as to kind and amount, are sufficiently certain, while others are manifestly defective and deficient, as for example, the item, "Bill, Phil-

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lipsburgh Iron Co., $794.30;" "T. M. Lesher & Bro., Extra Bill, $3701.12;" "Architect's charges and fees, $3617.65," and others. There is no reason why the plaintiffs could not have complied with these simple requirements as to kind, quality, amount, and time. Having failed to do so, we have come to the conclusion somewhat doubtingly as to the law, and may also add, reluctantly (as such claims are generally regarded as meritorious), that so much of the lien as relates to "extra work and materials," must be stricken from the record.

The claimants took this writ, assigning for error the order of the Court.

Reeder & Reeder, for plaintiffs in error.

The statement as to time of work done and materials furnished, was sufficient. If the time is fixed as being between two certain dates given in a statement attached to the bill, it is sufficient.

Dreisbach *v.* Keller, 2 Barr, 77.
Hillary *v* Pollock, 1 Harris, 186.
McCay's Appeal, 1 Wr. 125.
Bayer *v.* Reeside, 2 Harris, 167.
McClintock *v.* Rush, 13 Sm. 204.

Incident to nearly every contract for the erection of buildings for a specific sum, is a bill for extra work and materials. This bill is one springing out of the original contract by reason of changes in, and alterations of, the special contract, made as the work progressed, at the suggestion of the owner of the building himself. By reason of the peculiar position of the contractor, as owner of all the materials purchased for the work under the special contract, and both the material used in the extra work and under the special contract being taken from the common store, it is in most instances almost impossible, in some cases utterly so, for the contractor to ascertain the exact amount of material used or labor performed in the erection of the extra work until after the completion of the structure.

Where a builder is erecting a building not under contract, it is easy enough to file a lien, as he keeps his account for the work in detail as it is performed. But where the contract and the alterations or extra work are so connected that they are parallel to a certain extent, the same work being part under special contract and part in consequence of the alteration, how can he file his lien with the exactness required by the Act of 1836? For these reasons we contend that the law should regard the bill for extra work as a contract springing from the special contract, and running parallel to it, and should not require for such bill the same exactness they would require in a claim where there was no contract.

W. S. Kirkpatrick and *Robert I. Jones*, contra.

Greater exactness and conformity with the law is required against subsequent purchasers and encumbrancers, than against the defendant.

Lehman *v.* Thomas, 5 W. & S. 263.
Howell *v.* Phila., 2 Wr. 471.
McClintock *v.* Rush, 13 Sm. 203.
Lee *v.* Burke, 16 Id. 336.

The bill for extra work either bears a date more than six months prior to the filing of the lien, or else no date at all. In either event it is defective.

Shields *v.* Garrett, 5 WEEKLY NOTES, 120.
Van Roden *v.* Campbell, Id. 126.

Several of the cases cited on the other side were cases where the objections were not made till after issue joined, and the Court in each of them held that they could not then be considered.

It needs no argument to prove that many of the charges were not sufficiently stated, *e. g.*, "Architect's fees," "Bill, Phillipsburg Iron Co.," "T. M. Lesher & Bro., extra bill," etc.

May 5, 1879. THE COURT. Extra work and material done and furnished by a contractor during the performance of his agreement, may be included in and constitute a part of his claim, if the claim be filed within six months after completion of the contract. Though outside the contract, they are so closely connected with it that they have always been included with those done and furnished under the contract in filing the claim. As shown by the learned Judge below, the lien will be continued if the claim be filed within six months after the extra work was done, but more than six months after work on the contract was completed. He was clearly right in holding the converse. Including contract and extra work in the same lien subserves the interests of both contractor and owner, and it accords with such interests, as well as with the statute, that the claim may be filed within six months after the building is finished, even if one kind, in fact, was not within six months of the filing.

This claim states that the work and materials were done and furnished within six months last past, and refers to the bill of particulars as setting forth the time when they were done. At the foot of said bill is the following: "The work was commenced on or about the 14th day of June, 1872, and finished on the 28th day of June, 1873, on which day the last work was done, in which time said materials also were furnished." The lien was filed December 27, 1873. Prefixed to the first item in the bill for extra work, is the date February 19, 1873, and all others follow without mention of time. Doubtingly and reluctantly the Court struck from the record so much of the lien as relates to extra work and materials, because of the plaintiffs' failure to comply with the statutory "require-

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ments as to kind, quality, amount, and time." In Bayer *v.* Reeside (2 Harris, 167), the claim set forth that the work and materials were done and finished "within six months last past, to wit, between the 1st June, 1848, and 1st April, 1849," and the bill of particulars was without date. The defendant demurred, assigning for cause that time was not well stated. No question was before this Court other than the validity of the lien, and the judgment was affirmed. True, it is said in the opinion that, after a trial on the merits, technical objections are disregarded, but the demurrer was before trial, and treated as raising the question as pointedly as would a motion to strike off. That decision has not been overruled. The date of a bill of particulars for materials "furnished within six months," was December 3, 1868, the time of filing; in the margin to the first item, was June 9, without any year; there was no date to any other item. After a sheriff's sale of the premises, upon application of a subsequent lien creditor, the Court struck off the mechanic's lien, which judgment was reversed. "All that is required is such certainty as will enable those interested to discover during what period the materials were delivered or the work done, so as to individuate the transaction: Calhoun *v.* Mahon, 2 Harris, 56. 'It has been more than once said, we must not be hypercritical when scanning this species of lien, and estimating its sufficiency.' Per BELL, J." (McClintock *v.* Rush, 13 P. F. Smith, 203.) Both these cases were under the Act of 1836. Shields *v.* Garrett (5 WEEKLY NOTES, 120) was by a sub-contractor, and the claim was sought to be sustained under the Act of 1849, in force in Philadelphia and Chester Counties. Hahn's Appeal (3 Wright, 409) was a case under the Act of 1845, and relates to claims for work under contract.

In the light of Bayer *v.* Reeside and McClintock *v.* Rush, it is manifest there is no departure from previous decisions in holding that no portion of this lien is defective because of insufficient setting out of time. The rule is certainty to a common intent, not precision in statement. If the entire bill is to be deemed of that date, Feb. 19, 1873, it cannot be struck out, for the contract work was done within six months of filing the claim. But it is unreasonable to say the whole bill is of that date, for on its face it is patent that the items of work and materials were at different times. That really applies to the bill of coal; to the other items only by fiction.

The extra bill includes many things apparently within the contract for erection of the building, but where they are well stated they cannot be struck off on motion. The claimant may be able to show at trial, by sufficient proofs, that they are without the contract, and furnished at the owner's request. Does the phrase "architect's charges and fees" exhibit the nature and kind of work he did? The claimants so affirm, resting on authority of the Bank of Pennsylvania *v.* Gries (11 Casey, 423). There the architect had a contract to perform labor in and about the erection of the buildings, of which this Court said: "This is labor—mechanical labor of a higher order, contributing its proportionate value to the beauty, strength, and convenience of the edifice." In the same opinion, it is said: "A mere naked architect, and who may be such without being an operative mechanic, who draws plans in anticipation of buildings, usually could hardly be supposed to be within the Act, which provides a lien for work done for or about the erection or construction of the building." In Price *v.* Kirk, C. P. Chester County (35 Leg. Int. 325), it was decided that a claim by an architect for preparing drawings and specifications for a building, is not the subject of a mechanic's lien. BUTLER, P. J., gave conclusive reasons for the judgment, which has just been affirmed in this Court. (7 WEEKLY NOTES, 107.) Where an architect claims to have a lien for charges and fees, he must show work done for which the statute gives a lien, and such work is not shown by the name of his calling. Especially should the kind of work be set forth distinctly, when it is claimed as extra by the contractor. It will hardly be presumed that he is entitled to a lien for fees for superintending and directing himself in the performance of his own contract. The items "Bill of Phillipsburg Iron Co.," and "T. M. Lesher & Bro.'s extra bill," contain no sign of any kind of work or material in the construction of the building. It is vain to surmise what they are for. The statute requires expression, not occultness.

The "bill of coal, and carting same," exhibits the kind of material; it is not a subject for mechanics' lien. Of like character is "Extra boarding for Householder for extra time."

Judgment reversed, except as to the following items, namely, "Bill of coal, and carting same, $389.50;" "Bill of Phillipsburg Iron Co., $794.30;" "Extra boarding for Householder, for extra time, $19.60;" "T. M. Lesher & Bro.'s extra bill, 3701.12;" "Architect's charges and fees, 3617.65." And as to these excepted items, affirmed, and *procedendo* awarded.

Opinion by TRUNKEY, J.

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July '78, 133. Jan. 22, 1879.

Commonwealth v. Naile.

Escheat—Remainder — Trusts and trustees — Limitations—Acts of December 16, 1869; April 17, 1869, September 29, 1787; April 8, 1833.

The Act of 16 December, 1869, limiting the time within which proceedings for an escheat can be maintained, only applies to cases where the person for defect of whose heirs the escheat happens, dies in actual possession of the property.

The Commonwealth cannot enforce the escheat of an interest in remainder until the expiration of intermediate life estates.

Where the trust under which property sought to be escheated has expired, and the trustee has no active duties to perform, the principles of West *v.* Penna. Co. (14 Sm 200) do not apply, and the escheat may be enforced.

Error to the Common Pleas No. 1, of Philadelphia County.

This was a proceeding to escheat the estate of Cecilia Erben in the possession of William E. Naile, trustee under the will of Henry Sell. The inquisition filed showed that a jury of inquest found that Cecilia Erben died in 1852, intestate, without known heirs or kindred, and that she was possessed at the time of her decease of a vested interest in remainder in one-seventh part of the residue of the estate of Henry Sell, which interest vested in possession in June, 1876, and is now in the possession of William E. Naile, trustee.

The defendant, William E. Naile, trustee, filed a traverse to the inquisition, in which the right to an escheat of this estate was denied for the following reasons: (1) Because more than twenty-one years elapsed since the death of the said Cecilia Erben before the commencement of any proceeding or inquisition for an escheat, whereby the Commonwealth has become debarred from claiming the said property as escheated, according to the Act of Assembly of 16th December, 1869. (2) Because there is no adequate provision made by law for the escheat of said property, the same being an interest held in remainder. (3) Because there is no adequate provision made by law for the escheat of said property, the same being an interest held in trust.

Upon the trial a verdict was rendered for the Commonwealth, subject to the opinion of the Court, whether upon the admitted facts of the case the Commonwealth was entitled to judgment. These facts as incorporated in the point reserved were stated in the opinion of the Supreme Court as follows:—

"Henry Sell died in 1842. By his will, executed on the 2d of November, 1841, he devised his real estate to George M. Stroud, as trustee, directing that it should be leased; that three hundred dollars of the rents should be paid annually to his wife during her life, and that the residue should be paid to his parents and the survivor of them during the natural life of such survivor. Upon the death of his father, mother, and wife, the testator required that the trustee should sell the land, pay five hundred dollars of the proceeds to a nephew, and distribute the remainder amongst his brothers and sisters then living, and the children of such of them as should be dead. By a codicil, the share which his brother Charles would have taken under the will was given to Cecilia Erben, an adopted daughter. William E. Naile, the defendant, became the successor of Judge Stroud in the trust. The mother of the testator, who survived his father and wife, died in June, 1876, his seven brothers and sisters all then surviving. Immediately after the mother's death, the land was sold for $15,500. The trustee filed his account in the Orphans' Court, and although it has not been finally adjudicated, a balance of about $11,500 is in his hands awaiting distribution. Cecilia Erben died on the 26th of July, 1852, a minor, intestate, unmarried, and without known heirs or kindred."

After argument upon the point reserved, the Court below entered judgment for the defendant, *non obstante veredicto* (reported 6 WEEKLY NOTES, 191). The Commonwealth took this writ of error, assigning for error the entry of the judgment for the defendant, *non obstante veredicto.*

R. C. Dale (with him *H. C. Olmsted*), for the Commonwealth.

An examination of the Act of 16th December, 1869 (Purd. Dig. 616, pl. 31), by which it is argued that the Commonwealth has been barred from prosecuting her claim through lapse of time, shows that this Act does not cover the case in hand, because it is in terms expressly limited to cases where there is an escheat for defect of kindred of the owner last seised or possessed of an estate. The interest of Cecilia Erben being in remainder, she was not the owner last seised of the estate. This interpretation effectuates the beneficial intent of this Act. Before its passage, the Commonwealth was barred by no lapse of time, even though there had been an adverse possession for fifty years. It was to prevent the unsettling of titles established by possession adverse to the right of the Commonwealth for twenty-one years or upwards that the Act of 1869 was passed. But it was so worded, that its operation was limited to cases where there was a possession adverse to the Commonwealth for twenty-one years, and does not apply to cases where the possession of life-tenants is in no way adverse to

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that of the remainder man whose estate the Commonwealth claims.

Gernet *v.* Lynn, 7 Casey, 94.

There is nothing in the point that the Commonwealth cannot escheat a remainder, because the Act of April, 1833, under which we claim, covers an interest in remainder.

Cote's Appeal, 29 Sm. 235.

The ruling in West *v.* Penna. Co. (14 Sm. 195), that trust estates cannot be escheated, does not apply to cases where the active duties of the trustee have expired, and he might be sued at law by the cestui que trust for the amount of the trust funds due to the cestui que trust; because the 8th section of the Act of 29th September, 1787, relating to escheats, expressly provides that the Commonwealth may maintain any action for the recovery of moneys due to the person whose estate was escheated, which such person would be entitled to maintain.

A. I. Phillips (with him *E. C. Mitchell*), contra.

The Act of December 16, 1869 (P. L. 1870, 1372; Purd. Dig. 616) requires the Commonwealth to begin proceedings to enforce an escheat within twenty-one years after the death of the owner *last seised or possessed*, for defect of whose heirs the escheat takes place. If, therefore, Cecilia Erben's ownership at the time of her death was a "seisin or possession" within the meaning of the statutes relating to escheat, the right of the Commonwealth is now barred.

If, on the other hand, her ownership at the time of her death was not such a "seisin or possession," the escheat can never be enforced.

The Commonwealth lays her claim under the Act of 8th April, 1833 (P. L. 315; Purd. Dig. 611 & 809). This Act is a part of the intestate law, and expectant interests may pass under it, but it provides no means for its own enforcement. The Commonwealth, therefore, has proceeded to enforce it under the Act of 1787 (*supra*). If it cannot be enforced under this Act, it cannot be enforced at all, for this statute alone provides a means for carrying into effect escheats of decedent's estates. The Act of 1787, however, only covers property of which the intestate was "seised or possessed," at the time of death. Under section 3, a jury of inquest are summoned to inquire "whether the decedent was *at the time of his or her death seised or possessed* of any and what estate, real or personal." They are sworn only to inquire as to this, and have no authority to inquire whether the intestate had an ownership merely, without seisin or possession.

In West's Appeal (14 P. F. Sm.) 186, and West *v.* Penna. Co. (Id. 195) the nature of the proceeding under this Act was carefully considered. In these cases an attempt was made to escheat property in the possession of a trustee for want of known cestuis que trust. An escheat of such interests is provided for by the Act of 17 April, 1869 (P. L. 1869, 71; Purd. Dig. 612), but this Act, like that of 1833, is silent as to its own enforcement, and the same difficulties which arise in the attempt to enforce one, also arise in the other.

The Court held in these cases that the Act of 1869 could not be enforced under the Act of 1787, on account of the outstanding possession of the trustee.

If, therefore, Cecilia Erben died without seisin or possession, the jury of inquest had no authority to find that an escheat had occurred.

Whichever alternative is accepted there can be no recovery. If she died seised or possessed, the statute runs. If she did not, the entire proceeding is without warrant.

May 5, 1879. THE COURT (after stating the facts, as incorporated in the point reserved, *ut supra*). The fund to which Cecilia Erben, if living, would be entitled is claimed as an escheat by the Commonwealth, and the claim is resisted, *first*, on the ground that more than twenty-one years elapsed after the legatee's death before any proceeding by inquisition was begun, and the Commonwealth is therefore barred under the provisions of the Act of the 16th of December, 1869; *secondly*, because there has been no adequate provision made by law for the escheat of such property, it being an interest held in remainder; and *thirdly*, because no existing law authorizes or warrants the escheat of an interest held in trust.

(1) There can be no doubt that if Cecilia Erben had lived until the death of the mother of Henry Sell, she could take this fund. And there is no doubt that while the legatees for life survived, she could assert no claim to it whatever. It was an interest the title to which vested the moment Henry Sell died. It could vest in possession only on the happening of the contingency anticipated by the will. As the legatee could not have taken one step while the trust was in existence, it is not apparent how the Commonwealth, her successor in the title, could have moved. Indeed, the rules laid down in West's Appeal (14 P. F. S. 186), and in West *v.* The Penna. Co. for Insuring Lives (Idem, 196), would have been fatal to an inquisition if one had been attempted. Manifestly this case is not one to which the provisions of the Act of the 16th of December, 1869, could have been intended to apply. That was an Act to settle titles to property, lands or chattels perhaps, but some actual, existing, concrete thing as against the right of the Commonwealth to proceed for an escheat after the lapse of twenty-one years from the decease

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of the owner. This legacy did not become "property" in the statutory sense to which title by possession could have been acquired until the death of the last of the legatees for life. It was an interest, the nature of which was defined, but the measure of which was incapable of ascertainment. The fund had and could have no existence, as such, when Cecilia Erben died. It has grown out of Henry Sell's estate, but it is not "property" of which he was "the owner last seised and possessed." Nor was the legatee such an owner. She would have become "seised and possessed" of it if she had lived until June, 1876. At her decease, the Commonwealth succeeded to the precise rights given to her by the testator. Judge KENNEDY said, in Crawford *v.* The Commonwealth (1 Watts, 480): "It has been adjudged that a creditor, in case of his being unable to collect his debt of the administrator on account of his having committed a *devastavit*, may have an action upon the administration bond against the sureties by way of redress. This being the settled law where there are next of kin, it must be obvious to every one that where there are none, the Commonwealth, having established her right by escheat, comes in lieu of them, and why shall she not be entitled to the same security and the same remedy that are given to the next of kin? The Commonwealth in such cases may well be considered *ultima hæres* and as succeeding to all the rights and all the remedies of the heirs or next of kin in ordinary cases." The Act of the 29th of September, 1787, provided for the escheat of "any real or personal estate of which any intestate without heirs or known kindred should die 'seised or possessed.'" In the Act of the 16th of December, 1869, the word "property" was employed in the sense in which the words "real or personal estate" were employed in the Act of 1787. In both instances the language designated the same classes of subjects, and the terms of neither of the statutes applied to such an interest as that under consideration here.

(2) In the second place, it has been insisted upon, in behalf of the defendant, that no provision has been made by law for the escheat of an interest in remainder expectant on the determination of an estate for life. This is true while the life estate subsists. But the Act of the 8th of April, 1833, has provided for the escheat of interests that were not within the scope of the Act of 1787. The twelfth section declared that in default of known heirs or kindred, widow or surviving husband, the real and personal estate of an intestate should go to and be vested in the Commonwealth by escheat. While a husband may not have curtesy in his wife's estate in remainder, unless the particular estate be ended during the coverture (Hitner *v.* Ege, 11 Harr. 305), the interest of a wife in an estate in remainder vested in her husband stands on different ground. The right of the husband as tenant by the curtesy rests on the common law, and is excepted out of the statute of distributions, while by the terms of that statute the wife takes an interest in all the real and personal estate of her husband. It was held accordingly, in Cote's Appeal (29 P. F. S. 235), that a widow was entitled to a distributive share of an estate in remainder vested in her husband at the time of his death, under the Act of the 8th of April, 1833, and that she had a right to partition under the Act of the 29th of March, 1832, upon the determination of the estate of the tenant for life. This legacy was such part of "the real and personal estate" of Cecilia Erben as would have gone to her next of kin. She could have bequeathed it if she had lived to attain her majority, and her legatee would have the right to its possession upon the death of the elder Mrs. Sell. The language of the 12th section of the Intestate Act was broad enough to give the Commonwealth, in 1876, the interest to which the legatee would have succeeded, and which her heirs, if she had left heirs, would have taken.

(3) Another objection to the claim of the Commonwealth has been made on the ground that the interest of Cecilia Erben was held in trust. Without the Act of the 17th of April, 1869, it is probable that this objection to a recovery would be fatal. The first section of that Act made this provision: "Whenever any cestui que trust has heretofore or shall hereafter die intestate, without heirs or any known kindred, a widow or surviving husband, the beneficial interest of such cestui que trust in any property or effects, real, personal, or mixed, shall escheat to the Commonwealth, subject to all legal demands on the same." Before the passage of the Act of Parliament which modified it, the rule of the English common law appears to have been that where a cestui que trust died without heirs, the trust did not escheat to the crown, so that the lands could be recovered in a court of equity by the king; but the trustee should hold them for his own benefit. (Burgess *v.* Wheate, 1 Wm. Blacks. Rep. 123.) If no effect can be given to the Act of the 17th of April, 1869, such would possibly be the legal destination of this fund. It is true that here there is entire harmony between the brothers and sisters of the testator and the trustee. He does not question their right to the money. But cases might arise in which trustees would assert personal claims, and become or attempt to become *ultimi hæredes* of dead legatees or devisees. West's Appeal and West *v.* Penna. Co. (*supra*) have undoubtedly established the rule that a proceeding to escheat a fund cannot be allowed to interfere with the management of an

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active trust. In the first of the two cases, Judge AGNEW said that such a proceeding "would displace the trustee who holds the legal title, is bound to use it to maintain the purpose of the trust, and whose title and control may have to remain in order to preserve the estate, and to protect ulterior, contingent, or alternative interests." In the second case he said: "There may be no difficulty in ascertaining the beneficial interest in the case of a dry trust, or of property in a specific form, or an unclaimed deposit or declared dividend, but such is not the case where the trust is active, with a power to convert and collect, and when the beneficial interest can only be ascertained by a settlement and a decree of distribution." The facts of those cases were intricate and need not be recited. They showed an attempt to obtain control, by a proceeding to escheat, of funds in the hands and under the constant and active management of existing trustees. Upon such facts no other judgments than those entered would have been warranted. But those judgments are not applicable here. The Act of 1833 and the Act of the 17th of April, 1869, were passed in view and in aid of the Act of 1787, which remains effective and unimpaired, except as it has been modified by later legislation. In this case the machinery it provided can be applied without strain and without hazard of mischievous consequences. By the sale of the testator's land after his mother's death the trustee became possessed of a sum of money equal to one-seventh of the net proceeds, belonging to the proper representative of Cecilia Erben. The trust has ceased to exist. Its active duties ended with the sale. The trustee became the debtor of the distributees for the amount found due them in his hands. The eighth section of the Act of 1787 gave to the Commonwealth the right to recover "by information of debt, intrusion or action in the nature of trover and conversion, or on the case for money had and received" against any person indebted to an intestate whose estate should have been found subject to escheat, and against any person dwelling within this State having in his possession "any part of the estate, real or personal, which was of such intestate, and not mentioned or included in the inquisition." There has been no ascertainment of the exact amount of the fund in the trustee's possession. It was agreed at the trial that it was about $11,500. But the jury have found in favor of the Commonwealth for Cecilia Erben's share of the amount. For that share, when the final adjudication shall be made, judgment can be entered on the verdict. "An action for a legacy, being a substitute for a bill in equity, is to be so managed as to take effect without hindrance from common law technicalities." The Court can control the execution or enter a special judgment. (Seibert *v.* Butz, 9 Watts, 490; Martzell *v.* Stauffer, 3 P. & W. 398.) This involves no conflict between the Common Pleas and the Orphans' Court, and no interference with or disturbance of the trust.

The judgment entered for the defendant *non obstante veredicto* is reversed. And it is now ordered and adjudged that judgment on the verdict be entered for the plaintiff on the point reserved.

Opinion by WOODWARD, J.

May, '79, 187. May 27, 1879.

Toole's Appeal.

Tavern license—Discretionary power of Court of Quarter Sessions to grant or refuse the same without appeal.

The grant or refusal of a license is entirely within the discretion of the Court of Quarter Sessions of the proper county. No appeal lies from the granting or refusal of such license.

Certiorari sur appeal to the Court of Quarter Sessions of Huntingdon County.

Felix Toole filed his petition, recommendations, and bond for a license to keep an inn or tavern, having complied with all the requirements of the Act of April 12, 1875 (Purd. Dig. Supplement, 2029), and the rules of Court relating to the granting of licenses.

No remonstrances, objections, or evidence of any kind (other than the recommendation of twenty citizens, attached to the petition) were filed, but the Court made the following decree: "License is refused."

The President Judge was asked to file the reasons of the Court for refusing the license, and declined to do so.

The petitioner took this appeal and certiorari, assigning for error the refusal to grant the license.

Petrikin & McNeil, for appellant.

The Court, in the exercise of a sound legal discretion, founded upon recommendations or remonstrances, or evidence as to the requirements of the locality, etc., may, no doubt, grant or refuse a tavern license. But in the absence of any objections the Court cannot arbitrarily refuse a license, without cause; and in such case this Court has power to give redress.

Act of 1836, Purd. Dig. 1349.

June 9, 1879. THE COURT. This was an application in the Court below for a tavern license. The Act of Assembly gives no appeal in such case. The grant or refusal of a license is entirely within the discretion of the Court. On

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the face of the record we see no evidence of the abuse of the discretion. What testimony may have been before the Court does not appear, and we are certainly not to presume that the refusal of the license was arbitrary and without some good reason.

Order affirmed.

PER CURIAM.

Jan. '78, 262. March 25, 1879.

Heysham v. Dettre.

Vendor and purchaser—Fixtures—Gas fixtures and heaters personal property—Duress—Fraud—Compromise—Bills and notes—Parol evidence, when admissible to vary a writing—Errors and appeals.

Gas fixtures and heaters, though appurtenant to the house, are personal property.

Parol evidence is admissible to show a collateral agreement between the vendor and purchaser of a house that the gas fixtures and heaters should pass with the house to the purchaser of the latter under a written agreement.

The plaintiff and defendant had agreed for the sale of a house; before the time for delivery of possession the plaintiff claimed that he had the right to remove the gas fixtures and heater; the defendant denied this; he afterwards, however, gave the plaintiff his note for the amount agreed on as their value, making it non-negotiable, in order that the matter might be thereafter contested. In an action upon the note:

Held, that there was no evidence of either duress or fraud in obtaining the note, and that the transaction was nothing more than a fair compromise of a disputed question, which the defendants would not be allowed to gainsay.

A judgment will not be reversed because of the erroneous rejection of evidence which, if admitted, could not have helped the plaintiff in error's case.

Error to the Common Pleas of Montgomery County.

Assumpsit on a promissory note for $110, by Ambrose Dettre against Robert Heysham. Pleas non-assumpsit, payment with leave, fraud, want of consideration, and set-off.

On the trial before Ross, P. J., the defendant's evidence was, that he had purchased from the plaintiff a house under written articles of agreement duly executed by both of them; that before the time at which the plaintiff agreed to give possession, he discovered that the plaintiff proposed to take the heater and gas fixtures with him; that he (defendant) claimed that they were already his, inasmuch as they passed as appurtenant to the real estate, but that plaintiff was about then and there to remove them, and that he, to save the damage to the house, and to the articles in question, gave the note in suit, purposely making it non-negotiable, in order that the question of ownership might thereafter be settled.

The defendant offered to prove that the plaintiff had agreed (before the execution of the written agreement) that the gas fixtures and heater should go with the house for the price agreed upon.

Objected to. Objection sustained. Exception. (Third assignment of error.)

The articles in question were not mentioned in the written agreement. In the general charge his Honor said: [I am unable to see under the testimony any proof of that duress, which, under the law, would avoid a contract. An act influenced by a desire for peace, and to avoid a contest as to a civil right, is not duress in law, when this desire is the ruling and controlling motive. I can see no evidence of a physical duress or constraint; and there was no fraud, which constructively amounts to constraint, and is viewed by the law as an avoiding duress. . . . . The defendant alleges fraud. I am unable to discern it. The plaintiff stood on his rights under the written agreement; and that was the final action of both. The defendant, after the agreement was signed, bargained or dickered for these fixtures, until the plaintiff reduced his claim on their account to $110, and, as he declares, drew it in a form that was non-negotiable by purposely omitting the words "order or bearer." This was a trick neither moral nor honorable, for his purpose was to resist its payment, and make defence against it at maturity in the hands of the payee. . . . . Under the written agreement for the sale and conveyance of these premises, I charge you distinctly the plaintiff had a right to remove the fixtures, as to which the contention arose. I further charge you that this agreement cannot be changed, altered, or modified by parol evidence of what occurred before its execution. What was said and agreed immediately at the time of its execution, and which led to its execution on the part of the defendant, may be enforced as a part of it. I can find no evidence of any such modifying agreement made at the time of its execution or subsequently thereto, and therefore I repeat, if you believe the entire evidence in the case your verdict will be for the plaintiff. . . . . If the defendant had a legal remedy, and resorted to a compromise, he is bound by its terms. Therefore it is apparent that this note, whether viewed simply as the consideration of the plaintiff's right to the fixtures or as a compromise of his illegal claim to remove them, may be enforced against the defendant.]

Verdict and judgment for plaintiff. Defendant took this writ, assigning as error the rejection of the above offer of testimony, and the portions of the charge inclosed in brackets.

Geo. N. Corson, for plaintiff in error.

It was not for the Court to discover fraud, the question should have been left to the jury.

Bank *v.* Maxwell, 31 Sm. 139.

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If a note be given under the belief that an indebtedness exists, and it afterward appears that none in fact does exist, the payee cannot recover.

Bond *v.* Bronsin, 30 Sm. 360.

The refusal of the offer to show the agreement of the parties was manifest error.

Chas. Hunsicker, for defendant in error.

May 7, 1879. THE COURT. There is no doubt that the Court below erred in excluding the defendant's offer to show by parol evidence that the plaintiff had agreed that the gas fixtures and heater should go with the house. They were personal property, and so were the subjects of oral grant or reservation. The written agreement embraced realty exclusively, and there is nothing in it which precludes a collateral agreement concerning personal property. Growing crops pass by deed as appurtenant to land, and yet, as they are by custom personalty, a parol reservation of them is good. (Bachenstoss *v.* Stahler's Adm'rs, 9 Casey, 251; Harbold *v.* Keister, 8 Wr. 392.) If, then, growing crops may be so dealt with, we see no reason for dealing otherwise with a portable heater and gas fixtures.

This error, however, is harmless. Whether there was such an agreement or not was a matter about which the parties disputed, the one affirming, the other denying. Such being the case, the plaintiff had a right to retain the property until the question was legally settled. The defendant, however, professed to acquiesce in the plaintiff's view of the matter, and after some bargaining and cheapening, executed and delivered the note in controversy, and so got possession of the disputed articles. There was in this, on the part of the plaintiff, neither duress nor fraud. He had a right to insist on his understanding of the arrangement, and to make it the subject of compromise, and we agree with the learned Judge who tried this case, that the defendant's small trick in purposely making his note non-negotiable, in order that he might get possession of the disputed property, and, at the same time, leave the way open to impeach his contract, was neither honorable nor honest. Judgment affirmed.

Opinion by GORDON, J.

Common Pleas—Equity.

C. P. No. 1. June 9, 1879.

Young Men's Christian Association v. Donohugh, Collector of Delinquent Taxes.

Constitutional law—Taxes and taxation—Exemption of "institutions of purely public charity"—Art. IX. Sec. 1 of Constitution—Act of May 14, 1874—Apportionment, for purposes of taxation, of building owned by charitable association and occupied in part by lessees paying rent—Such portions from which rents are derived are not exempt—That such income is applied towards the support of the charity is no ground for exemption of the rented portions—The portion actually used and occupied by the charity is exempt—Abatement of assessment to the extent of the exempt portions.

Motion to continue preliminary injunction. Hearing on bill and answer.

Bill in equity, filed by the Young Men's Christian Association of Philadelphia, against William J. Donohugh, Collector of Deliquent Taxes of the City of Philadelphia, to restrain the defendant from proceeding to collect taxes assessed against the complainants' building and lot for the years 1874, 1875, 1876, and 1877, exceeding in amount $14,000.

The bill averred that the association complainant had been duly incorporated by Act of May 2, 1857; that the objects of the said corporation as set out in its Constitution and preamble were, *inter alia*, as follows:—

PREAMBLE.

We, the subscribers, actuated by a desire to promote evangelical religion among young men residing in or visiting this city and its vicinity; and impressed with the importance of concentrated effort in accomplishing that object, and desirous of forming an association in which we may together labor for the great end proposed, hereby agree to adopt for our government the following—

CONSTITUTION.

Art. I. Sec. 2. The object of this association shall be the improvement of the spiritual, mental, and social condition of young men.

Art. IV. Sec. 1. The members of this association shall seek out young men, resident or strangers in Philadelphia, and endeavor to bring them under moral and religious influences; aid them in selecting boarding places and means of employment; introduce them to the members and privileges of this association; secure their attendance at some place of worship on the Sabbath; and by every means possible surround them with Christian influences.

That in pursuance of this design they had erected a large and handsome building at the southeast corner of Fifteenth and Chestnut

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Streets, in the said city, containing a library and reading-room, parlor, lecture halls, students' class-rooms, gymnasium, etc.; that the reading-room and parlor, the lectures on scientific and other subjects, delivered under the auspices of the association, and the "social gatherings" were "free to all, especially young men," whether members of the association or not; but that members only could, under certain regulations, use the gymnasium and take books from the library for use out of the building. That with the exception of the first floor, which was rented out as stores, and the lecture hall, which, when not used by the association, was also rented out, and three small rooms up stairs, the whole building was in actual occupation by the association; that all income, derived from whatever sources, was applied only to the charitable purposes of the association, and that no officer or member received any private pecuniary profit; that while the aim of the association was to throw Christian influences over young men, this was without reference to any creeds or denominations, and that there was no necessity for those visiting the building for other purposes to hear or witness the exercises having this especial object in view; that they were advised and aver that they are a corporation for charitable, benevolent, and literary uses, and that the said real estate was held simply and solely for the purely public charity of the complainant. Finally, that the defendant, as Collector of Delinquent Taxes, is about to proceed against complainants to collect taxes assessed against the whole of said building.

The bill prayed (1) for a declaration that the association was a "purely public charity" and an association and institution of learning, benevolence, and charity. (2) For a decree that the said real estate, by virtue of the Constitution and the Act of May 14, 1874, is exen pt from taxation. (3) Or, if the Court should be of opinion that the portion of the building from which rent is derived is liable to taxation, for a decree that the other portions thereof which are actually in use by said association, are exempt from taxation. (4) Injunction. (5) General relief.

The answer denied that the complainants were a corporation for "charitable, benevolent, and literary purposes," and an "institution of purely public charity" within the meaning of Art. IX. Sec. 1 of the Constitution, and of the Act of May 14, 1874; and averred that, even if it were so, the said building would still be subject to taxation, under the proviso contained in the said Act, as being real property from which an income or revenue was derived.

Robert H. Hinckley, Jr. (*Junkin*, with him), for the motion.

The association is a purely public charity. Its benefits are not limited to a class. The word "Christian" in the corporate title is used in its broad sense as contradistinguished from the word heathen.

Is the rent derived from a portion of the building "income" within the meaning of the Act of May 14, 1874? Income is gain or profit. There is none here. The rent derived does not meet the interest on the mortgage. The rents are applied to the same uses as those for which the association was established. In the Philadelphia Library Case (5 WEEKLY NOTES, 196), MITCHELL, J., said: "It is not a question how the revenue is derived, but to what purpose and with what intent it is devoted." The intent of the law is to exempt charities. Now, where the principal portion of a building is used for charitable purposes, and another part of the same is made to contribute to the support of the charity, if we tax the whole we defeat the intent of the law, yet it seems impracticable to separate such portions for the purposes of taxation. Under the Constitution and the will of the Legislature, the greater overshadows the less, so as to exempt the whole.

Christian Kneass (*Powell*, with him), contra.

Under Art. IX. of the Constitution "all taxes shall be uniform." But, the Legislature has power to exempt certain properties, the Constitution specifying how and what; and to carry out this provision the Act of May 14, 1874, was passed, exempting public charities. Is this association purely a public charity? In the preamble to the charter it is stated, among other things, that the object of the association is the promotion of "evangelical religion." Under this term several classes of the community, viz., Roman Catholics, Jews, Unitarians, etc., are excluded. In order to make it a public charity, it must be indefinite in its objects and open to the whole public.

[PEIRCE, J. The term "evangelical" has a larger sense than that given it by a particular denomination; its origin indicates a proclamation of good tidings from Heaven to men.]

[ALLISON, P. J. "Evangelical" means, holding to the fundamental doctrines of the Christian faith. Under this the Roman Catholic Church would be included.]

Yet, in the common acceptation of the term they are not included. Inasmuch as this institution is shut against one or more classes, it is in so far private, and not public.

Exemption from municipal taxation is equivalent to an appropriation of money from the city, and an appropriation would be, in this case, contrary to the provisions of the Constitution prohibiting preferences to sects and forbidding appropriations for their benefit.

School District of Upper Darby *v.* The Rector, etc., of St. Stephen's Church, 34 Leg. Int. 291.

Donohugh's Appeal, 5 WEEKLY NOTES, 196.

The proviso to the Act of 1874 expressly pro-

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vided that all property, real or personal, "other than that in actual occupation for the purposes of the charity," shall be taxed. The occupation of portions of the building as stores has no relation to the promotion of "evangelical religion."

It is admitted that the building is not used "exclusively for the purposes of the charity," and the spirit of the law being in favor of uniformity and against exemption, the law should be construed strictly against the claim for exemption. It is impossible to apportion the rooms and enforce the collection of taxes assessed on particular rooms.

Hinckley, in reply.

Young men, strangers or resident in Philadelphia, it matters not who, come within the objects of the association; and the association comes within Mr. Binney's definition of a charity in Price *v.* Maxwell (4 Cas. 23). The whole building is necessary for the purposes of the association, part for the use of, and part for the support of, said association.

C. A. V.

July 12, 1879. THE COURT. We are asked to restrain the defendant from collecting taxes which have been assessed against the real estate belonging to the plaintiffs, situate at the southeast corner of Fifteenth and Chestnut Streets. The claim of exemption is founded upon the assertion that the corporation plaintiff is a charitable, benevolent, and literary institution, whose property is protected from taxation by the Constitution of the Commonwealth, and by an Act of Assembly of May 14, 1874 (P. L. 158) passed to carry into effect the first section of the ninth article of the fundamental law of the land. This section reads as follows: "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, but the General Assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial, not used or held for private or corporate profit, and institutions of purely public charity."

The reading of this section shows that the Constitution does not of itself exempt any kind of property from taxation; on the contrary it starts out with the assertion that all taxes shall be uniform; that is, they are not to vary or be different, but are to be of the same form and manner, so that there should be agreement not only as to the rates of assessment, but as to the kind or description of property upon which taxes should be assessed. Uniformity can only be secured by adhering to a rule which is equal and consistent in its application. But, though the principle of equality or uniformity is thus broadly asserted, power is at the same time given to the Legislature to depart from the rule which is thus laid down. The General Assembly is authorized to exempt from taxation the kinds of property mentioned in the first section of the ninth article. This grant of power is limited and restricted: thus far may they go, but no farther. It is claimed by the plaintiffs and denied by the defendant that the Young Men's Christian Association, is, in the language of the Constitution, a "purely public charity," and that it falls clearly within the exemption provided for in the Act of 1874, being an association or institution of learning, benevolence or charity, and that it is maintained by public and private charities.

The object of the association, as set forth in article 1st, section 2d, of the charter, is the improvement of the spiritual, mental, and social condition of young men. This gives to the charity its general and public character. Its object is the improvement of young men, without limitation or restriction. All are to be benefited alike; all are placed upon the same level; this makes the charity purely public, or, as it is defined in the case of the Philadelphia Library (5 WEEKLY NOTES, 196), this gives it an indefinite or unrestricted quality. The means to be employed in the accomplishing the objects sought to be attained are expressed in article 4, section, 1. Young men, residents or strangers in Philadelphia, are to be sought out and the endeavor made to bring them under moral and religious influences; to help them obtain boarding places and employment; introduction to the members and privileges of the association; secure their attendance at some place of religious worship, and surround them with Christian influences. It is in furtherance of the purpose thus expressed that the hall or building has been erected upon the lot at Fifteenth and Chestnut Streets. And the bill recites that the plaintiffs have provided a large reading-room and library, a furnished parlor, that they have two halls, in which lectures on scientific and other topics are given; that these privileges are open to all young men, whether members of the association or not. In addition to these advantages, plaintiffs maintain an employment bureau, and have fitted up a gymnasium for the use of the members and visitors. It does not take from the public character of the charity that the privilege of taking books out of the library and the use of the gymnasium are subject to regulations and conditions which are equal in their operations. This point was considered, in the able opinion of Judge MITCHELL, in the case of the Philadelphia Library (*supra*). Such regulations are within the implied power of the body as necessary to its proper regulation and control. Nor does it make against the conclusion that this corporation is a public charity, that in the preamble to the con-

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stitution it is recited that the subscribers desire to promote evangelical religion among young men. The criticism upon the term "Evangelical" is not borne out by the definition of the word according to accepted authority. Webster defines its meaning to be "according to the Gospel; consonant to the doctrines and principles of the Gospel; contained in the Gospel; sound in the doctrines of the Gospel, orthodox." That the word is sometimes employed in a more narrow and restricted sense does in no particular deprive the plaintiffs of their just claim to its use in its more broad and catholic signification, and that this is its true meaning as used in the preamble, is, we think, most evident from all that we have extracted from articles 1 and 4 of the Constitution.

In view of the repeated decisions of the Supreme Court of our own State, which will be found digested in Price *v.* Maxwell (4 Casey, 23), and in Miller *v.* Porter (3 P. F S. 292), no one can, we think, doubt that this is a religious and charitable use; and that it is a pure charity is settled by the fact that no profit or gain accrues to its members; and it is public, because its benefits are open and free to all young men. It falls within the definition that in law religious and charitable uses mean legal acts done for the promotion of piety among men, for the purpose of relieving their sufferings, enlightening their ignorance, and bettering their condition. It may also be gauged by the forcible and eloquent language employed by Mr. Binney in his argument in support of the will of Girard, in defining in general terms that which constitutes a charity or a religious use:—"Whatever is given for the love of God, or for the love of our neighbor, in the catholic and universal sense; given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private or selfish, is a gift for a charitable use, according to that religion from which the law of charitable uses has been derived. The love of God is the basis of all that is bestowed for His honor, the building up of His church, the support of His ministers, the religious instruction of mankind. The love of his neighbors is the principle that prompts and consecrates the use. The current of these two great affections finally run together, and they are at all times so near that they can hardly be said to be separated."

The question which still remains to be considered is more difficult of solution than the one which we have just considered. If we are right in the conclusion that this is a purely public charity, is the property in question, under the admitted facts of the case, exempt from taxation? The question is suggested by the proviso to the Act of 1874, that "all property, real or personal, other than that which is in the actual use and occupation for the purposes aforesaid, and from which a revenue is derived, shall be subject to taxation, except where exempted by law for State purposes, and nothing herein contained shall exempt the same therefrom." Property which belongs to a purely public charity is not exempt unless it is in actual use and occupation for the purposes aforesaid, as applicable to this case or the purpose of this charity, and unless it is used and occupied in such manner that no income or revenue is derived from it. In the language of the proviso, if not in actual use or occupation of the charity, or for the purposes of the charity, and if an income or revenue is derived from it, it shall be subject to taxation.

It is set up in the fourth paragraph of the answer, and it is not denied by the plaintiff, that the whole of the lower floor or story of the building is rented for stores; that three small rooms upstairs are rented; that the public hall is rented from time to time when not in actual use by the complainants for their work, and a large annual income is derived from said rents, stated by the plaintiff to have amounted to $21,000 for the year 1876.

These facts admitted, the plaintiffs contend that, constructively at least, the whole of the building is in their use and occupation; that the entire income derived from it is needed for and is actually used in carrying on the work of the association, and that they are therefore within the spirit of the proviso of the Act of 1874. But is this the correct rendering of the Act under which this exemption is claimed? If the portions of the building which are rented consisted of separate structures upon the lot at Fifteenth and Chestnut Streets it would hardly be pretended that, if rented to strangers as dwellings or stores, whatever use might be made of the income, that they would not be taxable under the Act of 1874. Can taxation of that portion of the building not in actual physical occupation of the plaintiffs, for which rent is paid to them, be avoided by appropriation of income to the maintenance of the charity? Not unless we disregard the plain letter of the law, because it is property other than that which is in actual use and occupation of the plaintiffs for the purposes of their organization, and, because not being so used and occupied by them, they derive an income or revenue by a use not connected with the charity, much less growing out of it or inseparably associated with its proper administration.

The position assumed by the complainants that appropriation of income is equivalent to actual use and occupation is, in our judgment, so strange and is such a marked departure from the letter of the law, and it seems so foreign to that which appears to have been in the mind of the Legisla-

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ture, that we are compelled to reject this interpretation, and to adopt another which, we think, is more in harmony with the reason and spirit of the Act. This proviso appears to have been intended to guard against an abuse of the privilege, when, under constitutional authority, the Legislature granted exemption to the several classes of holders of property mentioned in the Act, among others, to institutions of learning, benevolence, or charity, with the grounds thereto annexed and necessary for the occupancy and enjoyment of the same. Now, how easy it would be to organize purely public charities which might, with a lot and building equal to or greater than that of the plaintiff, require but a small room or office in the structure for the transaction of their business, and claim to rent the rest of it, from which a large income or revenue would be derived. This would, probably, be regarded as an abuse of the privilege, and yet in principle it would differ but in degree from the case in hand. The present plaintiffs occupy for the purpose of their charity probably about one-half of the building in question, which is, under the law, exempt. Of that portion, however, from which rent or income is derived, and which they do not occupy, the claim of exemption is not, we hold, well founded. It may be difficult, but it does not seem an impossible thing, to ascertain the true valuation of the interest in the property which is subject to the payment of taxes; probably the rental value of the portion for which rent is received might afford a standard which would very nearly, if not accurately, draw the line between that which is subject to taxation and that which is not. For whatever interest or valuation the property is taxable, the taxes so imposed would, of course, bind the whole property. If hardships or difficulties should arise, by which the interest of the charity might be put in jeopardy, by reason of such an assessment of taxes, there would be no just cause for complaint, for such difficulties are of their own creation, all of which can be avoided by paying the taxes out of the income derived from that portion of the property which is not in their actual use and occupation for the purposes of the charity.

Upon a full consideration of this question, which is without precedent, and therefore to be decided upon the governing principles as we understand them, we believe that substantial justice will be reached and the law upheld by giving the association the benefit of freedom from taxation for so much of their premises as is in their actual use for the purpose of the charity, and to hold that those portions which are rented to and occupied by strangers for business or traffic, for the use of which income in the shape of rent is received by the plaintiffs, are subject to an assessment and payment of tax according to a just valuation.

The preliminary injunction will be continued until a proper abatement of the tax which is claimed has been made on the basis of this opinion.

Opinion by ALLISON, P. J.

Common Pleas—Law.

C. P. No. 3. June 14, 1879.

Schultz v. Wilde.

Affidavit of defence law—Particularity of statement—Guarantee of quality of goods sold—Vendor and vendee.

Rule for judgment for want of a sufficient affidavit of defence. Assumpsit on promissory notes by payee against the maker.

The affidavit and supplemental affidavit of defence set forth that the plaintiff came to defendant's place of business, and offered to sell him tobacco, naming the price, and using these words: "I guarantee the tobacco to burn and hold fire." Upon this guaranty the defendant ordered the tobacco to be delivered to him, and gave the plaintiff the notes in this suit. That after it was delivered to defendant, he discovered that it entirely failed to be of the quality agreed upon and guaranteed; that it would not burn and hold fire at all, but was entirely unfit for use. The expression "it would burn and hold fire" is well known in the trade, and means that where the tobacco is prepared for use that it will when ignited burn and hold fire. Defendant has lost all the labor expended in having said tobacco made up into cigars, and has lost customers in his trade, and other losses greatly in excess of the amount of said notes by reason of the failure of said tobacco to be of the quality warranted.

Randal Morgan, for the rule.

Where goods are sold on an express warranty of quality, and are not as warranted, defendant can retain the goods, and set off, in an action for the price, the deficiency of consideration thus arising, but cannot retain both the goods and their worth.

Frankenfield *v.* Freyman, 1 Har. 56.
Dailey *v.* Green, 3 Id. 118.
Buffington *v.* Quantin, 5 Id. 310.
Youghiogheny Iron Co. *v.* Smith, 16 Sm. 340.

A set off to be available in an affidavit of defence must be exact as to time, amounts, etc.

Watson *v.* Galloway, 1 WEEKLY NOTES, 109.
Callahan *v.* Mann, 1 Id. 104
Greenwood *v.* Murray, 2 Id. 507.
Louchheim *v.* Becker, 3 Id. 449.

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Louis Brégy (with him *F. A. Brégy*), contra.

The affidavit sets forth an express warranty and failure thereof. The contract was executory, therefore the rule *caveat emptor* does not apply.

Dodd *v.* Kirk, 2 WEEKLY NOTES, 260.
Taylor *v.* North, 3 Id. 170.

The affidavit is similar to the one filed in Taylor *v.* North (*supra*), which was held sufficient.

There having been a warranty and breach, defendant need not allege the return of the goods.

Steigleman *v.* Jeffries, 1 S. & R. 477.
Borrekins *v.* Bevan, 3 R. 23.

Rule discharged.

C. P. No. 4. June 28, 1879.

Mathews v. Glenn.

Affidavit of defence law—Book entries of physician—Lumping charges for medicine and attendance—Insufficient under the Act.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit for medical services and medicine furnished.

The items in the book account, of which a copy was filed, were stated as follows:—

1872.	For attendance and mds., etc.	
March 3–4.	To 2 vsts., mds. and vaccinating 2	$4.50
5–6.	To 2 vsts., mds., and vaccinating 1	3.50
8.	To vst., mds., et ad.	1.25
May 22–24.	To 2 vsts., mds., et ext. ad. .	2.75
	(Etc. etc. etc up to May, 1875), with a credit item of	1 00

The affidavit of defence averred that $47.00 of the items were not furnished within six years, and moreover the paper filed was "not such a book of original entries as entitles plaintiff to judgment thereon; that the whole paper is made up of abbreviations and hieroglyphics, and is entirely unintelligible, except as to the figures and the words in the beginning."

Harrington, for the rule.

Mitcheson, contra.

Besides being unintelligible, this account lumps the charges for medicine and attendance, which has been declared improper by Common Pleas No. 2, in—

Birch *v.* Gregory, 7 WEEKLY NOTES, 147.

THE COURT. On the strength of the case of Birch *v.* Gregory in Court of Common Pleas No. 2, we will discharge the rule, There should be uniformity of practice on such subjects as this, and the view of that Court is reasonable in itself.

Rule discharged.

C. P. No. 4. June 28, 1879.

Scattergood v. Carberry.

Statute of limitations—Does not begin to run on a promissory note until expiration of days of grace.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note, dated February 12, 1873, payable three months after date. The writ issued May 15, 1879. The affidavit of defence averred that it was barred by the statute of limitation.

A. C. Seilen, for the rule.

The cause of action does not accrue until the expiration of the last day of grace, and it is then that the six years begin to run.

Thomas *v.* Shoemaker, 6 W. & S. 179.
Wickersham *v.* Russell, 1 Sm. 71.

Rule absolute.

C. P. of Lycoming Co. June 13, 1879.

Faries v. Weisel and Dierrer.

Practice—Appeal from judgment of alderman—When transcript cannot be treated as a declaration or statement—Compulsory arbitration—Act of June 16, 1836—In what cases a declaration necessary—Actions ex delicto and ex contractu.

Rule to show cause why the rule to refer, entered by the plaintiff, should not be stricken off for want of a declaration.

This was an appeal from the judgment of an alderman. The plaintiff, without filing any declaration or statement, entered a rule to refer all matters at variance between the parties to arbitrators, under the provisions of the compulsory arbitration laws of June 16, 1836. The defendant subsequently obtained the above rule.

C. K. Geddes, for the rule, cited and relied on the Act of June 16, 1836 (Purd. Dig. 81, 82). The words "declaration or statement," as used in the Act of Assembly, are not synonymous, but mean that a declaration must be filed when it is necessary to disclose the plaintiff's cause of action, and a statement may be filed in cases arising *ex contractu*.

This is an action of trespass, and in all actions *ex delicto* a declaration must be filed. A statement can only be filed in actions brought on a "verbal promise, book account, note, bond, penal or single bill."

Purd. Dig., 1166, pl. 10.
Holden *v.* Wiggins, 3 Penna. R. 469.
Gamble *v.* Greaves, 7 Philad. R. 433.
Ellis *v.* Penington, 2 WEEKLY NOTES, 29.

J. M. Wood, contra.

This question has been decided in this Court

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by his Honor Judge GAMBLE, in the case of Page *v.* Kelley & Platts.

C. A. V.

July 5, 1879. THE COURT. The above stated case originated before a justice of the peace, and as appears by the transcript filed, the summons was issued in what is known by justices of the peace as "trespass and damage." Judgment was entered before the justices in favor of the plaintiff. In due time an appeal was taken by the defendant, and a transcript from the justice of the peace was duly filed in this Court. Subsequently the plaintiff, without filing any declaration or statement, entered a rule to refer, etc., under the compulsory arbitration laws. The defendants now move to strike off the rule to refer, etc., for want of a declaration or statement. The plaintiff replies, the transcript filed is a compliance with the law. By the compulsory arbitration laws of this Commonwealth (Act of June 16, 1836, Purd. Dig. 81), after directing how rules to refer, etc., thereunder shall be issued, it is provided "That it shall not be lawful for the plaintiff in any suit to enter such rule, until after a declaration or statement of the cause of action shall have been filed by him." In the view we take of this case, it will not be necessary to consider the fact which appears on the record, that all the papers filed in this case were filed by the defendant. The plaintiff filed no declaration, statement, transcript, or other paper, except his praecipe for the rule to refer. We think the words declaration or statement are not synonymous, as used in the Act of Assembly, but are to be understood from the manner in which they are used in the practice of our courts. At common law there was no such thing as a trial or judgment of any kind by adverse process, without a declaration. By the Act of Assembly of 27 March, 1806 (Purd. Dig. 1166), judgments were allowed to be entered on a statement, in suits brought "for the recovery of any debt founded on a verbal promise, book account, note, bond, penal or single bill, or all or any of them." By our rules of Court many judgments are permitted to be entered on statements or copies of the plaintiff's claim in actions *ex contractu.* It was held in this Court by his Honor Judge GAMBLE, in an action *ex contractu,* in an opinion filed in Page *v.* Kelley & Platts, that when the transcript from the justice of the peace sets out the nature, character, and extent of the plaintiff's demand, it constitutes a sufficient statement of the plaintiff's claim to sustain a judgment upon an award of arbitrators. We know of no statute, rule of Court, or practice, in any of the Courts of this State where a statement is permitted to take the place of a declaration in an action *ex delicto.* We, therefore, hold that the words declaration or statement in this Act of Assembly are to be construed as follows: Rules to refer may be based on statements only in such cases where judgments are permitted to be taken on statements in the Courts, and in all other cases declarations must be filed.

If a statement could be filed in the case before us, we think the transcript filed in this case falls far short of the information required to be given in a statement. If judgment was entered on an award in this case, the record would not show what the injury was for which the damage was assessed. All that would appear would be that the summons had been issued in "trespass and damage," and that on hearing a judgment had been entered for the plaintiff. It is not claimed that the transcript filed is a declaration, and as we have seen no statement could be filed in actions *ex delicto,* and even if a statement might be filed in such a case, the transcript is wholly insufficient, it follows that the rule to refer must be stricken off, and the rule to show cause, etc., made absolute.

Opinion by CUMMIN, P. J.

Orphans' Court.

May 19, 1879.

Maguire's Estate.

Unincorporated charitable association not a partnership, but a quasi corporation—What constitutes partnership—Competency of members of such association as witnesses, upon a claim presented against decedent's estate—Act of April 15, 1869—Claim for services rendered—Evidence necessary to support.

Sur exceptions to adjudication.

From the adjudication of the account of decedent's administrator, Thomas Maguire, the following facts appeared:—

Alice Maguire died intestate, unmarried, and without issue. Her estate consisted of a deposit in the Beneficial Saving Fund to the amount of $1172.80. The only claims against this fund disputed were those of the St. Rose Dorcas Society, and Patrick Magee and wife.

The claim of the St. Rose Dorcas Society of St. Patrick's church of this city was to recover the sum of $312, which, it was alleged, had been paid decedent by the society in weekly payments of one dollar per week, under the belief that she was poor and needy, whereas she had a large sum of money on deposit in the Saving Fund; and it was also alleged that she ob-

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tained this sum from the society by falsehood and deceit, and afterwards promised to repay and return the amount to the society. It appeared that the society was unincorporated, and composed of ladies who voluntarily associated together for the purpose of relieving the necessities of the poor of the parish by furnishing them with money or clothing as their necessities required. Suit was brought in the name of the association without joining the members.

Before the Auditing Judge, in support of this claim, two members of the society were offered as witnesses to prove the declarations of the decedent, and the promise to repay the society the money she had obtained from it.

The claim of Patrick Magee and wife was to recover for thirty-four weeks' boarding and nursing decedent at $20 per week. It appeared that Mrs. Magee, a niece of decedent, took her from the almshouse, where she was lying ill, to her home, and nursed her during the period for which this claim was made until her death. The evidence disclosed that the decedent had directed the treasurer of the Beneficial Saving Fund, where her deposit was kept, to pay Mrs. Magee the sum of five dollars per week, and that this amount was paid to her, and received by her without objection or demand for increased compensation.

The Auditing Judge (HANNA, P. J.), disallowed the claim of the Dorcas Society, holding as follows: "The society being unincorporated is in law a copartnership, and no members of the firm would be competent to testify against the estate of a decedent debtor of the firm; the members of the society would not, it is to be presumed, have in fact any pecuniary interest in the amount to be recovered, yet it is easy to see that they would have the power to convert it to their own use. Again, the St. Rose Society, as such, has no existence in law; it has no corporate being, and any claim the members have must be prosecuted in the name of all the members of the society. No two members can represent their fellow members, and prosecute suits in their behalf. It follows, therefore, that the two ladies who presented this claim have no standing in this Court against the estate of the decedent, nor is a member of the association or society a competent witness as to any transaction occurring during the lifetime of the decedent. It would not have been competent testimony prior to the Act of 1869, and, for a still stronger reason, was not admissible since the Act was passed. (See Washington Beneficial Society *v.* Bacher, 8 Harris, 425; Marion Beneficial Society *v.* Commonwealth, 7 Casey, 82.) The testimony of these witnesses being disregarded, the evidence remaining is insufficient to justify an award in favor of the members composing the St. Rose Dorcas Society, even if they properly appeared as creditors of the decedent." . . .

The claim of Patrick Magee and wife was also disallowed.

To these findings exceptions were filed by the St. Rose Dorcas Society, and by Patrick Magee and wife.

J. H. Campbell, for the St. Rose Dorcas Society.

A society like this one, a dorcas society acting merely as the agent or trustees of the priest of the parish in receiving and distributing alms among the poor of the parish, does not constitute a partnership, all the cases of unincorporated associations being declared partnerships are where the members are associated together "for private and individual profit or pleasure, with no public object." So where it is for private emolument or benevolence confined exclusively to the associates, and in which none others participate, it is a partnership.

Prichett *v.* Schafer et al., 2 WEEKLY NOTES, 317.
Thomas *v.* Ellmaker, 1 Par. 98.
Hess *v.* Werts, 4 S. & R. 356.
Babb *v.* Reed et al., 5 R. 151.
Witmer *v.* Schlatter, 2 R. 359.
Ridgely *v.* Dobson, 3 W. & S. 118.
Beaver *v.* McGrath, 14 Wr. 479.
Hedge's Appeal, 13 Sm. 273.
Paul *v.* The Lodge, 3 WEEKLY NOTES, 408.

If this society, therefore, is *not* a partnership, then these witnesses, whose testimony was excluded, were competent. They had no interest, direct or otherwise, in the event of the suit. Officers or members of charitable and religious societies having no personal or private interests are competent witnesses; see

Washington Beneficial Soc. *v.* Bacher, 8 Harris, 429.
Marion Beneficial Soc. *v.* Common, 7 Casey, 86.
Davies *v.* Morris, 5 Harris, 205.
Greenleaf on Evidence, cited in this last case.
Sorg *v.* First German Congregation, 13 Sm. 156.

The decisions upon the Act of April 15, 1869, and its supplement, do not exclude these witnessses. By a careful examination of them it will be seen that the witnesses not being parties in the sense of the Act, and having no interest, were competent under the law prior to the Act, and that Act or its supplement did not disturb their position.

Karns *v.* Tanner, 16 Sm. 297.
Standbridge *v.* Catanach, 2 Norris, 368.
Hanna *v.* Wray, 25 Sm. 27.
Gavit *v.* Supplee, 2 WEEKLY NOTES, 561.
Evans *v.* Reed, 4 Id. 301.
Taylor *v.* Kelly, 30 Sm. 95.
Noble *v.* Mortimer, 4 WEEKLY NOTES, 300.
Gardner *v.* McLallen, 29 Sm. 403.

King for Patrick Magee.

June 7, 1879. THE COURT (after stating the facts). The Auditing Judge found that these facts had been established, and that an express promise by decedent to pay had been proposed to

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be proved by two witnesses, members of the society. Their testimony was rejected on the ground that they were parties to the suit, within the meaning of the Act of 1869, and that, independently of the Act, they were disqualified by interest. The claim was disallowed, first, because the society, being unincorporated, was a *quasi* partnership, all the members of which should have been joined as claimants; and secondly, because no express promise to pay had been shown. The first reason must be discarded. At the very basis of the definition of partnership lies the idea of profit and loss, and that idea is excluded by the constitution of the society in question. The definition by Kent has been pronounced the best: "Partnership is a contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions." (Kent's Com., 7th ed., vol. 3, p. 23.) That a religious or charitable society, though unincorporated, may appear as a party plaintiff in the courts of this State without joining all its members in the action, seems too clear for discussion. LOWRIE, J., in Phipps *v.* Jones (8 Har. 263), says: "Such associations have always, and especially since the Act of 1731, been recognized as having an associate and *quasi* corporate existence in law, with power to hold land and build appropriate houses, and, of course, with power to acquire rights by contract and to vindicate them." WOODWARD, J., in Ryerss *v.* The Congregation of Blossburg (9 Cas. 117), declared that whether the plaintiffs "were a duly constituted corporation, or only a religious society bound together by articles of association, it was a legal party competent to sue, and was named on the record as plaintiff." Under the view which we take of the second reason assigned for the disallowance of the claim, it will be unnecessary to consider the question of the competency as witnesses of the members of the association. Their testimony was needed only to show an express promise by the decedent to pay; but the fraud having been established, the money of the society in the hands of decedent became a debt to the claimants, out of which the law would raise a promise which could be enforced in assumpsit. (Mathers *v.* Pearson, 13 S. & R. 258.) In that case, GIBSON, J., said: "It is clear that money received *mala fide* or by deceit may be recovered back in an action for money had and received. Fraud renders the contract void, and puts the party defrauded in a condition to treat it as a nullity. If this be so, there is nothing in the way of a promise by implication of law to restore the money which the defendant received." On the same principle it has been held that fraudulent representations by the buyer will prevent the title to goods sold from passing, and that the goods may be reclaimed. (Smith *v.* Smith, 9 Har. 372; Backentoss *v.* Spiecher, 7 Cas. 324; Green *v.* Humphry, 14 Wr. 212; Harner *v.* Fisher, 8 P. F. Sm. 453.) It is true that these were cases of contract; and that in the present instance the subject matter of the fraud was a gift. But it was a gift only in name. As the official act of a society for the work of organized charity, it was coupled with the condition that the recipient should bring himself within the terms prescribed by the society to the objects of its bounty. It is difficult to see why the doctrine that "fraud nullifies everything tainted by it," which was laid down in Harner *v.* Fisher, should not apply to such a transaction. It may be objected that the claim is beyond the jurisdiction of the Orphans' Court, because it practically denies the title of the decedent to the money. But the doctrine of McBride's Appeal (22 P. F. Sm. 480), if carried to this extent, would place the creditor, whose property had been fraudulently appropriated by a decedent, in a worse position than the creditor to whom the decedent was indebted upon an ordinary contract. In McBride's Appeal, the husband of the testatrix alleged that all the rents which made up the assets in the account filed by her executors were collected from property which belonged to him as tenant by the curtesy. His, therefore, was no claim upon his wife's estate, and not claiming through her, he could not be regarded as a distributee of the fund. In the present case the money was given by claimants to the decedent, and became a part of her estate, and it is now claimed only by virtue of an implied promise to repay. We think the claim should be allowed.

The Auditing Judge was clearly right in refusing to admit the claim of Patrick Magee. It was in evidence that the decedent was taken from the hospital to the house of the claimant, and boarded and nursed by claimant and his wife until decedent's death, some thirty-four weeks afterwards. The decedent directed the treasurer of the savings fund to pay out of her funds on deposit the sum of five dollars per week to the claimant, which was accordingly done. Shortly before her death she requested the treasurer to draft a will for her, leaving her property, after payment of her indebtedness to the St. Rose Society, to her niece, Mrs. Magee, the wife of claimant. The will was not drawn, because the treasurer deemed her to be of unsound mind. On a *quantum meruit*, the claimant might justly have claimed a much higher rate of compensation, but his regular receipt of a stated sum per week was the strongest proof of a contract with decedent, and the amount so paid to him must be regarded as the measure of that contract.

Opinion by ASHMAN, J.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, JULY 31, 1879.* [NO. 14.

Supreme Court.

March 5, 1879.

Lazarus, adm'r., etc., v. Fuller.

Promissory note—Joint and several notes—Interest, payments on account of—Statute of limitations—When right of action is barred notwithstanding payment of interest.

The rule of law by which an endorsement on a note of a payment of interest, in the handwriting of the holder, proven to have been made within six years of the date of the note and action brought, tolls the statute of limitations, is not applicable to a joint and several note.

Clark *v.* Brun et al., 6 WEEKLY NOTES, 294, followed.

Error to the Common Pleas of Lehigh County.

Assumpsit, by William Lazarus, administrator of George Schuyler, deceased, against Orange M. Fuller, executor of J. W. Fuller, deceased, on the following promissory note:—

$500. CATASAUQUA, April 8, 1870.

One year after date we, or either of us, promise to pay to George Schuyler or order, five hundred dollars, with interest, without defalcation, for value received.

[Int. Rev. stamp.] DAVID A. TOMBLER,
J. W. FULLER.

On the back of said note are the following endorsements:—

April 1, 1871, paid interest one year, $30.
April 3, 1872, paid interest one year, $30.
April 1, 1873, paid interest one year, $30.
April 1, 1874, paid interest one year, $30.
April 1, 1875, paid interest one year, $30.
Interest paid on the within note to April 1, 1876.
Interest paid on the within note to April 1, 1877.

Upon the trial, before ALBRECHT, P. J., the plaintiff proved the signature of J. W. Fuller, and offered to prove that the endorsements of interest paid, on the back of the note, are in the handwriting of George Schuyler, deceased; and that they were made at the time they bear date, commencing April 1, 1871, to April 1, 1875, inclusive, the note being dated April 8, 1870, payable one year after date.

Objected to. Objection sustained. Exception.

The plaintiff then offered the note in evidence.

Objected to. Objection sustained. Exception.

The plaintiff resting, the Court entered a compulsory nonsuit, whereupon the plaintiff took this writ, assigning for error the rejection of his offers, and the entry of the nonsuit.

John Rupp (with whom were *J. B. Deshler* and *Hon. A. B. Longaker*), for the plaintiff in error.

An endorsement on a note of a payment on account, in the handwriting of the holder, proven to have been made within six years from the date of the date and time of suit brought, is evidence which will prevent the operation of the statute of limitations.

Addams *v.* Seitzinger, 1 W. & S. 243.
Cremer's Estate, 5 Id. 332.
Burr *v.* Burr, 2 C. 284.

A payment on account of an existing debt is an unequivocal acknowledgment, and will take it out of the statute of limitations.

Barclay's Appeal, 14 Sm 69.

Endorsements of credits on a note made by a promisor before the statute has closed upon the right to maintain suit is an evidence of corresponding payments to remove the bar of the statute of limitations.

Shaffer *v.* Shaffer, 5 Wr. 51.

This being the law, the same rule should prevail when the note is signed by two jointly. The presumption is, that both were principal debtors, and both jointly owed the note.

Bear *v.* Patterson, 3 W. & S. 233.

The case of Clark *v.* Brun et al. (6 WEEKLY NOTES, 294) was decided by a divided Court. It is respectfully submitted that that case should be reconsidered, and the dissenting opinion therein be adopted.

Edward Harvey (with whom were *McClure* and *Hamersly*), for the defendant in error, relied upon Clark *v.* Brun et al. (*supra*).

March 24, 1879. THE COURT. We affirm this judgment upon the authority of Clark *v.* Brun et al. (6 WEEKLY NOTES, 294).

Judgment affirmed.

PER CURIAM. PAXSON, J., absent.

July '78, 106. Jan. 29, 1879.

Filbert v. Bickel.

Partnership—Power of partner to bind his copartner—Admissions—Ratification.

J. T., a member of the firm of T. & F., whose business was the laying of wooden pavement, accepted a draft drawn in favor of the plaintiffs, signing his name "J. T. for T. & F." There was evidence that F., the other partner, had been shown the draft and made offers as to its payment:

Held, that this was sufficient evidence of a ratification by F. to send the case to the jury.

Held further, that evidence tending inferentially to disprove the alleged admission of liability by F. (*e. g.*, that the firm received no consideration) was inadmissible.

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Error to the Common Pleas No. 3, of Philadelphia County.

Assumpsit, by J. F. and J. M. Bickel against Jonathan Taylor and L. S. Filbert, trading as Taylor & Filbert, upon a bill of exchange drawn by Wm. T. Pelton in favor of J. F. and Jno. M. Bickel, and accepted as follows:—

"JOHN TAYLOR,
For TAYLOR & FILBERT."

Pleas, non assumpsit and payment. From the testimony upon the trial, before FINLETTER, J., the following facts appeared:—

Taylor & Filbert were a firm whose business was laying wooden pavements in Washington; Pelton was the owner of certain property in that city, upon which he was erecting a mill; the plaintiffs furnished a boiler and engine to Pelton, who gave them the bill of exchange in suit.

It farther appeared that Pelton was to furnish material to Taylor & Filbert, and that they were anxious to get his mill into successful operation. One of the members of defendant's firm had seen the plaintiffs before the engine and boiler were purchased, and had said: "We furnish the capital because he has no money; he will pay for it by sawing out and treating lumber."

It was in evidence that when the order was given by Pelton to one of the Bickels, they went together to Taylor, who said: "This is all right, but it is not for me; it is for Taylor & Filbert, and so I will accept."

One of the plaintiffs testified that he presented the order in suit to Filbert, who said "he was not prepared to pay it; said nothing about his liability; afterwards offered to pay half of it, and finally to pay the whole of it in District of Columbia evidences of indebtedness."

The defendants offered to prove that the engine was not ordered for them or upon their order; that there was no agreement between them and Pelton for the advance of money to Pelton; that they never received any value, directly or indirectly, on account of the bill in suit: which offers were overruled and exceptions taken.

It was shown that the business of Taylor & Filbert was very extensive; and it was farther in evidence that it was expressly understood between Taylor and ~~Bickel~~ Filbert that the former should not have authority to endorse or accept drafts.

In the general charge the Court said: . . . . On its face the instrument is a draft by Pelton on Taylor, and should have been accepted by him individually, but he refused to accept it in his own name, saying the affair was a firm transaction: in this he was right, if it was a firm transaction, as it was a draft on Taylor personally, it was apparently an individual transaction, and he had no right to use the firm name unless it was a partnership transaction or an incident to the partnership business.

[The plaintiffs contend it was an incident, and if they have satisfied you that it was an incident of the partnership which is admitted to have existed between Jonathan Taylor and Dr. Filbert, the verdict must be for the plaintiffs notwithstanding any question of consideration.]

[I don't understand that the defendants have met the allegations of the plaintiffs' case, if they, the plaintiffs, have established this to be an incident, then it was incumbent upon the defendant to explain it.]

Filbert was on the stand, and it is for you to say how far his testimony rebutted this allegation; I leave the question with you as to whether it was refuted.

[Even if not an incident, if it was acquiesced in by members of the copartnership it would bind them. Mr. Taylor could not say it was anything but a partnership transaction, because of the endorsement he made upon the back; Dr. Filbert was called upon to repudiate Mr. Taylor's right to endorse the firm name; I don't think he has done this successfully; I don't recollect in the course of all this case upon the stand, or elsewhere, that Dr. Filbert has repudiated Mr. Taylor's right to endorse the firm name.] If I err, you have the facts before you and will judge accordingly.

[Much has been said about the defendant's agreement to pay. The Bickels say Dr. Filbert said it was all right, and agreed to pay half, and that on one occasion he agreed to pay all if they would accept payment in District of Columbia evidences of indebtedness. His agreement to pay part of it or all of it in a particular manner is evidence from which his acquiescence may be inferred.]

[He admitted liability for one-half, and agreed to pay it upon condition. You have nothing to do with the condition; it is your duty to say how far his agreement to pay half is an acquiescence in the act of Taylor, and how far such acquiescence makes it the act of the firm, no matter how little consideration passed or how foreign it was to the partnership business.]

Verdict and judgment for plaintiffs for the full amount.

The defendants took this writ, assigning as error (in twenty-three assignments) the admission of plaintiffs' and the rejection of defendant's testimony, and the portions of the charge of the Court inclosed in brackets.

Wm. Henry Smith, for plaintiffs in error.

The business of Taylor & Filbert was not such as made the acceptance of a draft within the ordinary scope of a partner's employment, hence the acceptance by Taylor was insufficient to bind his partner.

Byles on Bills, *45.
Hedley *v.* Bainbridge, 2 Gale & D. 483.

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Slocum *v.* Sibley, 5 Martin, 682.
Clay *v.* Cottrell, 6 Har. 409.

The power of a partner to bind the firm is on the ground of agency; hence any act beyond the line of agency is inoperative.

Story on Agency, § 125.
Haslehan *v.* Young, 5 Ad. & E., N. S. 833.

In order to allow the admissions of Bickel to operate as a ratification, it must be shown that he knew he would not be bound without the ratification.

Burleigh *v.* Parton, 21 Texas, 585.
Slaymaker *v.* Irwin, 4 Wh. 381.

A. B. Shearer, for defendants in error.

One partner has an implied authority to bind his firm by contracts relating to his firm business.

Hill *v.* Voorhies, 10 Har. 68.
Winship *v.* Bank, 5 Peters, 529–561.

And in a large business such as the plaintiffs in error carried on, accepting a draft is not a very unusual exercise of authority. Bickel's ratification was, however, entirely sufficient, even though the acceptance were defective.

Evans *v.* Mengel, 6 W. 72.
McCullough *v.* McKee, 4 H. 289.
Bredin *v.* DuBarry, 14 S. & R. 27.
Kelsey *v.* Bank, 19 Sm. 426.

March 3, 1879. THE COURT. There are twenty-three assignments of error. Jonathan Taylor had accepted a draft for Taylor & Filbert, and the question was his authority. There was such a firm, whose business was laying wood pavements in Washington City. The consideration of the draft was an engine and boiler sold by the Bickels to one Pelton, and the draft was by Pelton on Taylor. Pelton had a mill at which blocks were made for Taylor & Filbert. Filbert's admissions were given in evidence that they furnished capital to Pelton to carry on the mill, and that on being shown the order accepted by Taylor, he said it was all right. Upon a question of partnership, the declarations of each of the parties charged are admissible against himself, though not as against the others, and so also the declarations of third persons in the presence of either not denied. The Court should be called on to instruct the jury as to the applicability of such evidence to each respectively. There was no error in refusing to permit the defendant Filbert to contradict his own admissions. If the jury believed Bickel's testimony as to Filbert's admissions and declarations, and without they did so the plaintiff had no case, it was not material what the facts were, so far as Filbert's liability as a partner on the acceptance was concerned.

Judgment affirmed.

PER CURIAM.

July, '78, 146. Jan. 20, 1879.

Easby v. Patterson.

Contracts—Wharves and docks on the river Delaware—Dockage—Assumpsit for use and occupation—Pleading.

In an action for use and occupation, a contract express or implied must be proved.

A. occupied the dock adjoining B.'s wharf on the river Delaware with lighters unloading a ship at the next wharf, so that no vessel could use B.'s wharf without the removal of the lighters. A. refused to pay dockage to B. There was no evidence that any vessel had been prevented from coming to B.'s wharf on account of this occupation. In an action for assumpsit for use and occupation brought by B.

Held, that judgment of nonsuit was properly entered.

Error to the Common Pleas No. 4, of Philadelphia County.

Assumpsit by William Easby against Robert Patterson & Son for the use and occupation of plaintiff's dock.

On the trial, before THAYER, P. J., it appeared that the plaintiff was the owner of a wharf on the Delaware River, at the foot of Queen Street, in the city of Philadelphia. The defendants were lightermen, whose business it was to load and unload vessels lying at the wharves. Between the plaintiff's wharf and the one adjoining was a dock eighty feet in width, as required by the Act of Assembly of April 8, 1868.* In June or July, 1876, a vessel was lying in the dock, moored to the side of the wharf adjoining plaintiff's, and the defendants were employed in discharging the cargo or ballast, and occupied the dock room to within a few feet of plaintiff's dock. The plaintiff testified: "I do not know that they" (the lighters) "actually prevented any vessel coming to my wharf. I do claim for the use of my dock, although it was not then used by me; just as I should claim if a man used my unoccupied house. I cannot give you any instance in which a vessel was prevented from coming to my wharf by the defendants' acts above detailed. My claim is for use and occupation; there was no instance of special damage." It was also in evidence that plaintiff had requested payment, which was refused; and that he had cast off the lines which had been made fast to his wharf from the lighters, but he distinctly disclaimed making any charge except for the use of the dock.

* "No license shall be granted under which a new wharf is to be built unless the property from which said wharf is to be extended shall have appertaining thereto sufficient breadth to have a dock or water surface at least forty feet wide on each side of such wharf, unless said Board of Wardens, by a vote of a majority of the whole Board, shall decide that the public convenience demands a variance from this rule in any particular case." P. L. 756.

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On defendants' motion the Court entered a nonsuit, which the Court below refused to take off. Plaintiff took this writ of error, assigning for error the refusal to take off the nonsuit.

Hunn Hanson, for plaintiff in error.

The Commonwealth has conferred upon the plaintiff the right to charge for the use of the dock (Act of April 8, 1868, P. L. 755, sec. 2).

"The water or dock left for the use of any wharf shall remain vested in the Commonwealth subject to existing laws, but the owner of such wharf shall be entitled to charge and receive compensation for the use of the same, and to enjoy all the rights and privileges in connection therewith to which he is now by law entitled." The word "*same*" clearly refers to "the water or dock left," etc., and the proviso is inserted because of the declaration in the first clause of the section that the water or dock shall remain vested in the Commonwealth. No Act was necessary to permit the owner of the wharf to charge for *its* use. The interpretation must be in accordance with common sense.

Gyger's Estate, 15 Sm. 31.
Comm. *v.* R. R. Co., 3 Sm. 62–9.

There is a special provision for cases of dispute in regard to the charge for dockage. Act April 8, 1851, sec. 5 (P. L. 354).

It was enough to show occupation and the right to payment, without any special damage.

The right to charge for dockage and moorage existed at common law.

Liby's Entries, 38.
3 Wentworth, Pl. 61
Chitty on Pl., 42, 7 ed.

N. Dubois Miller (with whom was *A. Sydney Biddle*), contra.

The title to the water remaining in the Commonwealth, plaintiff must show some special authority to charge for its use; it required an Act of Assembly to give title in the riparian owner even to the wharf.

Tinicum Fishing Co. *v.* Carter, 11 Sm. 301.

And assumpsit cannot be maintained by one in whom there is no title.

Stephens *v.* Coster, 1 Wm. Black. 423.
C. & A. R. R. Co. *v.* Finch, 5 Sanf. (N. Y.) 48.
Sherlock *v.* Bainbridge, 41 Ind. 35.
Original Hartlepool Collieries Co. *v.* Gibb, L. R., 5 Ch. Div. 713.

There can be no implied contract, there is no *quid pro quo*.

Hanson, in reply.

The license to charge for the use of the dock was property, and although defendants might have been trespassers, yet the plaintiff may waive the trespass, and sue upon the contract.

Howard *v.* Shaw, 8 M. & W. 111.

February 10, 1879. THE COURT. We think it very clear that the evidence showed no such permissive occupation of the plaintiff's wharf or dock as would raise an implied assumpsit. It did not appear that the plaintiff was at any time prevented from the full enjoyment of his property. The defendants refused to pay when required to do so, and the plaintiff and his son cast off the line from his wharf. In an action for use and occupation, a contract, expressed or implied, must be proved. (Brolasky *v.* Ferguson, 12 Wright, 434). So far from the plaintiff having consented to the defendants' occupation, the evidence showed a distinct refusal on his part. It would be confounding all the distinctions in the legal forms of actions to sanction a recovery under these circumstances, and the learned Judge below was entirely right in entering a nonsuit.

Judgment affirmed.

PER CURIAM. WOODWARD, J., absent.

Jan. '79. March 12, 1879.

School District, Denison Township, v. Padden.

School laws—Act April 11, 1862—School board cannot act except as by law directed—Authority to engage teachers—Power to delegate authority.

The Act of April 11, 1862 (P. L. 623), prescribing that school teachers can be selected only by a vote of the school board is to be strictly followed, and a contract made by the President and Secretary of the Board cannot be enforced.

Per GORDON, J., "No contract for the employment of teachers should extend beyond the current school year."

Error to the Common Pleas of Luzerne County.

This was originally an action brought by Martin Padden against the school district of Denison Township before an alderman of the city of Wilkesbarre, to recover the wages due his minor daughter as school teacher. Before the alderman there was a judgment for the plaintiff, from which the defendant appealed.

In the Court below, the plaintiff put in evidence a sealed agreement, dated May 14, 1877, signed by Rosa Padden, and by John O'Dea, President of the board of school directors, and countersigned by Michael McDermott, Secretary of the board, whereby Miss Padden was engaged as teacher for the period of six months. It was shown that she had received pay for two months.

The defendants offered to show that by a resolution of the board the schools were ordered to be closed during the summer, that Miss Padden had refused to comply with the direction and had thereupon been dismissed, but the offer was overruled.

On the trial the Court (STANTON, J.) charged the jury: "Mr. O'Dea was the President of this

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board, Mr. McDermott was its Secretary, and, as far as we are informed on the law, it is within their province to make and execute contracts, with the approval of the school board. We have no hesitation, therefore, in saying to you that this agreement offered in evidence is entirely legal, and stands upon a legal foundation."

Verdict and judgment for plaintiff. Defendants took this writ, assigning for error the rejection of the evidence offered, as above stated.

E. A. Osborne, for plaintiff in error.

The Act of Assembly of April 11, 1862 (P. L. 623), prescribes that no teachers shall be hired except by the affirmative votes of a majority of the whole number of directors; it was incumbent on the plaintiff below to show that this necessary prerequisite to her contract had been complied with, and having failed to do so her case failed.

The directors had the power to dismiss Miss Padden, even if she had been legally hired.

Burton *v.* Fulton, 13 Wr. 151.

John T. Lenahan (*John Lynch* with him), for defendant in error.

The board waived any right to claim the contract as invalid by recognizing the plaintiff's daughter as their teacher, and by paying her for two months.

May 7, 1879. THE COURT. It is very certain that O'Dea, the President of the board of directors, had no power merely by virtue of his office to employ teachers. By the Act of April 11, 1862, teachers can only be selected by the school board, and so specific is this Act upon this subject, that it requires the names of members voting both in the affirmative and negative to be recorded upon the minutes. This is the only manner in which teachers can be selected, and from the very nature of things, this power cannot be delegated. Before effect could be given to the contract exhibited by the plaintiff it was necessary to show not only that O'Dea was regularly constituted agent of the board, but that Miss Padden had been selected as a teacher by the previous action of the directors.

This statute is a valuable one, intended to compel expression of each individual member of the school board on a subject all important in the public education, and this for the very purpose of preventing jobbery, and the exercise of a one man power in the conduct of our common schools. We are, therefore, not inclined to permit the abrogation of its force and efficiency by a weak construction designed to meet a particular case. The plaintiff failed in that he did not show authority in the pretended agent who executed the contract, and in that he did not show that his daughter had been previously designated by the board as one for the services of whom such a contract might be made. But not only was this contract unwarranted in itself, but the Court permitted it to be used to overrule a previous resolution of the board of April 28, 1877, by which the vacation for the months of July and August had been ordered, and so to absolutely strip that body of its proper and lawful discretion in the government of the schools. On the 7th of July the directors ordered the vacation already directed by the ordinance above mentioned, but to this the contract of O'Dea was opposed, and to it the Court below gave effect to the exclusion of the action of the board. This was all wrong. O'Dea and the Secretary were not the school board, and their assumption of power was wholly unwarranted. Even supposing the contract to have been properly authorized, it nevertheless could not take from the public authorities the reasonable control and government of the schools. In every contract for the employment of teachers, such power must be taken to be reserved, otherwise great detriment might result to the administration of this important public trust, and its efficiency might be seriously crippled. Public officers cannot, by contract or otherwise, make over to private persons their functions or powers, for these are committed to them for the public welfare, and not for private gain. As long as their contracts do not compromise the common good, or tend to defeat the purposes for which they are elected, they may be enforced, but when they pass this line, they have no legal efficacy. Judged by this standard, the resolution of the seventh of July seems to us to have been but a reasonable and proper exercise of official discretion, and should have been admitted in evidence. For the two months which Miss Padden taught she was entitled to pay, not because of the contract made with the President, but because the school district had, without objection, received her services; for these two months' services she received full compensation; this was all she had a right to demand, and so it follows that the present action was not well brought.

We may take occasion to say here, that no contract for the employment of teachers should extend beyond the current school year. There are two reasons why such contracts should not be allowed: first, the incoming board should be left free to act for itself, unincumbered by the acts of its predecessor; second, the action of the county superintendent in refusing, as he may, certificates to teachers thus employed, may give rise to serious embarrassments, and lead to disputes and complications that should, when possible, be avoided.

Judgment reversed.

Opinion by GORDON, J.

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Jan. '79, 49. Jan. 8, 1879.

Overseers of Poor of Williamsport v. Board of Guardians of Poor of Philadelphia.

Courts—Jurisdiction—Mandamus—Paupers—Remedy for costs of removal of paupers—Act of April 15, 1867, construed—Status of Board of Guardians of the Poor of Philadelphia.

When no appeal is taken from the order of removal of a pauper, jurisdiction in relation to expenses thereof is not given to the Quarter Sessions of the removing district by the Act of April 15, 1867; the remedy for costs of removal in such case must be sought in the Courts of the district to which the pauper is removed.

The Board of Guardians of the Poor of Philadelphia are but a department of the city; proceedings to enforce the expense of maintaining and removing a pauper should be had against the city.

Upon petition of the Overseers of the Poor of Williamsport to the Court of Quarter Sessions of Lycoming County, it was decreed that the Board of Guardians of the Poor of Philadelphia pay the expenses incurred by the former in maintaining a pauper and removing him, upon order duly made, from Williamsport to Philadelphia. The Overseers of the Poor of Williamsport filed in the Court of Quarter Sessions of Philadelphia County a copy of the record of the Court of Quarter Sessions of Lycoming County, and a petition for a mandamus on the treasurer of Philadelphia to pay the sum named in the decree:

Held (sustaining the Court below), that even if the proceedings had been correctly instituted against the city of Philadelphia, instead of the Board of Guardians of the Poor thereof, the mandamus would have been properly refused.

Certiorari to the Quarter Sessions of Philadelphia County.

The petition of the Overseers of the Poor of the city of Williamsport, Lycoming County, to the Court of Quarter Sessions of Philadelphia County set forth: That upon complaint of the petitioners, it was adjudged by two justices of the peace of the district of Williamsport that Peter Kelley, a pauper, should be removed therefrom to the city of Philadelphia, the place of his last legal settlement; that the order of removal was accordingly served upon, and the pauper was delivered to, the Guardians of the Poor of the city of Philadelphia; that the said Guardians of the Poor did not appeal from the said order of removal, but refused to pay the expenses of the maintenance and removal of the pauper; that the petitioners obtained a rule upon the Guardians of the Poor of the city of Philadelphia to appear at the next term of the Court of Quarter Sessions of Lycoming County, and show cause why the said expenses should not be paid, which rule, together with a rule to take depositions in support thereof, was duly served upon the Guardians of the Poor of Philadelphia, and they were represented by attorney at the taking of the depositions; that the Court of Quarter Sessions of Lycoming County decreed that the Guardians of the Poor of Philadelphia pay to the petitioners the said expenses; that payment of the same has been refused, and the record of the Court of Quarter Sessions of Lycoming County has been filed in this Court. The petition prayed that a mandamus issue to D. P. Southworth, Treasurer of the city of Philadelphia, commanding him to pay the amount of the decree.

Upon a rule to show cause why the prayer of the petition should not be granted, the petition was dismissed. Whereupon the plaintiffs took this writ, assigning as error the refusal of the Court to issue the mandamus.

T. D. Beeber, for the plaintiffs in error.

The right to payment and the remedy is prescribed by the Act of April 15, 1867, which declares two things: (1) The district accepting the poor person shall be liable for the expenses, (2) "in the same manner and to the same extent as it would have been had the case been determined against it by the Court of Quarter Sessions, upon an appeal from said order of removal."

The first part of the Act was enacted to remedy the defect discovered in Directors of Schuylkill *v.* Overseers of Montour (8 Wr. 484). The second part intends that, when no appeal has been taken, the Act of June 13, 1836, §§ 20 and 22 should be followed.

Had the defendant appealed from the order of removal to the Quarter Sessions of Lycoming County, and the appeal been dismissed, the Board would have been ordered to pay costs, and the order would have been enforced on production of the record in the Quarter Sessions of Philadelphia. The Act of 1867 provides that exactly the same course shall be followed when no appeal is taken.

It is not possible, by refusal to appeal, to annul the effect of the Act of 1867.

An action in the Common Pleas of Philadelphia will not lie.

Directors of the Poor of Chester Co. *v.* Malany, 14 Sm. 144.

[SHARSWOOD, C. J. Whenever the Act provides a remedy, it must be followed; but if none were given, the action would lie.]

C. E. Morgan, Jr., Assistant City Solicitor (with whom was *W. Nelson West*, City Solicitor), for the defendant in error.

Since the passage of the Consolidation Act of 1854, the Board of Guardians of the Poor has ceased to have a separate corporate existence, and has become a department of the city of Philadelphia. The rule for a mandamus should have been directed against the municipality. But even if the proceedings had been properly instituted, the Quarter Sessions of Lycoming County acted in excess of its power.

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By the Acts cited, no authority was given that Court, either to compel overseers of the poor of other counties to come before it, and to subject themselves to its jurisdiction, or to make orders or decrees against boards or overseers, neither represented before them, nor parties to the proceedings.

Where there was no appeal, the Court had no authority to decree the payment of the costs.

Directors of Schuylkill *v.* Overseers of Montour, 8 Wr. 484.

Renovo Overseers *v.* Half-moon Overseers, 28 Sm. 301.

The effect of the Act of 1867 was simply to create a liability for costs and charges in cases where, prior to its passage, no such liability existed.

If in this case there be any liability of the city of Philadelphia to the Overseers of the Poor of Williamsport, it can only be enforced by an action at law in the Courts of Common Pleas of Philadelphia County.

January 27, 1879. THE COURT. It would be enough to say that the defendants are but a department of the city, and if there is any liability, the proceeding ought to be against the city itself. The rule in the Quarter Sessions of Lycoming County was taken against the department, and served upon its officers, and so was the rule to take the depositions. The city was in no way bound by such a rule or service. But passing this fatal defect in the proceeding, we are of opinion that the Court of Quarter Sessions of Lycoming County had no jurisdiction. It is true that the Act of April 15, 1867 (Pamph. L. 84), has enacted that a district accepting a poor person shall be liable to the removing district for costs and charges "in the same manner and to the same extent" that they would have been had there been an appeal. It is supposed that this gives jurisdiction to the Court to which there would have been an appeal. But this is a very violent construction of the words. How is that Court to enforce its judgment? The Act is silent. Surely not by mandamus to another county. The plaintiffs admit they must seek their remedy in the Court of the county to which the removal has taken place, by their application to the Court below to enforce the order of the Court of Lycoming County. This shows that the proceeding to enforce the liability created by the statute must be in the Courts of the county of the accepting district, to whose jurisdiction it is subject.

Proceedings affirmed.

PER CURIAM.

July, '78, 58. Jan. 20, 1879.

Twining v. Hunt.

Bills and notes—Promissory note—Accommodation maker—Want of consideration by holder—Pledge by payee for antecedent debt.

In the absence of fraud the maker of an accommodation note cannot set up want of consideration as a defence against a holder, with notice to whom it has been pledged as collateral security for an antecedent debt by the payee, for whose accommodation it was made.

Appleton *v.* Donaldson, 3 B. 381, and Lord *v.* The Ocean Bank, 8 H. 384, followed. Royer *v.* The Bank, 2 Nor. 249, distinguished.

Error to the Common Pleas No. 1, of Philadelphia County.

Assumpsit, by Jacob Hunt, against Watson Twining, on two promissory notes made by Twining, one to the order of W. R. Hunt & Co., and by them indorsed, the other to his own order, indorsed by himself and W. R. Hunt & Co.

Additional and supplemental affidavits of defence disclosed, "that the notes in suit in this case were given by defendant to W. R. Hunt & Co., the payees, without any consideration whatever, and upon the agreement as heretofore stated in defendant's affidavit of defence, viz., that said W. R. Hunt & Co. agreed to take care of said notes, so that no liability should occur to this defendant by reason thereof, and to return the notes to defendant. That the plaintiff admitted to the defendant that he well knew, at the time of receiving the notes, of the said arrangement between this deponent and W. R. Hunt & Co., the payees, and knew that the said notes were to be paid by W. R. Hunt & Co., and not by this defendant. That defendant is informed and believes, that said W. R. Hunt & Co., the payees, prior to the giving of the notes in suit, were indebted unto the plaintiff for money borrowed of him, and that these notes were given to him as collateral security for the said antecedent debt, and that the said notes were not given to or taken by the plaintiff as a payment upon his acount against the payees, nor was any extension of time, or credit, or other consideration given by the plaintiff to the payees, or any other person, for said notes."

The Court entered judgment for want of a sufficient affidavit of defence. Defendant took this writ of error, assigning as error the entry of the judgment.

B. F. Wagner, for plaintiff in error.

Jacob Hunt was not a holder for value of the notes in suit; he was in no better position than the payees.

Royer *et al.* *v.* Keystone Nat. Bank, 2 Norris, 249.

Rudolph M. Schick, contra.

This case differs from the one cited, in that no fraud is alleged here.

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The payee of a note, made for his accommodation, may pledge it to secure his antecedent debt.

Appleton *v.* Donaldson, 3 B. 386.
Lord *v.* Ocean Bank, 8 H. 384.

The only point of difference in this case, is in the fact that plaintiff knew that these were accommodation notes; but the question of notice is immaterial. The only question is that of consideration, as the cases show.

Cummings *v.* Boyd (2 Norris, 372) recognizes the right of the holder of an accommodation note to pledge it for an antecedent debt.

February 10, 1879. THE COURT. This case is ruled by Appleton *v.* Donaldson (3 Barr, 381), and Lord *v.* The Ocean Bank (8 Harris, 384), which have settled the law in this State that the maker of an accommodation note cannot set up want of consideration as a defence against it in the hands of a third person to whom it has been pledged as collateral security for an antecedent debt. Royer *v.* The Bank (2 Norris, 249) does not shake this principle in the least, for that was a case in which there had been a wrongful use of the paper by the payee.

Judgment affirmed.

PER CURIAM. WOODWARD, J., absent.

Jan. '78, 264. Jan. 21, 1879.

Mayer v. Senyard et al.

Decedent's estates—Trustees—Fraud—Administrator's purchase at his own sale, when void—Tender.

Where an administrator at the sale of his decedent's estate discouraged bidders with the view of procuring the property himself at a low price, and he purchased it through a third party, though not at a gross undervalue, the sale is fraudulent and void without regard to the price the property actually brought and the owners of such property are entitled to recover in ejectment, against such purchaser, without a tender of the purchase-money.

Error to the Common Pleas No. 4, of Philadelphia County.

Ejectment, by Senyard in right of his wife Elizabeth, James Mayer, and Thomas Mayer against Francis Mayer, for a lot of ground and two houses thereon erected. Plea, not guilty.

At the trial, before BRIGGS, J., the plaintiffs showed title to the premises in John Mayer, through whom the defendant also claimed. The plaintiffs were the children of John Mayer, who, as well as his wife, was dead. The defendant showed that Mary Mayer, wife of John, became his administratrix, and that on her death the defendant became John Mayer's administrator *d. b. n.*, on December 3, 1858; that he shortly afterwards petitioned the Orphans' Court for an order of sale of the decedent's real estate to pay his debts, on the ground of insufficiency of assets; that the schedule of debts annexed to the petition included $440, due on a mortgage of the premises given by the decedent to the Union Building Association, and $190 due Bridge & Cline; that the order of sale was granted, the premises in suit sold to James Bridge of the firm of Bridge & Cline, for $580, the sale confirmed, and the premises conveyed to Bridge on June 28, 1859; that on June 6, 1860, the defendant filed his account as administrator, charging himself with $580, the proceeds of the above sale, and crediting himself with $364 paid on account of the Union Building Association mortgage, and other payments, amounting together to $634.84, leaving a balance due the accountant; that on December 5, 1860, Bridge conveyed the premises in suit to the defendant.

The plaintiffs in order to show that the defendant obtained title fraudulently, called one McStay, who testified that he went to the Orphans' Court sale intending to bid for the premises, that he bid $500 when the defendant came to him and advised him to stop bidding as Bridge would buy the property at all events, that he stopped bidding accordingly. On cross examination he said he would have given $550 for the premises. Another witness testified that before the sale the defendant asked him to bid for him in case Bridge should be absent, that he went to the sale and the defendant told him that his man was there. The defendant, when called by the plaintiffs, testified that he paid Bridge his claim of $190, against the decedent's estate; he did not claim credit for this payment in his account, and there was some evidence that he had settled this claim on Bridge's conveyance to him of the premises in suit. The defendant admitted that he had not charged himself with their shares of stock of The Workingmen's Building Association, standing in the decedent's name, and worth about $300, that he had transferred this stock to Bridge who borrowed $300 thereon, which he gave the defendant towards the purchase at the Orphans' Court sale, that this was the only part of the purchase-money that Bridge paid him, and that this $300 formed part of his payment of $364, on account of the Union Building Association mortgage. One witness testified that at the time of the Orphans' Court sale the premises were worth from $800 to $1000.

The defendant, in rebuttal, called several witnesses who testified that at that time the property was worth from $500 to $600. He showed that, after the sale, Bridge called on a conveyancer and offered to sell the property for $700, and he offered to prove that in consequence of this visit the conveyancer negotiated Bridge's transfer to

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the defendant. Objected to. Offer rejected. Exception.

The plaintiffs presented, *inter alia*, the following point: (4) If the defendant discouraged bidding at the sale, by McStay and others, and if he procured Bridge to buy the property, and then, by paying Bridge's claim, got a transfer of his title, the verdict must be for the plaintiffs. Affirmed.

The defendant presented, *inter alia*, this point: If the jury believe the defendant, as administrator, purchased at his own sale, plaintiffs cannot recover unless they repay him the price paid by him, as his price was received by the distributees of the decedent, the sale has been affirmed, and the verdict should be conditional, that plaintiffs shall receive a deed for the premises if, within ninety days, they pay the sum of $580. *Answer*. This is so if you find that the purchase is not tainted with fraud, but if the defendant fraudulently induced any one not to bid, with a view of obtaining the property for himself, you should render your verdict for the plaintiffs.

In his general charge the learned Judge said, *inter alia:* "If the defendant arranged with, or persuaded any one not to bid so that he, or some one for him, might purchase the property at a less price than he otherwise could, such was more than a mere intention to perpetrate fraud; it was an act done in the execution of a fraudulent design; and if you find that the defendant did this, you should find a verdict for the plaintiffs irrespective of the money he paid."

Verdict and judgment for the plaintiffs. The defendant took this writ assigning for error, *inter alia*, the answers to the above points and the portion of the charge quoted.

Pancoast (with him *Sellers*) for the plaintiff in error.

Unless there was actual fraud at the Orphans' Court sale, we were entitled to a conditional verdict. The learned Judge instructed the jury that if they found certain facts, the fraud of the defendant was established irrespective of the price of the premises with which he charged himself.

The question whether the property sold for its full value was throughout ignored, especially in the answer to the plaintiff's fourth point. To make a sale absolutely void so that the former owner can recover without repayment of the purchase-money, it must be shown that the purchaser, or somebody for him made false representations, and that by reason of such representations he obtained the property at less than its value.

Dick *v.* Cooper, 12 Har. 222.
Sharp *v.* Long, 4 Cas. 437.
Abbey *v.* Dewey, 1 Cas. 413.

If the rejected evidence had been admitted it would have shown the absence of collusion between the defendant and Bridge.

F. F. Brightly, contra.

The case went to the jury on the question of actual fraud. Whether the price was adequate or not, the fraudulent intent was shown by the fraudulent expedients. Ejectment lies against a trustee *ex maleficio* without a tender of the purchase-money or the value of the improvements.

Riddle *v.* Murphy, 7 S. & R. 230.
Gilbert *v.* Hoffman, 2 Watts, 66.
Eberts *v.* Eberts, 5 Sm. 110.
Grim *v.* Grim, 1 WEEKLY NOTES, 79.

The defendant's account as administrator has not been confirmed. He admitted that he failed to charge himself with the value of the decedent's stock in the Workingmen's Building Association; under these circumstances, a simple charge in an unconfirmed account cannot be considered as a payment to the estate.

February 10, 1879. THE COURT. This case was put to the jury by the learned Judge below as a question of actual fraud. If the defendant below discouraged bidding at his own sale as administrator, with the design of thereby procuring the property for himself it was an actual fraud. Even if he did not succeed so far as to procure the property at an undervalue, that did not purge his action of its fraudulent character. He did become the purchaser through an agent, and it is a violent presumption that he had a fraudulent purpose, or he would not have resorted to fraudulent means to accomplish it. We think therefore the rulings of the Court below on questions of evidence were right, and that the case was properly submitted to the jury.

Judgment affirmed.

PER CURIAM.

Common Pleas—Law.

C. P. No. 2. March 3, 1879.

In re Catharine Irwin.

Adoption of children—Act of May 4, 1855—The Court cannot annex conditions to a decree of adoption.

Sur petition for adoption.

Samuel R. C. Matthews and wife filed their petition asking that the Court, under the provisions of the Act of May 4, 1855 (Purd. Dig. 61), would decree that a certain child, Catharine Irwin, should assume the name of the petitioner,

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and have all the rights and be subject to all the duties of a child and heir of the petitioners.

The answer of Thomas L. Gillespie, next friend of the child, united in the prayer of the petitioners, but asked that it be modified, so as to give to an agent of the Home Missionary Society (with which the child had been living, its parents being dead) the privilege of visiting the child.

[HARE, P. J. We cannot make a decree giving any such right to the Missionary Society; our authority under the Act is to decree the adoption of the child, which then becomes, like any other child, subject to the authority of the parent, without interference from other persons.]

Decree for adoption made, with the clause reserving right to visit the child stricken out.

C. P. No. 3. July 5, 1879.

Edridge v. Madden, owner, and Joynes, contractor.

Mechanics' lien—Sheriff's sale of premises while additions and repairs are in course of completion—Where materials were furnished prior to sheriff's sale, but claim filed after the sale there is no lien against the premises in the hands of the sheriff's vendee.

Case stated, sur mechanic's claim, showing the following facts:—

On December 2, 1878, the Frugality Loan and Building Association purchased at sheriff's sale a certain house and lot, taken in execution and sold as the property of one Madden, under a mortgage executed by him to one Pickering in 1874. Some time prior to said sheriff's sale, the said Madden (being then the owner) began to make certain additions and repairs to the premises, which repairs, etc., were in course of completion at the time of the sheriff's sale. The bricks used for said additions, etc., were furnished by the plaintiff, at Madden's request, between the 2d and 9th of November, 1878. On May 2, 1879, the plaintiff filed this claim for $61\frac{12}{100}$, for the price of said bricks.

"If the Court should be of opinion that said sheriff's sale of December 2, 1878, discharged said claim, then an order to be entered directing the clerk to mark said claim 'discharged by order of Court;' otherwise judgment to be entered for plaintiff for $61.12, with interest and costs."

H. R. Edmunds, for plaintiff.

F. W. Shain, for defendant.

Eo die. THE COURT. "Lien discharged by order of Court, as per case stated."

U. S. Circuit Court—Equity.

District of New Jersey. 1877.

Kintzing v. Hutchinson.

Decedent's Estates—Collateral inheritance tax, Lex domicilium—Situs of personal property for purposes of taxation—Pennsylvania statutes of 7 April, 1826, and 11 March, 1850.

The choses in action, such as bonds, stocks, debts, etc., of corporations and individuals in Pennsylvania, belonging to a decedent domiciled at his death in New Jersey, and passing to a collateral heir, not under the intestate laws of Pennsylvania, nor under any administration granted therein, but under the laws of New Jersey, are not subject to the Pennsylvania collateral inheritance tax.

H. died domiciled in New Jersey, leaving personal property in Pennsylvania, consisting of stocks, bonds, and debts of corporations and individuals there, which passed under the laws of New Jersey to his collateral heirs. Administration was taken in New Jersey, and the assets in Pennsylvania were collected under the foreign letters without an ancillary administration in Pennsylvania. In a bill in equity by the collateral heir to compel the administrators to return certain securities deposited with them by her to meet whatever collateral inheritance tax should be due on her share of this personal property:

Held, that no collateral inheritance tax was due to the State of Pennsylvania; that the Acts of 7 April, 1826, and 11 March, 1850, did not apply to cases of this character.

Hearing upon bill and answer.

Bill in equity, filed by Elizabeth L. Kintzing, a citizen of New York, against Mahlon Hutchinson, a citizen of the State of New Jersey, and Samuel J. Sharpless. The bill alleged that John P. Hutchinson was in his lifetime a citizen of New Jersey, and was domiciled in that State at the time of his death, on February 11, 1875; that he died intestate, possessed of a large personal estate, and that the complainant, as one of his nieces and next of kin, became entitled to one-fifteenth part of his personalty, distributable by his administrators after payment of his debts and the expenses of the administration; that the intestate at his death was possessed of stocks and loans, both coupons and registered, of various municipal and other corporations chartered under the laws of Pennsylvania, stocks of sundry National banks, organized under Acts of Congress, and carrying on business in said State, debts secured by bonds and mortgages on real estate within said State, and loans of the said Commonwealth of Pennsylvania; that administration was granted on the estate of said John P. Hutchinson by the Surrogate of Burlington County, New

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Jersey, to the defendants, Mahlon Hutchinson and Samuel J. Sharpless, and Benjamin P. Hutchinson, since deceased; that the surviving administrators by virtue of the Act of Assembly of the State of Pennsylvania of April 8, 1872 (P. L. 44), filed of record with the Register of Wills of Philadelphia County a certified copy of the letters of administration granted them in New Jersey, and by means thereof, under the provision of said Act, they became empowered and authorized to, and did collect, sell, assign, and convert the assets, securities, and personal property of their intestate within the State of Pennsylvania, and carried the proceeds into their accounts as filed in Burlington County, New Jersey, without taking out, or being required by law to take out, ancillary letters in Pennsylvania or accounting there; that the defendants had filed their final account, which had been duly confirmed, in which they had included the proceeds of all the assets, securities, and personal property of their intestate realized in Pennsylvania, and that complainant had been paid her distributive share thereof.

The bill further averred that, before such payment was made to her, she was required to and did deposit with the defendant's administrators as aforesaid, $3000 of Pennsylvania Railroad registered bonds, and $1000 of Lehigh Valley Railroad registered bonds, which they were to hold for the purpose of enabling them to pay out of the proceeds such sum for collateral inheritance tax upon the complainant's share of said John P. Hutchinson's estate, derived from investments in Pennsylvania, as might be determined to be due, and to reimburse them for all expenses of counsel fees, costs, and charges in reference to any claim for this tax.

The bill further averred that, under the laws of Pennsylvania at the death of the intestate, no collateral inheritance tax had legally accrued to the State, and that none of the laws of that State then in force had assumed to charge or impose this tax upon personal estates of decedents within this Commonwealth, who were at their deaths domiciled in another State or country, and that any Act assuming to impose such a tax would be unconstitutional; that no claim for the tax had ever been made by the State of Pennsylvania, and that as all the assets of the estate had been withdrawn from Pennsylvania, and the estate settled, the complainant was entitled to have the securities deposited by her with the defendants to meet this tax, returned to her; but that her request for the surrender and return of the said securities had been refused by the defendants.

The bill prayed: (1) a disclosure by the defendants of the assets of their intestate which were in Pennsylvania at his death, and which had been realized from and brought into their accounts; (2) that the defendants disclose whether any claim for this collateral inheritance tax had been made upon them; and (3) that it be decreed that no collateral inheritance tax is due by the complainant on her share of said estate, and that the defendants deliver up and surrender to the complainant the said bonds deposited by her with them.

The answer of the defendants admitted the material facts averred in the bill, and set forth in detail the various assets of the personal estate of the intestate which, at the time of his death, were in the State of Pennsylvania. The defendants admitted holding the securities claimed, on the terms stated in the bill, and expressed a willingness to return them if it should be judicially determined that no collateral inheritance tax was due by the complainant on her share of the estate. That the Attorney-General of the Commonwealth of Pennsylvania had been notified of the pendency of this suit, and called on to intervene and assert whatever claim the said Commonwealth might have against the securities so deposited with the defendants for or in respect of the collateral inheritance tax in question.

John G. Johnson, for the complainant.

The case of the Foreign-held Bonds (15 Wallace, 300) is conclusive against the right of a State to tax debts due by its citizens to foreign creditors, and rules this case as to all the personal property sought to be taxed, save the stock of corporations chartered by the State of Pennsylvania; and shares of stock of this character are neither within the letter nor spirit of the collateral inheritance Act of 7 April, 1826 (9 Sm. L. 146; Purdon, p. 214, pl. 1). The words "being within this Commonwealth" in this Act, refer to the person dying, and not to the estate which passes by the death. Property may be within the Commonwealth, but the estate or interest therein, which is the subject matter of taxation, is not a thing having locality. The leading case in England upon this subject is Thomson *v.* Advocate-General (12 Cl. & Fin. 1), where the House of Lords decided that personal property, having no *situs* of its own, followed the domicil of the testator, and that upon the law of his domicil depended the question of the liability of the legacy to duty. This overruled the old rule, upon the authority of which the Pennsylvania cases, Com. *v.* Smith (5 Barr, 143), and Alexander's Est. (4 Penna. L. J. 453), lay down the contrary doctrine. The interpretation given to the Act of 1826 in these cases is based upon no reasoning, and this Court will accord the complainant the protection of a proper construction. But conceding that these decisions, with the Act of 11 March, 1850 (P. L. 170, Purdon, p. 216, pl. 8), settle that the *estate* within the Common-

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wealth is what is contemplated as the subject of the tax, still this case does not fall within its terms. Shares of stock are mere choses in action, and have no *situs* other than their owner's domicil.

Somerville *v.* Somerville, 5 Vesey, J., 750.
Note to Jackson *v.* Forbes, 2 Crompt. & Jar. 405.

Again, the Act of 1826, if it means what the Attorney-General claims, is unconstitutional, in that the property taxed by it is not within the State. The stockholder owns no portion of the corporate assets; all that he is entitled to is to demand his dividends, and until these are declared he gets nothing. Thereafter, he stands as a creditor of the corporation entitled to sue for their recovery, and his position is similar to that of the bondholder who was held not liable to be taxed in the Foreign-held Bond Case.

Again the tax is unconstitutional because it is not levied upon property, but upon the right of a citizen of another State to receive what the law of his State gives to him, as a succession or inheritance. There is no warrant for such taxation, no correlative protection is afforded, and no equivalent is given for it.

George Lear, Attorney-General, for the Commonwealth of Pennsylvania.

There can be no question but that this property is subject to the tax imposed by the Act of 1826. Commonwealth *v.* Smith (*supra*) decided that it was not the person, but the *estate within the Commonwealth* upon which the tax was levied. The Act of 1850 extended the provisions of the Act of 1826, in consequence of the decision in Com. *v.* Smith to persons dying domiciled within the Commonwealth as well as to estates. And this Act was applied in Short's Estate (4 Harris, 63).

The cases of Railroad Co. *v.* Jackson (7 Wall, 262), and the Foreign-held Bonds (*supra*), do not rule this case. This is not a tax, in the strict sense of the word, but a condition imposed upon the legatee or distributee before he can receive his interest. It is a share taken by the Commonwealth before the beneficiaries have any rights in the distribution for the aid which it grants their representatives in the collection of the assets of the decedent.

The provision of the Federal Constitution, that the citizens of each State shall be entitled to the privileges and immunities of citizens in the several States, applies only to the personal privileges of citizens in their private capacity, and not in any official or fiduciary relation. The right of the owner to take this property out of the State at any time is a natural right which could not be prohibited him, while the right of this distributee, who takes by descent, is not a natural but a legal right, which must be taken and accepted under the conditions, and according to the terms which the law prescribes. The actual *situs* of the property, and not the domicil of the owner is the true guide in determining the question under the law of what State it shall be taxed. The converse of this proposition is founded on a fiction, which has been repudiated in several States.

Alvany *v.* Powell, 2 Jones Eq., N. Carolina, 51.
State *v.* St. Louis, etc., 47 Mo. 594.

In the case of the Foreign-held Bonds certain public securities, consisting of State Bonds and bonds of municipal bodies (such as there are nearly $300,000 worth of here), were expressly excepted from the rulings of the decision.

Again, the *situs* for taxation of National Bank stock is fixed by Act of Congress of 1864 (13 Stat. at Large, 112) at the place where the bank is located, and not elsewhere, and this has been declared by Act of 10 February, 1868 (15 Stat. at Large, 34) to mean the State within which the bank is located.

Joseph B. Townsend, for the defendants.

The real question involved here is not whether *situs* by domicil will exempt specific securities, stocks, etc., from this tax, but whether the succession to personalty in this State under a foreign law is taxable. Strode *v.* Com. (2 Sm. 189), decided upon this very Act, holds that it is the succession to the property which is taxed, and not the specific securities in which it is invested. Now as it is a well-settled law that questions of succession to personal property are governed by the law of the decedent's domicil, which in this case was New Jersey, it is clear that this tax cannot be imposed. Again the legislation of Pennsylvania since 1858 is a virtual concession that this estate is exempted from the tax. The Act of 10 April, 1849 (P. L. 571, Purd. Dig. 215, pl. 4) making property of this very character subject to the tax, was expressly repealed by the Act of 22 April, 1858 (P. L. 470). Then followed the various Acts ending with that of 8 April, 1872 (P. L. 44, Purd. Dig. 421, pl. 84), which swept away all necessity for a local administration of the estates of non-residents, which was the sole basis and reason of the decisions in Com. *v.* Smith and Alexander's Estate, *supra*.

The case of the Foreign-held Bonds rules this case. The Court there say that the power of a State to tax is limited to persons, property and business within her jurisdiction. When the decedent died his personal estate passed into the hands of his administrators in New Jersey, for the use, so far as the distributive balance is concerned, of his next of kin entitled under the laws of that State, without the aid of the machinery of the Registers or Probate Courts of Pennsylvania to give effect to those rights or to accomplish the conversion of the assets.

Oct. 2, 1877. THE COURT. This case has been elaborately argued, and I have received all

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the assistance that counsel can give. There is no controversy between the parties respecting the material facts. The testator at his death was domiciled in New Jersey. His will was proved and administered there, and there his executors have settled their final accounts. They sought no aid, and they had none from the intestate laws of Pennsylvania, from the courts of the State, or from any will proved in the State. At the time of his death the testator owned loans, stocks, and other personal property, consisting of State loans of Pennsylvania, municipal bonds of that State, bonds and stocks of its corporations, shares of stock in national banks located in that State, and various claims against Pennsylvania debtors. These stocks and loans were transferred by the executors of the testator's will by virtue of the letters testamentary granted to them in New Jersey. No letters of administration were ever taken out in Pennsylvania. Such are the material facts, and the sole question of the case is, whether the property is subject to a tax under the laws of Pennsylvania, it having passed by the will to collateral heirs or legatees of the testator.

The collateral inheritance tax laws of the State are obscure, needlessly so, and the obscurity has not been removed by the decisions of its Supreme Court. The original legislative Act of the State, enacted April 7, 1826, imposed a tax of two and one-half per cent. (subsequently raised to five) "upon all estates, real, personal, and mixed, of every kind whatsoever, passing from any person who may die seized or possessed of such estate, being within this Commonwealth, either by will, or under the intestate laws thereof, . . . etc., to any person or persons, or to bodies politic or corporate, in trust or otherwise, other than to or for the use of father, mother, husband, wife, children, and lineal descendants, born in lawful wedlock;" and it made it the duty of all executors, administrators, and their sureties, to pay the tax. It expressly enacted that "all executors, administrators, and their sureties, shall only be discharged from liability for the amount of the tax on estates, the settlement of which they may be charged with, by having paid the same," as directed by the laws in 1847. Strangely enough, it was said by the Supreme Court of the State that the words of the statute, "being within this Commonwealth," referred to the estate and not to the decedent, that it was the estate within the Commonwealth, and not the person, on which the tax was levied. In view of this declaration, probably, the Legislature (in 1850) passed a declaratory act, enacting "that the words in the Act of 1826," *being within this Commonwealth*, "should be construed as relating to all persons who had been at the time of their decease or then might be domiciled within the Commonwealth, as well as to estates." Other statutes, respecting the tax, and the mode of its collection, have, from time to time, been enacted, but none of them affect the present case. The Act of April 10, 1849, which would be important if it remained in force, was repealed by the Act of April 22, 1858.

The question I have to determine, then, is, whether, under the Act of 1826, as construed by the Act of 1850, the choses in action of a decedent, not domiciled at his death in Pennsylvania, passing to collateral heirs or legatees, but not passing under the intestate laws of that State, nor under any will proved and administered in that State, are subject to a tax, if they are rights in action against the State or its corporations, or against inhabitants of the State. I say choses in action, for all the property claimed in this case to be liable to a tax was intangible, mere rights in action. The question is primarily one of statutory construction, and I think exclusively such, for, in my view, it is unnecessary to inquire how far a State can impose a tax that operates extra-territorially.

It must be admitted that the language of the statute is broad and general. It embraces all estates, real, personal, and mixed, being within the Commonwealth, passing to collateral heirs or legatees, either by will, or under the intestate laws, or by deed, grant, bargain, or sale, intended to take effect in possession or enjoyment after the death of the grantor or bargainor. But, notwithstanding the generality of the statutory words, they must, I think, receive a reasonable construction, in harmony with the construction usually given to such statutes, and consistent with the legislative power of the State. The English Act of Parliament of 36th Geo. III. enacts that "every legacy given by any will or testamentary instrument to any person" shall be liable to a succession tax, and "that any gift by will of any person, which shall, by virtue of such will, have effect, or be satisfied out of the personal estate of such person, shall be deemed a legacy within the meaning of the Act." Comprehensive as the Act is, it is now firmly held by the English courts that English stocks, owned by non-resident testators, are not liable to the tax. So it was decided by the House of Lords, in Thomson *v.* The Advocate General (12 Clark & Finelly, 1), and the same construction was adopted in Attorney-General *v.* Napier (6 Exch. 217). The ruling is based upon the general doctrine of the common law, that personal property, having no *situs* of its own, attends the person and domicil of its owner, and hence that the law of the domicil of a testator or intestate must determine whether his personal estate is liable to a legacy duty. I shall spend no time in arguing that such is sound doctrine. It was asserted early, by Lord THURLOW, in Bruce *v.* Bruce (2 Bos. & Puller,

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231), where he said: "Personal property follows the person of the owner, and in case of his decease must go according to the law of the country where he had his domicil, for the actual *situs* of the goods has no influence;" such is the universally recognized rule alike of the common law, the civil law, and the *jus gentium*. I see no sufficient reason why it is not applicable to the Pennsylvania statutes. The law of that State, respecting the legal *situs* of personal property, is the same as the law of England. No statute has attempted to change it. It is there held, as elsewhere, that transfers of right and devolutions of personalty by will, or intestacy, are always governed by the law of the owner's domicil. (Desesbats *v.* Berquier, 1 Bin. 336). To the same effect is McKeen *v.* The County of Northampton (49 Penn. St. 519). It is perfectly clear that the subject of taxation, whatever it may be, must be within the territorial jurisdiction of the State that imposes the tax. Hence a tax law must be construed as applying to nothing extra-territorial, no matter how general its language may be. If a tax be laid upon a person the person must be within the jurisdiction; if upon property, the *situs* of the property must be in the State. Neither personal nor real property can have a *situs* in two States.

A person domiciled in another State, though he owns loans of the Commonwealth of Pennsylvania, or stocks of its corporations, or claims against its citizens, has no estate by virtue thereof within the Commonwealth. His estate or ownership is where he resides, and is taxable there because he resides there. Neither he nor his estate is within the jurisdiction of Pennsylvania.

Turning now to a more detailed examination of the Act of 1826, I find in it much that indicates the absence of any intention to tax any stocks, loans, or rights in action of decedents domiciled in other jurisdictions. As I have noticed, it imposes upon the executors and administrators of the decedent whose estate is made liable to the tax, the duty of paying it. This must mean domestic executors and administrators. It is not to be supposed that the Legislature intended to control or impose liabilities upon foreign personal representatives of foreign decedents. They are not subject to its jurisdiction, and if such an intention existed, the attempt to carry into effect would be vain; performance of the duties enjoined could not be enforced.

Again, the tax is laid, not upon the personal property found in the State, or (using the words of the statute) "being within the Commonwealth," but upon the estate therein, by whomsoever owned, if it passes to collaterals. Personal estate of a decedent, whether it passes by will or descent, is ownership of what may remain after the payment of debts and expenses of administration. This is the relation in which the owner stands to the property. It is not the property itself. It is intangible, and, as I have said, it has no legal *situs* apart from the person and domicile of the owner. The domiciled inhabitant of Pennsylvania is taxable, and he is taxed upon his stocks in extra State corporations, and upon the debts due to him by the citizens and corporations of other States. The reason, and the only justification for this is, that the *situs* of such property or rights is with him at his domicil. This has been decided: McKean *v.* The County of Northampton, cited *supra*. The same is true of the collateral inheritance tax. But taxation levied upon a domiciliated inhabitant of the State for the loans of another State, or for the stocks of foreign corporations, or for rights in action he may have against debtors in another State, proceeds upon the assumption that the *situs* of such property is in the State where the tax is laid. It cannot be in that State and at the same time in another. No one can doubt that New Jersey might have taxed the identical estate which it is now claimed, on behalf of the defendants, Pennsylvania has taxed. The truth is, it is impossible to disregard domicil when the inquiry is the *situs* of rights in action, or to personalty generally, and where is legislative jurisdiction over them. I think the Act of 1826 did not disregard it. With the full knowledge that such rights have their *situs* with the person of the owner, the tax was laid only on personal property "being within the Commonwealth." That must mean legally being there. If not, no personal property, not actually in the State, is taxed. Yet the contrary is the ruling of its Courts. No attempt has been made to change the common law respecting the situation of such property. Indeed I am not prepared to admit that in all cases personal property, not in action, but tangible and capable of manucaption, is within the purview of the statute. If a domiciled inhabitant of Ohio sends by rail through Pennsylvania, shipped for New York, a thousand barrels of flour, and dies intestate during its passage through the State, leaving only collateral heirs, is the flour subjected by the Act to a five per cent. tax? If a citizen of New Jersey crosses the Delaware with his horses and carriage to shop in Philadelphia, and dies before his return leaving a will bequeathing his property to collateral legatees, must a tax be paid to Pennsylvania of five per cent. on the value of the carriage and horses? I cannot believe that such was the intention of the law. If thus construed it would lead to the most absurd and unjust results. I think no such construction has ever been given to it. Yet the cases put are those in which the property has an actual *situs* within the

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State. In the case I have in hand, there was no actual *situs* apart from the legal *situs* with the owner.

The Act contains another definition of the subject it intended to tax, which is very significant. The subject is not generally "estates" being within the Commonwealth, but estates being within the Commonwealth "passing" to collateral heirs or legatees, "either by will, or under the intestate laws thereof." Estates not passing by will or under the intestate laws of the State, or by deed or grant intended to take effect after the death of the decedent, are not embraced within the statute. This is very clear, and it is equally clear that no estate of Mr. Hutchinson passed at his death under the intestate laws of Pennsylvania or by virtue of any deed or grant he made, intended to take effect after his death. Nor did the estate pass by any will known to the laws of Pennsylvania. The transmission to collaterals was affected by a New Jersey will, never proved or administered in Pennsylvania. It is no more to be admitted that the Act speaks of foreign wills than it is that it speaks of foreign executors and administrators. Devolution under the intestate laws of the State, or under wills authorized by the State, were, in my opinion, alone intended.

For these reasons I conclude that the Statute of 1826 has no reference to such estates or property as passed to these defendants for distribution under the will of their testator, and which is now claimed was taxable.

And I think Commonwealth *v.* Smith (5 Barr, 142), if carefully examined, will be found not necessarily inconsistent with this conclusion, whatever may be said of some of the observations of the Judge who delivered the opinion. That was a case of testacy. The testator, after having been domiciled in Philadelphia, acquired a domicil in France, where he died. By his will, after describing himself as of Philadelphia, he appointed his brother of that city the executor, and bequeathed a legacy to a subject of France. The property of the testator consisted of a bond secured by mortgage upon Philadelphia property, together with bills and notes of persons residing there, and stocks of Pennsylvania and New Jersey corporations. The will was proved in Philadelphia where the administration of the estate was to be settled. The Court held that all the testator's estate in Philadelphia at the time of his decease was subject to the collateral inheritance tax, but for what reason is not very clearly stated. I do not understand the decision to have rested solely on the ground, that the bonds and stocks were an estate being within the Commonwealth; it seems rather to have rested on the fact that the will was proved and administered in the State. Thus the Judge said: "It is the amount of the estate being within the Commonwealth, passing either by will or descent, that the Act make subject to the collateral tax, and the domicil has nothing to do with the question. If it is an intestate estate, and administration is granted in Pennsylvania to enable the administrator to collect the assets, the administrator pays the tax out of the aggregate of the estate. *If a will be proved and administered* in Pennsylvania, the executor deducts the collateral inheritance tax from the devises, unless the will directs otherwise." Thus it appears the place of administration and authority for it were considered important. Concede that the case is authority for all it decided. The present case differs materially in its facts. Here there was no administration in the State, no letters testamentary, and no personal representatives amenable to the law. So in Alexander's Estate (4 Pennsylvania Law Journal, 448), in the Orphans' Court of Philadelphia, all that was decided was, that county stock and Pennsylvania State stock, belonging to a decedent domiciled at his death in London, is subject to the collateral inheritance tax, where there has been a new administration in the State. It was because the aid of the State laws had been invoked, and there had been an election to consider the fund as being within the Commonwealth. Such is not the present case.

I shall therefore decree in favor of the complainants, and in accordance with the third prayer of the bill.

Let a decree be prepared.

Opinion by STRONG, Justice.

[See next case.]

U. S. Circuit Court—Law.

Eastern District of Penna. May, 1879.

Allen v. The Philadelphia Savings Fund.

Collateral inheritance tax—Choses in action—Lex domicilium.

Choses in action within the State of Pennsylvania, belonging to one domiciled at her death in another State, are not liable to the Pennsylvania collateral inheritance tax on the failure of lineal descendants, no administration on her estate having been taken in Pennsylvania.

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It is no defence by the parties in whose possession the choses in action may be, to a suit for their recovery by the foreign executor of such non-resident owner, that the collateral inheritance tax has not been paid.

The right of foreign executors to sue in this Court for a debt due their testator, not decided.

Rule for judgment for want of a sufficient affidavit of defence.

Debt, by Allen and others, citizens of New Jersey, and executors of Mary Ann English, deceased, who at the time of her death was domiciled in New Jersey and a citizen of that State, against the Philadelphia Savings Fund Society, a citizen of the State of Pennsylvania.

The plaintiff filed a copy of their decedent's deposit book showing deposits made with the defendants, and a balance due her of $838.90.

The affidavit of defence admitted the accuracy of the copy filed, but alleged that the plaintiff's decedent, Mary Ann English, died without leaving father, mother, husband, children, or lineal descendants, by reason whereof, under the statutes of the Commonwealth of Pennsylvania, in such case made and provided, all the personal property of her, the said testatrix, within said Commonwealth, including the balance due of the said amount so deposited with defendants, became subject, after payment of debts, to a tax of five per cent. on the net amount thereof to the said Commonwealth, which tax has never been paid. And further that letters testamentary granted to foreign executors, if they authorize them to sue in the Courts of the United States a debtor of their testatrix, can give no higher power or authority for collecting the assets of the estate in this Commonwealth than is given by the law thereof to domestic executors.

E. P. Allinson and *Dallas Sanders*, for the rule.

Choses in action within the State of Pennsylvania belonging to a citizen of New Jersey and there domiciled at his death are not subject to the Pennsylvania collateral inheritance tax upon the failure of lineal descendants. This so far as this Court is concerned is *res adjudicata*.

Kintzing *v.* Hutchinson, reported *supra;* 34 Leg. Int. 365.

And even were the money sued for subject to the tax, the defendant cannot set up its non-payment, and recoup it from the fund, as they are in no way liable to the State for its payment.

Henry Wharton, contra.

May 16, 1879. THE COURT. The plaintiffs, citizens of New Jersey, and executors of the will of M. A. English, who was also a resident of New Jersey at the time of her death, sue the defendants, The Philadelphia Savings Fund Society, to recover a debt of $838.90, with interest. The affidavit of defence admits the existence of the debt; but avers that M. A. English died "without leaving father, mother, husband, children, or other lineal descendants;" that the money due is therefore subject to collateral inheritance tax, under the statutes of Pennsylvania, and sets this averment up as an answer to the suit. No other defence is presented, and no other can therefore be considered. That this is insufficient, cannot, we think, be seriously doubted. In Kintzing *v.* Hutchinson *et al.* (Leg. Int., Oct. 19, 1877), Judge STRONG, sitting in the Circuit Court for the district of New Jersey, held that the statutes referred to have no application to choses in action here, belonging to one domiciled in another State at the time of his death, though his legal representatives must come here to reduce them to possession. Even if this were in conflict with the construction put on these statutes by the Courts of this State it would bind us. The learned Judge, however, on careful review of the cases says it is not.

If the law were otherwise, the result would be the same; the averment still would not constitute a defence. If the plaintiffs based their right to sue on letters issued here, the contrary would not, we presume, be suggested. But if they may sue here on letters issued elsewhere (and the defendant has not questioned this), their right to recover is precisely the same as if the letters had been issued here. If the State can sustain a claim for the tax, as suggested, it cannot sustain it against the defendant, but must look to the balance of estate in the hands of the legal representatives after they have reduced it to possession and paid the debts. If necessary it may raise an administration for this purpose.

Judgment must therefore be entered for the plaintiffs notwithstanding the affidavit of defence.

We desire it distinctly understood that the defence set up by the affidavit and urged in the argument, does not, as we view it, involve the question whether the plaintiffs can sue for the debt on the letters issued in New Jersey. That question was not presented in any form.

Opinion by BUTLER, Dist. J.

[See Kintzing *v.* Hutchinson, reported *supra*, p. 226.]

[Upon the question of the right of foreign administrators to sue here, which was expressly left open by the Court in the above case, the rule is, that they are not unless authority is given them to do so by the law of this State. (See Curtis *v.* Smith, 6 Blatchlf. 537, and Noonan *v.* Bradley, 9 Wall. 394.) The point was raised and decided by this Court, in Glassell's Admrs. *v.* Wilson's Admrs. (4 Wash. C. C. 59), in favor of the right to sue. This case was decided, however upon the authority of McCullough *v.* Young (1 Binn. 63), which held that a foreign administrator might sue in our State Courts without taking out ancillary letters. In Sayre *v.* Helme (11 Sm. 299), the Supreme Court say that this rule has long ceased to be the law in Pennsylvania, and it would seem doubtful, therefore, whether the Circuit Court has jurisdiction of cases of this character.—REP.]

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, AUG. 7, 1879.* [NO. 15.

Supreme Court.

July, '78, 148. April 2, 1879.

Delaware, Lackawanna & Western R. R. Co. v. Napheys.

Negligence—Contributory negligence—Burden of proof—Carriers of passengers, liability of—Railroad company, duties of—Passengers, duties of—Accidents—Damages.

It is the duty of a railroad company to provide safe and reasonably convenient means of ingress and egress to and from its cars; it is the duty of passengers to use the means thus provided with reasonable circumspection and care.

The general rule is that a party who alleges negligence as the basis of a claim for damages is bound to prove the fact alleged, and the extent of the injury, if more than nominal damages are claimed; but in some cases slight proof only is required to justify a presumption of negligence.

But if a passenger, seated in a railroad car, is injured in a collision, or by the overthrow of the car, the breaking of a wheel, axle, or other part of the machinery, he is not required to do more in the first instance than to prove the fact, and show the nature and extent of the injury. A *prima facie* case is thus made out, and the *onus* is cast upon the carriers to disprove negligence.

While in the act of alighting from the lower step of a railroad car to the ground, a passenger was injured by fracture of the knee-cap, the result of the apparent strain of stepping down the distance variously estimated at from eighteen to twenty-nine inches. The train had reached its destination, and the passenger was assisted in alighting by her husband on a spot where many thousand passengers had previously done so in safety:

Held (reversing the judgment of the Court below), that the facts did not raise the presumption, *prima facie*, of negligence in the defendant, and throw on it the burden of disproving negligence; but that the case was governed by the general rule that he who alleges negligence as the basis of a claim for damages is bound to prove it affirmatively.

MERCUR and GORDON, J.J., dissent.

SHARSWOOD, C. J., and PAXSON and WOODWARD, JJ., concurred in judgment, but were of the opinion that there was not sufficient in the facts disclosed by the testimony to justify their submission to the jury.

Sullivan *v.* Philadelphia and Reading R.R. Co., 6 Cas. 234, explained and distinguished.

Error to the Common Pleas of Monroe County.

Trespass on the case, by George D. Napheys against the Delaware, Lackawanna & Western R. R. Co., to recover damages for injuries to the wife of the plaintiff caused by the alleged negligence of the defendant. Plea, "Not guilty."

Upon the trial, before DREHER, P. J., it appeared by the plaintiff's evidence, that the plaintiff and his wife were, upon August 10, 1875, passengers by the defendant's railroad from Mauch Chunk to Stroudsburg. The train arrived in safety, and stopped at Stroudsburg, its destination. Mrs. Napheys was assisted to alight by her husband: in stepping down from the lower step of the car platform to the gutter between the tracks, where the passengers were in the habit of descending, and were expected to descend, she advanced her left foot first to the ground, leaving her right foot upon the step, and while in that position, without slipping, stumbling, or external cause, her right knee-cap was fractured. The injury resulted in prolonged confinement to the house, the suffering of much pain, and a permanent weakness of the injured limb.

On behalf of the defendant it was testified that Mrs. Napheys had, in 1874, dislocated the same knee-cap while walking in the street, and was at the time of the accident at Stroudsburg still wearing an elastic knee-cap in consequence of the continuing effect of the former injury. Voluminous testimony of a statistical nature was introduced to show that many millions of passengers had alighted on similar localities without injury, and that such had been the case with ten thousand passengers per annum on the spot in question. Experts testified that the steps could not be lowered without extending beyond the line of the sides of the cars, and thereby greatly impairing the safety of the passengers; that elevated platforms were dangerous, and that many railroads had therefore dispensed and were continually dispensing with them. Although it did not appear what was the exact height which caused the accident, there was much evidence to show that the height from the lower step to the top of the rail was sixteen inches, and to the ground from nineteen to twenty-one inches; that this was not greater than that found on the principal railroads of the United States, and was less than that on some; that in wagons, omnibuses, and other vehicles, a distance of from eighteen to twenty-four inches was usual, and considered perfectly safe; that the Miller platform, now in use, increased the distance by from four to six inches, and had not, so far as was known, caused any accidents.

Medical testimony tended to establish a softened and fragile condition of Mrs. Napheys' bones.

The plaintiff, in rebuttal, contradicted this medical testimony; gave the measurements as from twenty-five to twenty-nine inches; and

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proved that where the high platforms had been taken away they had usually been replaced by low-grade platforms on a level with the top of the rail, which would make the descent about sixteen inches.

The plaintiff presented the following points:—

(1) The defendant was not only bound to convey Mrs. Napheys safely to her destination, but to furnish her with a safe and convenient means of leaving the car if human foresight and prudence could so provide, and in determining what is a safe and convenient mode of egress the criterion is not what is the custom on other roads, nor how much strain other people have sustained in various ways without injury, but what did the safety and convenience of Mrs. Napheys require. *Answer.* The first clause of this point is affirmed. As to the second clause, while the custom on other roads, or the amount of strain other people have sustained, are not the criterion by which to determine what is a safe and convenient mode of egress in this particular case, yet such custom of other roads is evidence for the jury to consider in passing upon the question of negligence of the defendant in the case trying. (1st assignment of error.)

(2) A carrier of passengers is bound to the utmost degree of care and prudence in providing means of egress from its cars. Any want of such care and prudence renders the company liable to respond in damages for an injury resulting therefrom. *Affirmed.* (2d assignment of error.)

(3) That the defendants, as carriers, are bound to give secure access to and egress from their passenger cars, so that a passenger carefully descending from the cars may do so in safety, and if the jury believe that the height from the lower step of the car to the ground was so great that Mrs. Napheys, in attempting to descend with reasonable care, fractured her knee-cap in consequence of the height of the step, the defendant is liable for such damages as were sustained by the plaintiff in consequence of this injury. *Affirmed.* (3d assignment of error.)

(4) The proof in the case being uncontradicted that Mrs. Napheys without any negligence on her part received an injury in descending from the cars of the defendant, it raises the presumption *prima facie* that the defendant was guilty of negligence, and the burden of proof is upon the defendant to show that it was not guilty of negligence. *Answer.* Negatived for the reason that I cannot say that the evidence as to the negligence is uncontradicted. (4th assignment of error.

(5) If the jury believe that Mrs. Napheys, without any negligence on her part, received an injury in descending from the cars of the defendant, the defendant was, *prima facie*, guilty of negligence, and the burden of proof is upon the defendant to show that it was not guilty of negligence. *Affirmed.* (5th assignment of error.)

The defendants presented, *inter alia*, the following points:—

(6) If Mrs. Napheys was subject to any peculiar condition of the bones or body, which rendered her more liable to bony fracture than the generality of persons, the defendant was under no obligation to construct their cars or platforms with reference to such abnormal condition, and if the injury of Mrs. Napheys was produced in consequence of that condition, the defendant is not responsible for such result, and in that event there can be no recovery in this action. *Answer.* I cannot affirm this point. While I can assent to the first part of the proposition, I cannot affirm it as a whole, for the reason that though the facts should be as stated in the first clause, and that the accident would not have happened if she had not been in such condition of bones or body, yet the liability of the company depends upon the question of negligence, under the evidence and all the circumstances of the case. (6th assignment of error.)

(10) Under all the testimony in the cause there is not sufficient evidence that the exclusive negligence of the defendant caused the injury complained of to warrant a verdict for the plaintiff. *Negatived.* (7th assignment of error.)

The Court charged the jury, *inter alia*, as follows: "Railroads for carrying passengers are not constructed for a particular class or size of persons. Large or small, lean or fleshy persons, those of large and those of small muscles and different temperaments, may travel, and railroad companies, in constructing their roads and means of access to and egress from their cars, are presumed to know that all such persons will travel on their roads.

"It is argued on the part of the plaintiffs that the injury to Mrs. Napheys occurred in consequence of the step to the platform of the car being too high from the ground. On the other hand it is alleged by the defendant that the step was no higher than those in use by many other railroads, and not so high as some companies use, and that the accident did not result from any unusual height of the step. The evidence upon the question of negligence of the company as respects the height of the step is for the jury, and in passing upon this question you are to take into consideration the height of the steps in use by other railroad companies. The question is whether the accident occurred from the negligence of the company alone. If it did then the defendant is liable.

"In the case of Mrs. Napheys, that is the suit in which she and her husband are joint plaintiffs for her use, the law has no fixed rule for assessment of damages. You should allow her such

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reasonable damages as under all the circumstances you may think she is entitled to, for the pain and suffering endured by her in consequence of the injury." (10th assignment of error.)

Verdict for plaintiff for $2000, and judgment thereon. The defendant took this writ, assigning for error the answers to the points, that portion of the charge quoted, and the failure of the Court to more adequately present the facts to the jury, and to more fully explain the meaning of negligence and contributory negligence as applicable to the circumstances.

W. H. Jessup and *H. Green* (*William Davis* with them), for the plaintiff in error.

The exclusive control of the defendant over the person and movements of the plaintiffs, which continued while the cars were in motion and before the train reached its destination, had ceased. The further act of leaving the car was the exclusive act of the plaintiff, and for what she did in that connection she alone is responsible.

That height of step which general experience demonstrates as being safe and secure for passengers to alight from, ought to be the criterion by which the rule of duty should be determined.

A railroad company is bound only to give a *reasonable* opportunity to alight in safety.

Fairmount, Arch St. P. R. W. Co. *v.* Stutler, 4 Sm. 375.
Johnson *v.* Westchester & Phila. R. R. Co., 20 Id. 357.
Empire Transportation Co. *v.* Wamsutta, etc., Co., 13 Id. 14.
Meier *v.* Penn. R. R. Co., 14 Id. 225.
Pittsburgh & Connellsville R. R. Co. *v.* McClurg, 6 Id. 294.

The practical meaning of the answer of the Court to the plaintiff's third point is that if all other human beings were able to descend from the steps of one car without fracturing the kneecap, nevertheless Mrs. Napheys was so constituted that she could not do so without that consequence happening, we were guilty of negligence. It is error thus to make the test of our legal duty the disability of one person.

Pittsburgh & Connelsville R. R. *v.* McClurg, *supra.*
Bogle *v.* Winslow, 5 Phil. Rep. 136.
Tennery *v.* Pippinger, 1 Id. 543.

A railroad company in the performance of its duty is not to be held to the impracticable, nor to results which do not follow in an *ordinary and natural sequence.*

Tuller *v.* Talbott, 23 Ill. 357.
Pittsburg, Cinn. & St. L. R. R. Co. *v.* Thompson, 56 Id. 138.
McGrew *v.* Stone, 3 Sm. 441.
Ford *v.* London & S. W. R. R. Co., 2 F. & F. 730.
Le Barron *v.* East Boston Ferry Co., 11 Allen, 312.
Curtis *v.* Rochester & Syracuse R. W., 18 N. Y. 534.
2 Redfield on Railways, 230.
Frankford & Bristol Turnpike Co. *v.* Phil. & Trenton R. R. Co., 4 Sm. 345.

We were entitled to an explicit answer to our point relating to Mrs. Napheys' physical condition.

Tenbrooke *v.* Jahke, 27 Sm. 392.

If the language of the Court taken in connection with the circumstances of the case may have misled the jury, or the Court presented the facts of one side only, it is error.

Wenger *v.* Barnhart, 5 Sm. 303.
Gregg Township *v.* Janison, Ibid. 468.

It is error not to fully explain to the jury the meaning of the term negligence.

Pittsburgh, Fort Wayne, etc., R. R. Co. *v.* Evans, 3 Sm. 250.
Reeves *v.* Del., L. & Wes. R. R. Co., 6 C. 462.

The instruction on the question of damages was erroneous.

Penn. R. R. Co. *v.* Books, 7 Sm. 339.
Penn. R. R. Co. *v.* Kelly, 7 C. 372.
Penn. R. R. Co. *v.* Butler, 7 Sm. 338.
Penn. R. R. Co. *v.* Zebe, 9 C. 318.
Penn. R. R. Co. *v.* Vandever, 12 Id. 303.
Rose *v.* Story, 1 B. 190.

When a case is submitted to a jury upon clearly insufficient evidence this Court will reverse.

Sartwell *v.* Wilcox, 8 H. 117.
Lower *v.* Clement, 1 C. 63.
Silveus *v.* Porter, 24 Sm. 448.
Cauffman *v.* Long, 1 N. 72.
State *v.* P., W. & B. R. R. Co., 47 Md. 77.
Smith *v.* First National Bank, 99 Mass. 605.

E. J. Fox and *S. Holmes*, for the defendant in error.

The main question is whether or not the defendant was guilty of negligence in the construction of its car platform. The law implies in the contract of carrying passengers that the railroad company shall provide safe and sufficient road and cars, competent and careful train hands, and safe and convenient means of ingress and egress to and from the line of the road.

Penn. R. R. Co. *v.* Zebe, 9 C. 326.
Penn. R. R. Co. *v.* Aspell, 11 H. 149.
McDonald *v.* C. & N. W. R. R. Co., 26 Iowa, 124.
Knight *v.* P. S. & P. R. R. Co., 56 Me. 234.
Memphis & Charleston R. R. Co. *v.* Whitfield, 44 Miss. 466.
Shearman & Red. on Neg. § 275–277.
Wharton on Neg. § 77.
Hulbert *v.* N. Y. Cent. R. R. Co., 40 N. Y. 145.

The burden was on the defendant to disprove negligence.

Sullivan *v.* Phil. & Reading R. R. Co., 6 C. 234.

A party cannot complain of an insufficient answer to an immaterial point.

Williams *v.* Williams, 10 C. 315.
Del. & Hudson Canal Co. *v.* Torrey, 9 Cas. 143.
Ashbridge *v.* Kenyon, 15 Leg. Int. 158.

A passenger physically disabled is entitled to more protection than one in perfect health.

Sheridan *v.* B. C. & N. R. R. Co., 36 N. Y. 39.
O'Mara *v.* Hudson Riv. R. R. Co., 38 Id. 445.

An omission to charge upon a particular point, for which there was no request, cannot be assigned for error.

Lilly *v.* Paschal, 2 S. & R. 394.
Poorman *v.* Smith, Ibid. 464.

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Kean *v.* McLaughlin, Ibid. 469.
Fisher *v.* Larick, 7 Ibid. 99.
Morris *v.* Travis, Ibid. 220.
Rahn *v.* McElrath, 6 W. 151.
Dennis *v.* Alexander, 3 Barr, 50.
Fisher *v.* Filbert, 6 Ibid. 61.
Klein *v.* Franklin Ins. Co., 1 Har. 247.
Davis *v.* Bigler, 12 Sm. 242.
Cooper *v.* Altimus, Ibid. 486.

A passenger is entitled to the *greatest possible* care.

The New World *v.* King, 16 How. 469.
Longmore *v.* Gt. Wes. R. W. Co., 19 C. B. (N. S.) 183.

A railway company using cars, the steps of which are elevated much above the ground, is undoubtedly bound to provide platforms upon which passengers may step, and which are long enough to accommodate all the cars of an ordinary train, so that a passenger in any car may easily reach the platform.

Shearman & Red. on Neg. § 277.
Foy *v.* L. B. & S. C. R. R. Co., 18 C. B. (N. S.) 225.
Nicholson *v.* L. & Y. R. R. Co., 3 Hurls. & C. 534.
Burgess *v.* Gt. Wes. R. R. Co., 6 C. B. (N. S.) 923.
J. M. & I. R. R. Co. *v.* Riley, 39 Ind. 569.
Knight *v* P. S. P. R. R. Co., 56 Me. 234.

The instruction upon the question of damages was correct.

Shearman & Red. on Neg. 679.
Dailey *v.* Dismal Swamp Canal Co., 2 Ired. (N. C.) Law, 222.
Frink *v.* Schroyer, 18 Ill. 416.
Peoria Bridge Ass'n *v.* Loomis, 20 Id. 235.
Curtis *v.* B. & S. R. R. Co., 18 N. Y. 3 H. & C. 534.
Spicer *v.* Chicago R. R. Co., 29 Wis. 580.
Hopkins *v.* Atlantic, etc., R. R. Co., 36 N. H. 9.
Hunt *v.* Hoyt, 20 Ill. 544.

May 5, 1879. THE COURT. The claim of the defendants in error for damages in this case is based on an accident of rather extraordinary character. The train on which they were passengers arrived safely at its destination in daylight. The other passengers had left the car, and Mr. and Mrs. Napheys were the last to go out. He alighted first and assisted her down the steps from the front platform of the car. While her right foot rested on the lower step, and just as her left touched the ground, her right *patella* or knee-cap was fractured, and she was thus suddenly disabled. The fracture was transverse and entirely across the bone. At the same place, and under similar circumstances, thousands of passengers had before alighted from the cars in safety, and so far as appears without inconvenience, but it so happened that Mrs. Napheys unfortunately met with the singular accident which undoubtedly caused her a great deal of inconvenience and suffering. Whether the injury resulted wholly from the negligence of the railroad company without any fault on her part, whether it was one of those fortuitous events against which, in the exercise of reasonable and proper care, it is impossible to guard, and for which neither party is to blame, was the question to be determined by the jury; and while we think there was sufficient in the facts and circumstances disclosed by the testimony to justify their submission to the jury, it is not so clear that they would have reached the conclusion they did if it had not been for the instructions complained of in the fourth and fifth assignments of error. In the latter the jury were told that if Mrs. Napheys, without any negligence on her part, received an injury in descending from the cars, the company was, *prima facie*, guilty of negligence, and the burden of proof was on the defendants to show that it was not guilty. The fourth point was in substance the same, with the exception of assuming, as an uncontradicted fact, that there was no negligence on her part. This assumption of fact the learned Judge refused to adopt, but in other respects affirmed the proposition in its full length and breadth. In view of the uncontradicted facts in the case, we think this instruction was calculated to prejudice the defence.

The general rule is that a party who alleges negligence as the basis of a claim for damages is bound to prove the fact alleged, and the extent of the injury, if more than nominal damages are claimed, but in some cases slight proof only is required to justify a presumption of negligence. The mere circumstances attending the injury, when put in proof, may be enough to cast the burden of exculpation on the defendant.

If a passenger seated in a railroad car is injured in a collision, or by the overthrow of the car, the breaking of a wheel, axle, or other part of the machinery, he is not required to do more, in the first instance, than to prove the fact, and show the nature and extent of the injury. A *prima facie* case of negligence is thus made out, and the onus is cast upon the carrier to disprove negligence. It was accordingly said in Sullivan *v.* The Philadelphia and Reading Railroad Co. (6 Casey, 234): When a railroad company undertakes the transportation of a passenger for an agreed price, "the contract implies that they are provided with a safe and sufficient railroad to the point indicated, that their cars are staunch and roadworthy, that means have been taken beforehand to guard against every apparent danger that may beset the passenger, and that the servants in charge are tried, sober, and competent men. When in the performance of this contract a passenger is injured without fault on his part, the law raises, *prima facie*, a presumption of negligence, and throws on the company the onus of showing that it did not exist." It is reasonable that it should be so, because the company has in its possession and under its control, almost exclusively, the means of knowing what occasioned the injury and of explaining how it

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occurred; while, as a general rule, the passenger is destitute of all knowledge that would enable him to present the facts, and fasten negligence on the company in case it really existed. The facts of the present case are very different. The cars were at rest on the track, there was no jar or breaking of machinery; Mrs. Napheys, with the assistance of her husband, was descending the steps from the platform of the car. They had every opportunity of seeing and knowing where she was going, and controlling her movements. If the lower step was inconveniently or dangerously high for her in the condition she was, she and her husband had as good an opportunity as any one else of knowing the fact. If they had even a suspicion that it was in the least degree unsafe for her to take the last step, there was no urgent necessity for her to do so. The train had reached its destination, and there was no occasion for haste in leaving the car. If they had any apprehension of danger, or even inconvenience in descending from the lower steps there was nothing to prompt them to incur the risk. They might have called on those in charge of the train to provide a better and more convenient means of egress if they deemed it necessary. Taking the uncontradicted facts of the case as they were presented, there existed no reason for relaxing the general rule that he who alleges negligence as the basis of a claim for damages, is bound to prove it affirmatively.

The circumstances of the case were very peculiar, and demanded great care in explaining to the jury the relative rights and duties of the parties. While, on the one hand, it is the duty of the company to provide safe and reasonably convenient means of ingress and egress to and from its cars, on the other hand it is equally the duty of passengers to use the means thus provided with reasonable circumspection and care.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by STERRETT, J.

MERCUR and GORDON, JJ., dissent.

SHARSWOOD, C. J., and PAXSON and WOODWARD, J.J., concur in the judgment, but would not award a *venire de novo*, as they think there was no evidence of negligence in the defendants.

[*Cf.* Harrold *v.* G. W. Railway (14 L. T. N. S. 440), and Siner *v.* G. W. Railway (L. R. 4 Exch'r 117). In both of these cases the facts were similar, and, in the last case, almost identical with those in Mrs. Napheys' case. In Mrs. Siner's case, the train overshot the platform, and Mrs. Siner, without any request from, or communication with, the company's servants, alighted, by taking her husband's hands and jumping down. In so doing she injured her knee. The jury found for the plaintiff. The Court in banc held that there was no evidence of negligence on the part of the defendant, and entered judgment for the defendant. This was affirmed in Com. *v.* Scace. MELLOR, J., said (p. 122): "The evidence seems to me to establish, not negligence, but only a less degree of convenience than is usual, and for that the defendants are not responsible." HANNEN, J., said (p. 125): "Other people got down without injury. It is true the female plaintiff said she could not. But she does not say why she could not. Suppose she had said so of an ordinary platform. This bare assertion would not be enough; and, applying the common knowledge we all have as to the construction of carriages, I think it lay upon the plaintiff to show more special reason why it was dangerous or impossible to use the foot-board, so as to make it negligent on the part of the company not to provide some other means of alighting."]

Jan. '77, 186. Feb. 27, 1879.

Davis's Appeal.
Assigned Estate of Lippincott.

Vendor and vendee—Mortgage—Personal liability of vendee for mortgage debt—Implied contract.

The mere fact that the amount of a mortgage upon land has been retained out of the nominal purchase-money as recited in the deed, is not sufficient to create a personal liability for the mortgage debt on the part of the vendee.

A. purchased land, upon which was a mortgage of $11,000, for $3000; the consideration expressed in the deed was $14,000. Accompanying the deed was a separate and cotemporaneous covenant by the vendor that the mortgage debt should not be called in for five years if the interest were punctually paid; the agreement recited that the vendor had that day conveyed "for the sum of $3000 a lot of land subject to the payment of a mortgage of $11,000." The mortgage was sued out and a balance of the debt remained unpaid. Upon the presentation of a claim for the balance against the estate of the vendee, the auditor found as a fact that payment of the mortgage debt had not been personally assumed:

Held, that the claim was properly disallowed.

Appeal from the Common Pleas No. 3, of Philadelphia County.

The account of the assignee of the estate of William H. Lippincott was referred for settlement to an auditor (Henry Wharton), who reported, *inter alia*, as follows:—

"Mr. R. P. White presented the claim of Mr. E. M. Davis for the sum of $2206.50 under the following circumstances: Mr. Davis in the year 1874, by deed dated the 28th day of March of that year, and recorded in Montgomery County in Book No. 217, page 1, conveyed to the assignee a piece of ground at Chelten Hills, in that county, adjoining property on the Old York Road belonging to him, containing about fourteen acres and a half. The consideration expressed in the deed is the sum of $14,000. At the date of this instrument the property was in point of fact subject to a mortgage debt of $11,000 to Edward Hopper, executor of James Mott, deceased. But no mention of any kind of this mortgage debt is made in the deed. There is to be found no covenant, express or implied on the face of the latter, for its payment or assumption by the grantee.

"The history of the transaction is as follows: The lot in question lay between property belonging to Mr. Lippincott and Mr. Davis. Mr. Davis had been anxious to dis-

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pose of it to the former, and it seems had once or twice spoken to him upon the subject of a purchase by him. On the 24th day of February, 1874, Mr. Davis addressed to Mr. Lippincott a letter, a copy of which is annexed. [The letter did not appear in the paper books.] In this letter, which sets out his reasons for considering the purchase at the price advantageous to Mr. Lippincott, the writer says: 'I told you I have $11,000 on it that can run for five years from March 1st. Now with this on it, if you will give me $3000 cash on the 1st day of March, I will let you have all the evergreens, all the stone, nearly $300 worth, and the cut wood that belongs to me. It is a rare bargain, and I sell it at this sacrifice because I want money.'

"There is nothing anywhere to indicate the desire or expectation on the part of Mr. Davis, that Mr. Lippincott should assume, or be personally responsible for, the mortgage debt—it is not even an offer to sell for $14,000, part in mortgage and part in cash. Indeed the statement that the '$11,000 can run for five years,' so far as it has any significance, points the other way. It is rather the vendor undertaking to indemnify the vendee.

"The letter being satisfactory to Mr. Lippincott, he placed it in the hands of his conveyancer and counsel, Mr. Littleton, with instructions to see Mr. Davis, and if he could do no better, to close on that basis. According to his testimony there were no special instructions on either side as to how the deed was to be drawn, nor is there any agreement shown on the subject, parol or otherwise, outside of the letter. This, consequently, is the foundation of the deed. Mr. Littleton, who acted, he said, solely for the vendee, in which Mr. Davis agrees, deliberately omitted any covenant or assumption of the payment of the mortgage debt in the deed, express or implied, which he did for the very purpose of preventing any personal liability on the part of his client for the principal outside of the property conveyed. After the deed was prepared it was executed by Mr. Davis without objection on account of the absence of any agreement to assume the mortgage. He, however, says that Mr. Littleton told him that it was 'all right,' of which the latter has no recollection, but he says that he has no doubt that if Mr. Davis did ask the question he so answered him, 'as I thought it was all right in my view.'

"With reference to the question as to what the purchase money was to be, apart from the terms of the letter, Mr. Lippincott and Mr. Littleton, according to their testimony, both understood that the *price* was $14,000, but to have regarded that as its arithmetical measure, not as an agreement by Mr. Lippincott to pay or assume the payment of that sum. Mr. Lippincott, who is now practically indifferent in the matter, is positive on this point. He says: 'I never agreed to pay that mortgage.' In reply to the question, 'When was it agreed that you were to pay $3000 and *retain* the $11,000?' he said: 'I don't think it ever was so agreed.' He had known before that there was a mortgage for $11,000, but had understood that it was to be 'deducted from the purchase-money.' By this the auditor understood, having reference to the rest of the witness's testimony, that the purchase-money was to be so much less, not that the mortgage debt was to be taken out of it.

"The deed was accompanied by a separate covenant on the part of Mr. Davis, that the mortgage debt should not be called in for five years, if the interest were punctually paid; a copy of the material part of which is annexed. This agreement appears to sustain Mr. Lippincott's understanding in two ways. In the *first place* it recites that 'Whereas, I, Edward M. Davis, have this day conveyed to William H. Lippincott, for the sum of $3000 (not $14,000), a lot of land in Cheltenham Township, etc., subject to the payment of a mortgage debt of $11,000 to Edward Hopper,' etc., and *secondly*, the taking an express covenant from the vendor, to indemnify the vendee for a limited period, without any corresponding undertaking on the part of the latter to indemnify the former at the end of the period, is strong to show that this was not intended. The omission of such a covenant from a document where it ought to have been inserted is more significant than mere silence.

"After Mr. Lippincott's assignment, the mortgage was sued out by reason of the non-payment of the interest, as was testified to by Mr. Hopper, the mortgagee, which of course abrogated this last-mentioned covenant or guaranty. The property was sold at sheriff's sale on April 19, 1875, of which there can be no doubt that Mr. Davis had notice, and was bought by his son, by whom it was a few weeks after sold and conveyed to a Mr. Dobbins, for $10,000. Mr. Davis, the father, negotiated this last sale, but denied having any interest in the matter. The judgment on the mortgage was for $11,852.50; on this, Mr. Hopper received in cash from the sheriff, $4646, which, with a mortgage from the purchaser at the sheriff's sale for $5000, made $9646, leaving a balance on the judgment of $2206.50, which was paid by Mr. Davis to Mr. Hopper, on the 17th June, 1875. It was for this balance that Mr. Davis claimed against the assigned estate; he has also brought suit therefor against Mr. Lippincott, personally."

Upon this state of facts the auditor disallowed the claim of E. M. Davis, and the exceptions filed on his behalf were dismissed. (Reported 4 WEEKLY NOTES, 103.) From this decree Davis took an appeal assigning for error the decree dismissing his exceptions.

R. P. White, for appellant.

The personal liability for the mortgage debt assumed by the grantee of land is not a contract in relation to land within the statute of frauds, and may be proved by parol; the fact of the agreement not being inserted in the deed therefore argues nothing; but in point of fact it was in the contemporaneous deed, and they are to be read together as part of the same contract. The law implies the agreement whether it be in the deed of conveyance or not, and this is implied from the fact that the amount of the incumbrance was retained out of the purchase-money; it is upon this that all of the decisions holding the grantee liable are rested. It may be safer to have a statement in the deed that the property is conveyed subject to an incumbrance, but it has never been held that these words are requisite to cast the duty of indemnifying the vendor upon the vendee, and the contrary was ruled in—

Taylor *v.* Preston, 29 Sm. 436.
Buckley's Appeal, 12 Wr 491.

And there need be no express promise: from the mere abatement of the purchase-money the contract will be implied.

McCracken's Estate, 5 C. 428.
Kostenbader *v.* Spotts, 30 Sm. 433.

John M. Thomas, contra.

The argument as to the admissibility of parol testimony to prove the facts is superfluous; it was admitted, and the auditor found *as a fact* that the vendee had not assumed the payment of

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the mortgage debt, and this Court will not set aside that finding.

Mengas's Appeal, 7 Harris, 222.
Dellinger's Appeal, 21 Sm. 428.
Birely's Appeal, 3 WEEKLY NOTES, 213.

The appellant contends that whenever one buys real estate subject to an incumbrance the law will imply an agreement on his part to pay it; but this has been emphatically denied.

Kearney *v.* Tanner, 17 S. & R. 97.

White, in reply.

Whenever the mortgage is counted as part of the purchase-money, this makes the vendee liable, and he is bound to indemnify the vendor.

Thomas *v.* Pledwell, 7 Vin. Abr. 53, pl. 5.
Kearney *v.* Tanner, 17 S. & R. 97.
Girard Life Ins. Co. *v.* Stewart, 5 WEEKLY NOTES, 88.
Metzgar *v.* Gernert's Appeal, 21 Sm. 330.
Hoff's Appeal, 12 H. 205.
Lennig's Est. 2 Sm. 139.
Woodward's Appeal, 2 Wr. 327.
Blank *v.* German, 5 W. & S. 42.

March 24, 1879. THE COURT. Upon the evidence before us we see no reason to correct the findings of the learned auditor in the Court below upon the questions of fact, and on the facts as found by him we think the conclusion at which he arrived was right.

Decree affirmed and appeal dismissed at the costs of the appellant.

PER CURIAM.

[See Stokes *v.* Williams, 6 WEEKLY NOTES, 473; Moore's Appeal, Id. 474; Samuel *v.* Peyton, Id. 476; Thomas *v.* Wiltbank, Id. 477.]

July '78, 31. Feb. 6, 1879.

Brice's Appeal.

Building laws—City of Philadelphia—Alteration of buildings—Building inspectors—Act of April 21, 1855, § 6—What constitutes a new building within the meaning of the Act—Power of the Court under the Act.

A back building was raised one story, changed, as to two of its walls, from frame to brick, and so altered internally by staircases, ranges, partitions, and doors as to make practically four separate dwelling-houses, each constituting a cheap tenement house for a family:

Held (sustaining the decision of the Court below), that the alterations constituted a new building within the meaning of the Act of April 21, 1855, requiring that all new buildings within the city of Philadelphia shall front upon a street of not less than twenty feet in width, and shall have an open space attached to them of twelve feet square:

But, held further (reversing the decree of the Court below), that the owner cannot be restricted in his right to lease a part of his building, or to permit it to be so occupied.

Per MERCUR, J. The object of the Act was to secure and protect health and life by furnishing each family with a sufficient quantity of light and pure air, and with a reasonable facility for escape in case of fire. It should be construed so as to give due effect to its wise sanitary provisions.

The power of the Court under this Act is limited to restraining the continuance of the work, and to ordering the removal or change of so much of *the building* as may come within the prohibition of the law, but does not extend to controlling the use and enjoyment of it.

Certiorari to the Common Pleas No. 3, of Philadelphia County.

Petition by Robert W. Bowers, one of the building inspectors of the city of Philadelphia, for an order and injunction against Conrad Backle and William Brice.

The petition alleged that in November, 1877, Backle took out a permit from the board of building inspectors of the city of Philadelphia for the erection or construction of one three-story addition to the back building of premises No. 1084 Beach Street; that Brice is the owner of said property, and that Backle is making the alterations thereof; that the petitioner, upon his inspection of the alteration made under color of the said permit, is satisfied that the said back building is converted into four separate tenement houses, which will front on a seven feet wide yard, without any open space attached to them in the rear or at the side equal to at least twelve feet square, as required by the Act of Assembly in that case made and provided.*

The petition prayed for an order commanding them and each of them to close up such new doorways and windows as have been opened or constructed in the rear building of said house, and in all respects to place the said back building in the same condition, as to walls, partitions, doors, and stairways, that it was in before said permit was issued, except as to the one three-story addition to said back building, as covered by said permit, within five days; and for an injunction.

Separate answers were filed by Backle and Brice, both denying that any new building had been erected within the meaning of the Act.

The following facts were subsequently agreed upon:—

(1) The question is, whether or not an alteration of the back building of house, 1084 Beach Street, with a new entry-way therefrom through the main building in the front part of the house, is or is not within the provisions of the Act of Assembly, requiring every new dwelling-house to have an open space attached to it in the rear, or at the side, equal to at least twelve feet square, because it is admitted that if said alteration is within the Act and constitutes four new build-

* The material provisions of the Act are quoted in the opinion of the Supreme Court, *infra*.

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ings, there is not such an open space attached to each, or in the rear or side thereof, inasmuch as the said back building fronts on a yard but seven feet wide, and has no other open space attached to it, or to said four dwelling-houses. The question as to the frontage on a seven feet wide alley or passage-way is also submitted.

(2) Externally the alteration consists in the demolition of two frame walls of the rear room of said back building, leaving the two brick walls thereof standing, and the erection in place of the two demolished walls of two new brick ones, and in adding one new story in height to the whole rear building, which was formerly only two stories high, except the rear room, which was formerly only one story high, and which is now three stories high, and a cellar.

(3) Internally the alteration of said back building as constructed, is in making four instead of three rooms, by a partition in one of the four rooms. Formerly there were only two stairways in said back building, and the hall stairway; that now there are four stairways and the hall stairway, each of the said stairways extending to the third story; that formerly there were but two ranges in said back building, but now there are four, each of the ground rooms having one; that formerly there were but two outside doorways in said back building, but now there are four, each of the ground rooms having one outside doorway; that formerly all of the three rooms of the back building had communicating doors on the first floor, but that now one of those rooms has been divided by a studding partition, which has an opening for a doorway, with jams, etc., but said door is at present nailed up, and is not hung on hinges. It would require not more than fifteen minutes to tear off the strips by which the door is nailed up, and to swing it on hinges. The two rooms next to the main building communicate by open doors, but the door between the rear rooms on the ground floor is nailed up similarly to that in the new partition; that on the second floor none of the rooms are communicating; that on the third floor none of the rooms are communicating; that the only entrance and exit to and from the second and third floors is by the staircase leading from the rooms on the first floor directly below, except as to the first and third floor rooms next to the entry, where there are doorways to the entry.

The Court entered the following decree: And now, April 6, 1878, after hearing upon petition, answer, and statement of evidence agreed upon by counsel in writing, and filed in this case, the Court order, adjudge, and decree that the defendant, William Brice, owner of the property described in the petition, open communication from room to room on each of the three floors of the back building of said property or dwelling described in said petition, and keep open said communication; and that he shall not lease, use, or allow to be used the subdivisions of said back building as separate dwellings or tenements, unless they, or either of them so leased or used, shall be made to front upon a street, alley, or court of at least twenty feet in width, and have attached in the rear or side to each subdivision so leased or used at least twelve feet square of open space.

The defendant took this writ, assigning for error the entry of the decree.

John G. Johnson, for the appellant.

There is but *one* building, fronting on Beach Street, and it complies with all the requirements of the Act of 1855. The back building constitutes, with the main building, into which it opens by the hall-way and to which it is physically attached, but one entire structure. It is not necessary that the main and back buildings should *each* have an open space in the rear, or at the side, "equal to at least twelve feet square."

For alterations which have been held not to constitute new buildings, see—

Miller *v.* Oliver, 8 Watts, 514.
Landis's Appeal, 10 Barr, 379.
Miller *v.* Hershey, 9 Sm. 65.

The error of the Court lay in treating the main and the back building as two entirely separate buildings, and in requiring an open space on the side or in the rear of both. The mere fact that the two may be separately used does not make the altered building a new building. If nothing more had been done than to make additional partitions without altering the exterior, it could hardly be contended that the whole structure would have been liable to demolition under the Act of 1855. Yet such alteration would have been attended with the same practical results as those which have ensued.

William P. Messick, for the appellee.

The question is not one of law, but of fact, which will not be reviewed by this Court.

The case is governed by Schultz *v.* Doak (4 Phila. Rep. 151).

May 5, 1879. THE COURT. Section 6 of the Act of 21st April, 1855 (P. L. 265), relating to the city of Philadelphia, declares "that no new dwelling-house, or other building within said city, shall front upon any street, alley, or court which shall be of less width than twenty feet, or without being made to recede so that such street, alley, or court shall be of that width, the buildings on each side equally receding. Every new dwelling-house shall also have an open space attached to it in the rear or at the side equal to at least twelve feet square." By section 5 of the Act of 7th May, 1855 (P. L. 464), it is made the duty of the building inspector to visit and inspect each building that is in course of erec-

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tion, construction or alteration within his district, and see that it is being erected, constructed, or altered according to the Act, and all Acts and ordinances in force in said city. Section 18 of the same Act provides that when he inspects, condemns, and notifies, and his condemnation and notice are disregarded, he shall petition the Court of Common Pleas, which is authorized to make a decree restraining the continuance of the work and the removal of so much of the building as may have been constructed contrary to law. By virtue of these Acts of Assembly, and in pursuance of their provisions, the decree in this case was made.

The work complained of was the alteration and substantial change of the back buildings of a house, the main part of which fronted on Beach Street. The question is whether the alterations and changes, as made, create a new dwelling-house or other building within the true meaning and spirit of the Act. The changes were both external and internal. Prior to the alteration one part of this back building was two stories high; another part only one story. The main exterior alteration was made by tearing down two frame walls and erecting brick walls in their places, and by extending them so high as to make the whole building three stories. This necessarily required the other walls to be elevated.

Formerly there were three rooms only on the ground floor, two stairways in addition to the hall stairway, two ranges, two outside doors, and communicating doors between all of the three rooms on the first floor. The alteration consisted in putting in a partition on the first floor, thereby creating four rooms, and making such further changes that now there are four stairways besides the hall stairway, each extending to the third story; four ranges, each room on the first floor having one; an outside doorway to each of said four rooms; two of the doorways between adjoining rooms on this floor are nailed up, and none of the rooms on either the second or third floor are communicating.

This construction and arrangement shows a clear intention to make four separate dwelling-houses. Although a part of the old building is retained, yet new and distinct dwelling-houses are built where they did not stand before. Each by itself has the necessary formation and appointments to constitute a cheap tenement house for a family.

The object of the Act was to secure and protect health and life by furnishing each family with a sufficient quantity of light and pure air, and with a reasonable facility for escape in case of fire. It should be so construed as to give due effect to its wise sanitary provisions.

We think the learned Judge was clearly right in holding that the changes and alterations constituted a new building within the meaning of the Act. It is conceded that if the buildings are within the Act, there is not such an open space attached to each, or in the rear or side thereof, as the statute requires, for they all front on a yard only seven feet wide, and have no other open space attached to them.

In so far as the decree orders the appellant to open communication between the rooms on each floor and keep them open, so as to destroy the separate character of the houses, we see no error; but we are unable to find any warrant in the statute to sustain the other part of the decree, which restricts the appellant's right to lease a part of his building separately or to permit it to be so occupied. The power of the Court under this Act seems to be limited to restraining the continuance of the work, and to ordering the removal or change of so much of *the building* as may come within the prohibition of the law, but extends not to controlling the use and enjoyment of it. On the building being made to conform to the law so that it may remain, the right of the owner to let it to one or to several tenants, must remain unimpaired. This part of the decree is reversed and so modified; the other part of the decree is affirmed.

And now, May 5, 1879, this cause having been duly argued by counsel, it is now, on due consideration thereof, ordered, adjudged, and decreed that the appellant, William Brice, owner of the property described in the petition, open communications from room to room on each of the three floors of the back building of said property or dwelling in said petition described, and keep communication open.

It is further ordered that the costs in the Court below, and one-half of the costs of this appeal, be paid by the appellant, and the other half of the costs of the appeal be paid by the appellee.

Opinion by MERCUR, J.

Jan. '79, 87. April 1, 1879.

Buck v. The Commonwealth.

Taxes—Collectors, when not liable for collection of taxes improperly assessed—Act of May 27, 1841.

A tax collector proceeding under a warrant duly granted by a borough council, directing the collection of a tax properly levied by the borough, is not criminally responsible for the collection of the tax from a person afterwards shown to have been improperly assessed by the assessor and county commissioners.

The Act of May 27, 1841, § 8 (P. L. 400) is intended to prevent the voluntary payment of illegal taxes for the evasion of the election laws, and will not support an indictment on a charge of enforcing an illegal payment.

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Error to the Quarter Sessions of Northampton County.

Indictment, at the suit of Ritter, against Buck, collector of taxes for the First Ward of South Bethlehem, for demanding of the prosecutor taxes which had not been legally assessed, and giving him a receipt therefor, contrary to the Act of May 27, 1841 (P. L. 400). At the trial the following facts appeared: Ritter, the prosecutor, was the owner of a house in Saucon Township, near the line of the borough of South Bethlehem. The borough council, by its warrant, directed Buck to collect borough taxes, as in an annexed duplicate noted. This duplicate contained, *inter alia*, the name of Ritter as assessed for the said house and lot at a specified valuation and rate. Buck demanded the tax from Ritter, who declined to pay it, on the ground that the property was assessed in Saucon Township, where it was in fact situated, as proved at the trial. Buck then applied to the borough council to be exonerated from the collection of Ritter's tax, but the council told him that the assessment was regular. Snyder, the borough assessor, testified that the county commissioners had directed him to assess Ritter as of the borough, which he had done; but that he returned his assessment book to the commissioners' office without noting therein a valuation of Ritter's property. After the borough council had refused an exoneration, Snyder told Buck that Ritter's assessment was proper, and then Buck levied upon Ritter's horse and wagon, which he released upon payment of the tax by Ritter under protest, for which he gave a receipt.

The defendant presented, *inter alia*, the following points: (1) If the jury believe that the collector collected the tax because it was on his duplicate, because he had compared the duplicate with the assessor's book; had applied to be exonerated and had been refused; had been shown the borough surveys, locating Ritter in the borough, and been instructed by the burgess to proceed with the collection, and that he executed the orders in good faith, there can be no conviction. (2) It was not the duty of the borough tax collector to go behind his duplicate and the assessment book exhibited to him by the assessor of the borough.

Answer. The offence created by the 8th section of the Act of May 27, 1841, consists in the violation of certain provisions thereof by the public officers named therein. . . . If the jury find from the evidence, beyond a reasonable doubt, that at the time when the defendant demanded and received the tax from Ritter, he, the defendant, was informed by the said Ritter . . . that he had no property in the borough of South Bethlehem; . . . that the defendant, by his negligence, failed to use reasonable diligence to ascertain the fact whether Ritter had been duly assessed in the borough of South Bethlehem, and return of said assessment had been made to the office of the county commissioners, then if the defendant received said tax under such circumstances, such act constitutes a violation of the said Act of 1841.

Verdict guilty; and the defendant was sentenced to pay a fine of $100. The defendant took this writ, assigning for error, *inter alia*, the above portion of the answer to his points.

W. E. Doster, for the plaintiff in error.

A collector is not criminally responsible for the collection of taxes improperly assessed. His undertaking is simply to receive and pay over the amounts charged in his duplicate. Where he holds a warrant regular on its face, issued by an authority having lawful power to issue it, he need not inquire as to the regularity of the preceding steps.

Moore *v.* Allegheny City, 6 Harris, 55.
Cunningham *v.* Mitchell, 17 Sm. 81.

The Act of Assembly under which this indictment is framed, relates to offences against the election laws.

C. M. Anstett (with him *Fox* and *Kachline*), contra.

The Act of 1844 will support this indictment. It was an omnibus Act, for various purposes. Nothing can be gathered from titles of Acts passed before the new Constitution.

The assessment, never having been duly returned to the county commissioners, was invalid.

McCall *v.* Lorimer, 4 Watts, 351.
Wharton *v.* Borough of Birmingham, 1 Wr. 372.

All who engage in the collection of a tax assessed without authority are trespassers.

Wilson *v.* Borough of Lewistown, 1 W. & S. 430.
School Directors *v.* Carlisle Bank, 8 Watts, 294.

The collector's warrant might protect him in case a civil action should be brought against him, as in the cases cited by the plaintiff in error. But there can be no agency in crime, no protection under the commands of others in the violation of the provisions of a penal statute.

May 7, 1879. THE COURT. In the case of Moore *v.* Allegheny City (6 Harris, 55) it was said by Mr. Justice BELL, that as an executive officer, a collector is not liable for acts done in the execution of his precept, apparently regular, and emanating from persons having authority over the subject. The ruling in this case is approved in Cunningham *v.* Mitchell (17 P. F. S. 78), and the doctrine therein stated, reiterated. Now there is no doubt about the power of the authorities of the borough of South Bethlehem to levy borough taxes, or that their warrant empowered Buck, the defendant below, to collect such taxes. It is also a fact that the property of Daniel Ritter, the prosecutor, had been assessed

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as lying in the aforesaid borough. The allegation, however, is that the assessment was irregular in that the property was not embraced within the borough lines, and also because the duplicate in which the assessment was made was not returned to the county commissioners. There is no doubt about the correctness of this allegation, but then who was responsible for these mistakes? Surely not Buck. He had no power to revise what his superiors had done. Whether Ritter's property lay in the borough or in Saucon Township could only be determined by a survey, which the defendant had no power to make. He did what he could to ascertain the correctness of his duplicate; he had applied to the assessor, and was by that officer informed that the assessment was correct; he had applied for an exoneration, and was refused; there was, therefore, nothing left for him to do but to collect the taxes. It was not his business to revise the assessments or survey the borough lines; but it was his business, as a ministerial officer, to obey the direction of his warrant. The irregularity in this case is certainly no greater than that in Cunningham *v.* Mitchell, where the school directors had assessed a bounty tax, though the township had never agreed to pay bounties. The error in the present case originated with the assessor and county commissioners, for Snyder, the assessor, says the commissioners told him to put this assessment in the duplicate of South Bethlehem. *Prima facie*, then, Ritter's property was properly assessed in the borough, and though this was afterwards found to be a mistake, it would be out of all character to make the collector liable criminally for the fault of his superiors.

But again it was a mistake to suppose that an indictment, on a charge such as this, can be supported under the Act of May 27, 1841 (P. L. 400). The 8th section of that Act, the one relied upon to sustain this indictment, is intended to prevent fraudulent voting. On what other hypothesis can the provisions be explained that no county treasurer, county commissioner, or collector of taxes in any township, ward, or district, nor any other person on his or their behalf, shall receive payment, or give any receipt for the payment of taxes that have not been duly assessed, and that neither of the persons above named shall receive payment, or give any receipt for the payment of any taxes from the payment of which the party assessed has been exonerated according to law, unless the party so exonerated shall himself appear, in his own proper person, and tender payment of the taxes from which he has been so exonerated? Now it is very clear that all this is directed against the voluntary payment and receipt of taxes, and not against the enforcement of such payment by legal process. And if it is not meant to prevent the use of tax receipts improperly obtained, as a fictitious qualification for voting, then we know not what it does mean. For why, ordinarily, should one who has been exonerated, not be permitted to pay his taxes by the hand of another, or why should he not be permitted voluntarily to pay a tax irregularly assessed?

It follows from either view of the case, as above taken, that the defendant has been convicted without warrant of law. The sentence of the Court of Quarter Sessions is reversed and set aside, and record remanded.

Opinion by GORDON, J.

Jan. '78, 304. Jan. 20, 1879.

Schœning v. Leeds.

Execution—Sheriff's sale—Purchase—Conditions of sale—Failure to pay purchase-money—Resale—Measure of damages.

A. paid $50 on his accepted bid of $1100 for real estate at sheriff's sale under the following conditions: "The balance of the purchase-money must be paid to the sheriff at his office within ten days from the time of sale, without any demand being made by the sheriff therefor. Otherwise the property may be sold again at the expense and risk of the person to whom it is struck off, who in case of any deficiency at such resale shall make good the same." A. having failed to pay the balance of the purchase-money, the property was resold to B. for $16,000. He also failed to comply with the conditions, and at a third sale C. purchased at $100, and received his deed. In a suit by the sheriff against A.:

Held, that he was entitled to recover the difference between the purchase-money paid by C., and the amount of A.'s bid, less $50 paid at the time of the first sale.

A purchaser at sheriff's sale who fails to pay the purchase-money within the time limited by the terms of sale is not relieved from his liability to the sheriff by the fact that there is a second sale at which the property is struck off at an increased price, unless the purchaser at the second sale pays in his purchase-money.

Error to the Common Pleas No. 2, of Philadelphia County.

Case stated, in which William R. Leeds, late sheriff of Philadelphia County was plaintiff, and Jacob Schœning, defendant, showing the following facts:—

By virtue of a pluries writ of venditioni exponas issued out of the late District Court of Philadelphia County to December Term 1872, the plaintiff exposed for sale a certain piece of real estate under the following conditions of sale:—

"Fifty dollars of the price or sum at which the property shall be struck off shall be paid to the sheriff at the time of sale unless the purchase-money shall be less than that sum, in which case only the purchase-money shall be paid. Otherwise the property will again be immediately put up and sold. The balance of the purchase-money must be paid to the sheriff, at his office, within ten days from the time of sale without any demand being made by the

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sheriff therefor. Otherwise the property may be sold again at the expense and risk of the person to whom it is struck off, who in case of any deficiency at such resale shall make good the same."

At this sale the premises were struck off to Geo. A. Dedrick, as attorney for the defendant, for $1100, the sales-book was duly signed, and $50 paid on account of the purchase-money. Mr. Dedrick purchased the premises solely under instructions from defendant and as his attorney. The terms of sale not having been complied with, another sale took place, and the property was struck off to E. Bromall for $16,000. He also failed to comply with the terms of sale. On May 5th they were again sold for $100 to F. Blackburne, who paid the purchase-money in full and obtained a deed. "If the Court shall be of the opinion that upon the above facts the plaintiff is entitled to recover, then judgment is to be entered in his favor for $950, being the difference between the amount agreed to be paid by the defendant, and that for which the property subsequently sold, less the fifty dollars paid by the defendant on account of purchase-money. If the Court shall be of the contrary opinion, then judgment is to be entered for the defendant."

The Court entered judgment for plaintiff for $950. Defendant took this writ of error, assigning as error the entry of the judgment.

D. W. Sellers (with whom was *Benjamin Daniels*), for plaintiff in error.

The condition of Schœning's bid was that if he made default he was to pay the difference in amount between his bid and his accepted bidder at the next sale if there were a deficiency; but there was no deficiency, and the conditions of the sale were then fulfilled. If the sheriff proposed to hold him at such resale he was bound to see that his accepted bid was a good one. Purchasers at former sales who do not get actual notice of the resales may fairly consider themselves exonerated when they find that a larger bid than their own has been accepted. To hold the bidder liable until the property shall be actually sold, is to impose an entirely new condition, which cannot be done without consent.

Freeman *v.* Husband, 27 Sm. 389.

A. T. Freedley (with whom was *C. B. McMichael*), contra.

This is simply a question of the measure of damages, which is the difference between the bid and the sum obtained at the first *completed* sale. The amount of an intermediate bid never completed is immaterial.

Cooper *v.* Borrall, 10 B. 492.
Peddle *v.* Hollingshead, 9 S. & R. 277.
Zantzinger *v.* Pole, 1 D. 419.

The point was specifically decided in—

Moor *v.* Roberts, 3 Con. Bench N. S. 839.

The statute of limitations commences to run from the date of the original sale.

Leeds *v.* Seery, 2 WEEKLY NOTES, 223.
Funk *v.* Smith, 16 Sm. 29.

February 10, 1879. THE COURT. One of the conditions of the sheriff's sale, which the plaintiff in error signed, was that if he failed to comply with his bid, the property should be sold again at his expense and risk. There was here a second sale at which a sum greater than the first was bid, but that bidder also made default.

It is contended that this terminated the liability of the first bidder. It is evident, however, that if he can procure some man of straw to bid at the second sale, he can escape his responsibility by the mere forfeiture of the deposit. But this is evidently not the meaning of the condition under which the bidder will remain liable until there is a resale consummated by payment of the purchase-money.

Judgment affirmed.

PER CURIAM. WOODWARD, J., absent.

Common Pleas—Law.

C. P. No. 1. Dec. 21, 1878.

Tyrell Building and Loan Association v. Daughen.

Certiorari to magistrate—Landlord and tenant—A party interested, though not a party to the record, is entitled to a certiorari—Act of April 3, 1830—A record which fails to set forth the terms of the lease, the amount of rent, and other facts, is fatally defective.

(1) Rule to quash certiorari to a magistrate.

(2) Exceptions to magistrate's transcript.

This was a proceeding to obtain possession of the premises No. 616 Bainbridge Street, for non-payment of rent, under the provisions of the Act of April 3, 1830. The defendant was in possession by virtue of a lease from Mary Gort, dated May 5, 1877. The Association plaintiff purchased the premises at sheriff's sale on February 4, 1878, under proceedings on a judgment obtained for arrears of ground-rent reserved by deed, and brought this action, claiming that defendant had attorned to them. The complaint alleged that plaintiffs demised the premises to defendant, reserving rent; that the rent is due and unpaid; that there are not on said premises sufficient goods, etc., not exempted from levy; and that defendant, after being duly notified, has neglected or refused to deliver up the premises. The magistrate's docket merely set forth that A. B. and C. D. were sworn and examined for plaintiff; E. F. and G. H. sworn and examined for defendant. Judgment entered against defendant, that he deliver possession, etc.

Mary Gort, claiming to be still the lawful owner of the premises, notwithstanding the

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sheriff's sale to the association plaintiff, having filed an affidavit alleging, *inter alia*, that the magistrate had not jurisdiction of the cause by reason of a dispute as to the title, obtained a writ of certiorari, and excepted to the proceedings had before the magistrate, on the ground that the jurisdiction and cause of action did not sufficiently appear in the complaint and record.

The plaintiff took the present rule to quash the certiorari, and the exceptions were argued at the same time.

J. Alcorn, for the exceptions.

The Act of 1830 limits the jurisdiction of the magistrate to certain cases, viz., where the lease is for a term of years, etc., and the rent is not paid according to the terms of the contract, and there are not sufficient goods exempt from levy upon the premises, etc. That the present case is within the limits thus fixed cannot be presumed, but must be affirmatively shown by the complaint and the record.

Act April 3, 1830, Purd. Dig. 884, pl. 25.
McDermott *v.* McIlwain, 25 Sm. 341.
Trimbath *v.* Patterson, 26 Id. 277.
McKeon *v.* King, 9 Barr, 213.
McCale *v.* Kulp, 8 Philad. 636.
Jones *v.* Evans, 1 Browne, 207.

The record must set forth the substance, at least, of the evidence.

City *v.* Borst, 1 WEEKLY NOTES, 186.

Where the title to the premises is in dispute the magistrate has no jurisdiction in proceedings under this Act, and plaintiff's remedy is by action of ejectment.

Clark *v.* Everly, 8 W. & S. 226.

J. Sloan, for rule to quash.

Mary Gort, not being a party to the record, was not entitled to the writ of certiorari.

Act of March 20, 1810, Purd. Dig. 608, pl. 28.

J. Alcorn, in reply.

The party *injured by the judgment*, Mary Gort in this case, is entitled to a writ of certiorari.

Act of March 24, 1865, Purd. Dig. 886, pl. 32.
Road Comm'rs *v.* Fickinger, 1 Sm. 48.
Bletz *v.* Haldeman, 2 Cas. 403.
Deaves *v.* Brightly, 4 Clark, 37.
Binns' Justice (7th ed.) 206.
Steel *v.* Bridenbach, 7 W. & S. 150.
Cadmus *v.* Jackson, 2 Sm. 295.
Read *v.* Husulton, 27 Leg. Int. 198.

C. A. V.

Dec. 28, 1878. THE COURT. The Act of Assembly allows the party, his agent or attorney, to take out a writ of certiorari. In this case it was taken by Mary Gort, a party in interest, though not a party to the record. On principle, as well as on the authority of the case of Road Commissioners *v.* Fickinger (1 Sm. 48), she was entitled to the writ of certiorari, and therefore the rule to quash is discharged.

This rule being disposed of, there is no difficulty as to the exceptions. The record of the magistrate is so radically defective in not stating the term of the demise and the rent reserved, that the exceptions must be sustained.

Oral opinion by ALLISON, P. J.

C. P. of Lycoming Co. July, 1879.

Nippenose Township v. Bastress Township.

Assessments—Taxes—Lands lying in different townships—The purchase and annexation of a smaller tract of land situate in one township to a larger tract situate in another, and farmed as a whole, renders the whole assessable in the township where the mansion house is situated —Act of July 11, 1842.

Case stated, showing the following facts:—

Adam Dietrich, a resident of Nippenose Township, Lycoming County, was the owner of 120 acres of land, on which his mansion house and other frame buildings were erected. Prior to the assessment of 1877 Dietrich purchased 50 acres of land, adjoining his farm, and lying in Bastress Township, upon which was erected a small frame building, which he removed before the taxes for the year 1877 were assessed, and subsequent to said purchase farmed the 50 acres in connection with the 120 acres as one farm. The township line between Nippenose and Bastress Townships separated the 50-acre tract from the 120 acres. The assessor of Nippenose Township assessed the whole of the 170 acres in that township, and the taxes so assessed were paid. The assessor of Bastress Township assessed the 50-acre tract for the year 1877, as had been previously done for fifteen years, and claimed to be entitled to collect the taxes so assessed, because it was a separate tract of land. If the Court should be of the opinion that the whole farm of 170 acres was properly assessed in Nippenose Township then judgment to be entered for the plaintiff; but if the Court should be of the opinion that the taxes assessed on the 50 acres were properly assessed in Bastress Township, then judgment to be entered for the defendant, with the right of appeal.

Geo. W. Youngman, for the plaintiff.

The case is governed by the Act of July 11, 1842, sec. 59 (Purd. Dig., 1360, pl. 15), which provides that: "The assessors of the several counties within this Commonwealth shall, on seated lands, make the assessment in the township in which the mansion house is situate, where township lines divide a tract of land." This Act was intended to prevent the inconvenience of taxpayers having to pay taxes in different municipalities. The Act is remedial, and should receive a liberal construction.

Bausman *v.* Lancaster County, 14 Wright, 210.

John J. Metzger, for the defendant, contended that the Act of 1842 did not apply to this case,

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that it was only applicable to cases where the township lines *divided* the tract of land. That as the division line between the townships did not divide the 50 acres, it was a separate tract of land, divided from the main farm. Having previously been assessed in Bastress, it was still assessable in that township, because it was not such a part of the mansion farm as comes within the provisions of the said Act.

July 19, 1879. THE COURT (after stating the facts). The right to assess the 50 acres in Nippenose Township is based upon the 59th section of the Act of Assembly of July 11, 1842 (Purd. Dig., 1360, pl.15), which enacts that assessments of seated lands shall be made in the township in which the mansion house is situate, where the township lines divide a tract of land. The township of Bastress denies the right of Nippenose Township to assess these 50 acres, on the ground that for a number of years prior to the purchase by Dietrich these 50 acres were assessed and taxed in said township as a separate farm, and that the said farm was not a part of the same tract with that owned by Dietrich in Nippenose Township. This then raises the question between these two townships as to the right to assess and collect the taxes from these 50 acres of land, and whether the case comes within the provisions of the Act of July 11, 1842. Justice STRONG says, in Bausman *v.* County of Lancaster (14 Wright, 210), "It is fairly deducible from the Act of April 15, 1834, that while it was made the duty of assessors and assistant assessors of the several counties to take an account of, and value all real estate within their respective wards, townships, and districts, they were directed to assess such objects of taxation as a whole. It was not contemplated that they should divide farms, or lots of ground, or real estate of any description that had been used and enjoyed as a whole up to the time of assessment. Such a mode of assessment would have necessitated measurements, in very numerous cases, of parcels cut off from the main body of a tract of land by township or ward lines. And as by the supplementary Act of April 15, 1841, the valuation is required to be made at such rates and prices as the properties valued will sell for separately at a *bona fide* sale, division of properties by ward and township lines would often render such valuation impossible. Hence the passage of the Act of July 11, 1842." We think the assessment of the whole 170 acres in Nippenose Township was right, and within the provisions of the Act of July 11, 1842. There being no buildings upon the 50 acres, and the whole 170 acres having been used as one farm, the owner had the right to have it assessed as a whole. The Legislature, fixing the locality of the mansion house as the place where the taxes are to be collected, evidently had in view the convenience and propriety of calling on the occupier, and not on empty fields, for the money demanded. That the 50 acres had previously been assessed in Bastress Township can make no difference, if, after the purchase by Dietrich, the buildings were removed, and the 50 acres were annexed to his farm, and it was used as a whole. It is true, that the owner of a farm in one township could not purchase a large portion of land in another township and annex it to his farm and claim to have it assessed as a whole in the township where his mansion house was situate, and thus deprive a township of a large portion of its taxes. The Act of July 11, 1842, must receive a reasonable construction, and in the present case the purchase was by Dietrich of the 50 acres, and annexing the same to his farm, and claiming to have it assessed as a whole in Nippenose Township would not be unreasonable. Justice STRONG, in speaking of the Act of July 11, 1842, in Bausman *v.* County of Lancaster (*supra*), says, "That Act was plainly remedial, it aimed to prevent the mischief which would flow from contests between the assessors of adjoining municipal divisions, respecting the right and duty of assessing property intersected by the division lines of district, and it guarded against the low valuation which assessment of an entire property in parcels tended to produce. It should therefore, receive a liberal construction, both as a remedial statute and as tending to produce equality of taxation." Guided by this rule of construction, we think the case of the plaintiff comes within the provisions of the Act of Assembly of July 11, 1842, and judgment is, therefore, entered on the case stated in favor of the plaintiff, "the township of Nippenose."

Opinion by MAYER, P. J., of 25th Judicial District.

U. S. Circuit Court—Law.

April 26, 1879.

Duncan et al. v. Dun et al.

Negligence—Mercantile agency—Contract limiting liability.

A mercantile agency is not liable for a loss to a subscriber acting upon information collected by its agents and communicated by them to him under his written contract with the agency, wherein it is expressly agreed that the information to be given subscribers is mainly obtained and communicated by servants, clerks, attorneys, and employés appointed as the sub-agents of the subscriber, and expressly providing that the mercantile agency shall not be

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responsible for any loss caused by the neglect of any of the said servants, attorneys, clerks, and employés.

Under such a contract there is no liability on the part of the agency, even for gross negligence in the collection and communication of information by its agents.

Motion to take off non-suit.

Case, by Duncan, Hale & Co. against Dun, Barlow & Co., proprietors of the "Mercantile Agency," to recover damages for the loss suffered by the plaintiffs by reason of selling goods on credit to one James Hill upon information obtained from the mercantile agency as to his mercantile standing and credit.

The narr. alleged a contract whereby the defendants undertook to communicate to the plaintiffs, who were subscribers to the agency, information by means of which they might be enabled to know the standing, responsibility, means, and credit of persons with whom they should be connected in business. That the plaintiffs, to determine the propriety and safety of selling goods to one James Hill, applied to the defendants at their offices in Williamsport and in Philadelphia for information concerning the pecuniary responsibility of the said James Hill, and were informed that he had in his business a capital of $4000, and was the owner of real estate worth $10,000 clear of encumbrances, whereupon the plaintiffs, believing and relying upon said information, and that due care and diligence had been exercised in ascertaining the same, sold and delivered to the said Hill goods to the value of $5110.30. That the defendants were grossly negligent in ascertaining the financial responsibility, standing, and credit of the said Hill, and that on the day on which the defendants communicated the information to the plaintiffs the said Hill was not the owner of real estate clear of encumbrances and worth $10,000, but, on the contrary, was the owner of real estate, all of which had mortgages thereon which were duly recorded in the county wherein the said real estate was situated, and that the said Hill was at the date of the sale and delivery of the goods insolvent, and did not pay for the goods, whereby the plaintiffs, by reason of the gross negligence of the defendants, wholly lost the value thereof.

The defendants pleaded "not guilty," and also a special plea, averring that the information was given the plaintiff in pursuance of a written contract, whereby it was agreed that such information as might be communicated by the defendants to the plaintiffs had mainly been and should mainly be obtained and communicated by servants, clerks, attorneys, and employés appointed as sub-agents of the plaintiffs, and that the defendants should not be responsible for any loss caused by the neglect of any of the said servants, attorneys, clerks, and employés in procuring, collecting, and communicating the said information.

Upon the trial, before McKennan and Butler, JJ., the plaintiffs offered in evidence the written contract between the parties, which contained, *inter alia*, the following clauses:—

"The said Proprietors are to communicate to us, on request, for our use in our business, as an aid to us in determining the propriety of giving credit, such information as they may possess concerning the mercantile standing and credit of Merchants, Traders, Manufacturers, etc., throughout the United States and in the Dominion of Canada. It is agreed that such information has mainly been, and shall mainly be obtained and communicated by servants, clerks, attorneys, and employés, appointed as our sub-agents, in our behalf, by the said R. G. Dun & Co. The said information to be communicated by the said R. G. Dun & Co. in accordance with the following rules and stipulations, with which we, Subscribers to the Agency as aforesaid, agree to comply faithfully, to wit: . . . . The said R. G. Dun & Co. shall not be responsible for any loss caused by the neglect of any of the said servants, attorneys, clerks, and employés, in procuring, collecting, and communicating the said information, and the actual verity or correctness of the said information is in no manner guaranteed by the said R. G. Dun & Co."

The plaintiffs also offered the following report of James Hill, communicated by the defendants by their agents at Williamsport and Philadelphia.

James Hill, Comm. Merchant, Pittston, Pa., July 20, 1876, character, etc., good; capital in business $4000, owns real estate worth $10,000, and clear. Credit good.

Plaintiffs then offered the records of unsatisfied mortgages given by James Hill, amounting to $8250, and judgments against him amounting to $4000, and rested.

Defendants asked for a non-suit, which was granted. Plaintiffs now moved to take it off. Upon the hearing of the motion the Court requested counsel to confine the argument solely to the question of liability for gross negligence under the contract.

David W. Sellers, for the motion.

The interpretation given to the contract upon the trial as a release of all liability, even from gross negligence, is contrary to public policy.

Railroad Co. *v.* Henderson, 1 Sm. 316.
Railroad Co. *v.* Lockwood, 17 Wall. 368.

The clause in the contract relied on by the defence cannot be construed to protect them from the consequences of the gross negligence of its employés; it should be construed as covering ordinary negligence only, and as merely expressive of what the law would have been without it, viz.: freedom from liability for ordinary negligence.

Pasley *v.* Freeman, 2 Sm. Lead. Cases, *55, American note.

The law frequently exempts from liability for ordinary negligence where it would not if the negligence was gross, thus recognizing a distinction which defendants claim does not exist.

De Haven *v.* The Bank, 31 Sm. 95.
Bank *v.* Graham, 4 Norris, 91.

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W. W. Montgomery, *Samuel Wagner*, and *Wm. Henry Rawle*, contra.

There is no difference in kind between ordinary and gross negligence. Though a man may not protect himself by contract against his own negligence, he may do so against that of his servants.

Austin *v.* Manchester R. R., 10 C. B. 454.
Perkins *v.* N. Y. Central R. R., 24 N. Y. 196.
Wells *v.* N. Y. Central R. R., Ib. 181.

The cases of Railroad *v.* Henderson and Railroad *v.* Lockwood (cited on the other side), hold that a *common carrier* cannot exempt himself by contract from liability for the negligence of his employés; but this is not the law as to private persons or those on whom there is no common law liability in regard to the work to be done.

See Bullitt *v.* Baird, 27 Legal Int. 71, and comments thereon in Bradstreet *v.* Everson, 72 Pa. State, 124, also the telegraph cases in the different States.
Passmore *v.* Telegraph Co., 78 Penna. State, 238.

When the employment of sub-agents or substitutes is expressly provided for in the contract, the original agent will not be liable, unless negligence in the choice of the agent be proven.

Story on Agency, § 201.
Commercial Bank of N. O. *v.* Martin, 1 La Ann. 346.
Darling *v.* Stanwood, 14 Allen (Mass.), 504.

Here the Mercantile Agency by its contract has particularly warned the plaintiff of the danger of mistakes which arise from the necessity of employing a multitude of sub-agents, and has bargained for liberty to employ them, without responsibility for their neglect. Plaintiffs being so warned, entered into the contract with their eyes open, and *ipso facto* make the employés of defendants their own agents. Moreover, they do so in terms, and thereby show clearly their intention of taking the risk of the mistakes of such employés.

April, 29, 1879. THE COURT. At the close of the plaintiffs' case a judgment of non-suit was entered by direction of the Court. A motion having been made to take it off, we have again looked into the testimony to ascertain whether it contains anything to support a verdict in the plaintiffs' favor; and the impression we entertained on the trial has now deepened to conviction.

The declaration charges "gross negligence in ascertaining the financial standing and responsibility of James Hill." Mr. Hill resided at Pittston, Luzerne County. The evidence shows an application by the plaintiffs to the defendants' agent at Williamsport for information respecting the financial standing of this gentleman; that they received an answer saying he had a business capital of $4000, and real estate worth $10,000, clear of encumbrances; that the inquiry was repeated at the defendants' Philadelphia office, and a similar answer received; that the plaintiffs, relying on this information, sold goods to Mr. Hill, to a large amount, on account of which a balance of over $3000 remains unpaid, and cannot be collected, Mr. Hill having failed; that the information furnished was incorrect, the real estate owned by Mr. Hill being encumbered at the time beyond its value. Upon this statement (which is sufficiently accurate and particular for the purpose in hand) it may be admitted that the plaintiffs would be entitled to recover but for the provisions contained in the second and fourth paragraphs of the contract; the former of which stipulates that the agents, in gathering information, shall be regarded as the plaintiffs' representatives; and the latter that the defendants "shall not be responsible for any loss caused by the neglect of said agents, attorneys, clerks, or employés in procuring, collecting, and communicating the said information." The language in this latter paragraph of itself is broad enough to exempt the defendants from liability for *all* negligence of such agents. The plaintiffs think it should apply only to *ordinary* negligence, and be read as if *gross* negligence was expressly excepted. For this we can find no warrant. The defendants' business required the employment of numerous agents; and it was foreseen that they might, in some instances, prove negligent and unfaithful. The defendants were particular in calling attention to this, and in guarding themselves against the danger of loss therefrom; and no reason can be seen why they should be less anxious for protection against *gross*, than against common negligence, from this source. The danger from the former was as great as from the latter. By the contract the plaintiffs expressly agreed to take the risk of such loss on themselves. The authorities to which we have been referred have, in our judgment, no application to the case. Common carriers, innkeepers, and others engaged in the exercise of a public calling, cannot thus protect themselves against the consequences of gross negligence in the agents whom they employ. This limitation of the right to contract, as parties may choose, is an exception from the general rule, and confined to the class of cases named, where the public interests are supposed to demand its application. It has no place here. The contract which these parties entered into must be enforced as they made it. It may have been unwise, but with that we have nothing to do. One or the other must bear the risk involved in depending upon agents scattered over the country, of whom neither could know much. The plaintiffs agreed to bear it, and they must take the consequences.

That the negligence here complained of, whether gross or otherwise, is the negligence of the agents and not of the defendants personally, is undisputed and clear.

The motion is therefore refused.

Opinion by BUTLER, J.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, AUG. 14, 1879.* [No. 16.

Supreme Court.

July, '76, 79. Feb. 14, 1879.

Heiskell v. Farmers and Mechanics' National Bank.

Common carriers—Bills of lading—Rights of indorsee of—Practice—Refusal to answer irrelevant points.

Bills of lading, properly indorsed, are symbols of the property covered by them, serving all the purposes of actual possession, and so remain until there is a valid and complete delivery of the property to some person entitled to the possession under the bill of lading.

Cotton was shipped from Galveston for Philadelphia, *via* New York, and the bills of lading therefor in the name of A., properly indorsed, forwarded together with drafts on the purchaser for the price of the cotton, to a bank in Philadelphia for collection, with directions to hold the bills of lading until payment of the drafts (this being in accordance with the terms of the sale). The cotton was reshipped from New York, new bills of lading being issued in a new name, and was delivered at Philadelphia by the carrier (the original bills of lading remaining in possession of the bank) to the purchaser in this city, who obtained from B. an advance of $10,000 thereon. In replevin by the bank against B. :—

Held, that the delivery was unauthorized, and that the bank was entitled to recover.

When points are submitted which are irrelevant or of which there is not sufficient evidence to justify the submission, the Court may properly decline to answer them.

Error to the Common Pleas No. 3, of Philadelphia County.

Replevin, by the Farmers and Mechanics' National Bank against Colson Heiskell, J. F. Hellen et al., to recover 426 bales of cotton. Heiskell entered a claim-property bond for 159 bales, and a plea that the cotton belonged to J. F. Hellen, subject to a lien in defendants' favor for $10,000 advanced thereon.

The facts of the case were as follows: In the spring of 1874, J. M. Morey & Co., cotton buyers in Galveston, Texas, were telegraphed by J. F. Hellen, a cotton broker in this city, and a defendant in this suit, to purchase for him a certain number of bales of cotton. Not being furnished with funds, Morey & Co. applied to Ball, Hutchings & Co., bankers in Galveston, who agreed to advance the money for the cotton on condition that they should have drafts of Morey & Co. on Hellen for the price of the cotton with the bills of lading attached, the bills of lading and the cotton to be retained until the drafts were not only accepted but paid. The terms were agreed to by Morey & Co., and the cotton shipped to Philadelphia *via* New York, bills of lading being issued by C. H. Mallory & Co. to Morey & Co. On reaching New York, the cotton was shipped for Philadelphia by the Express Steamboat Co. line, and a new bill of lading issued to Mallory & Co., containing a provision that if the goods were not immediately upon arrival removed from the wharf, they would be stored at the owner's expense, and containing on the margin a memorandum, "Notify J. F. Hellen." The original bills of lading issued to Morey & Co. were by them indorsed in blank, and delivered to Ball, Hutchings & Co., together with the drafts on Hellen for the cotton. Ball, Hutchings & Co. indorsed the bills of lading to the National City Bank of New York, and forwarded them with the drafts attached to them for collection, with express written instructions to retain the bills of lading until payment of the drafts; by them they were forwarded to the Farmers and Mechanics' National Bank, defendants in error. The drafts with the bills of lading attached, and with a slip in front on which was written "Hold bill of lading until payment of draft," were duly presented to Hellen, and accepted by him on July 13, 1874. The cotton arrived in Philadelphia on July 15, 1874, and Clyde & Co., the agents of the Express Steamboat Co., notified Hellen, and required him to remove it; he did so, stored it in the warehouse of Heiskell, and on July 17, 1874, obtained $10,000 from them as an advance thereon. Within a few days Hellen became bankrupt owing to the failure of a firm in the South, a large quantity of whose paper he had indorsed. On July 23, 1874, the bank learned of the delivery to Hellen, and the same day instituted this action. It was in evidence that in former transactions between the same parties, the drafts and bills of lading had been sent on with the same instructions as to retention, and had been retained, and that Clyde & Co. had delivered the cotton to Hellen in the same manner as in the case in suit, without presentation of the original bills of lading.

The defendants requested the Court to charge: (1) That if the jury are satisfied that Hellen entered into no agreement as to the retention of the bills of lading until payment of the drafts, and that the stipulation made by Morey & Co. to that effect was without authority from him, then Hellen would not be bound by such stipulation, and his sale or pledge of the cotton to any *bona fide* purchaser or pledgee for value would pass the title to such purchaser as against the plaintiff.

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(2) That if the jury believe that Hellen obtained possession of the cotton owing to the failure of the bank to take proper care to prevent its delivery, there can be no recovery in this case.

The Court (LYND, J.) declined to answer these points, but in the general charge said, *inter alia*, "As a point of law, the Court submits to you, that in this case the question is not what Mr. Hellen wanted Morey & Co. to do, or what the terms of Mr. Hellen's order upon them were; but it is what they were able to do. This was to be a sale, and if Mr. Hellen wanted to insist upon the benefits of a sale, and claim that it was a sale to him, he would have to take it subject to such terms as Morey & Co., who were acting for him, had to submit to in order to procure the money at Galveston. . . . . [Now, the allegations on the part of the plaintiff, as you know very well, are . . . . (The Court then reviewed the facts as set forth above) . . . . Now, as the Court has already said, in the view taken by the Court of this question of law here, if you find the facts to be as the Court has stated them, then your verdict ought to be for the plaintiff.]

Verdict for the plaintiff for $13,017.83, and judgment thereon. Hieskell took this writ, assigning for error the refusal to answer the points submitted, and the portions of the charge above quoted in brackets.

J. E. Gowen and *J. B. Townsend*, for the plaintiff in error.

Ball, Hutchings & Co. never had a full title to this cotton, but were mere pledgees; the cotton belonged to Hellen, subject to their lien. Hellen had a right to the cotton upon acceptance of the drafts, for such is the universal custom in these transactions; he could not be held to another agreement entered into without his consent.

Bank *v.* Bank, 1 Otto, 92.

As the bank did nothing in this or in any of the previous cases to prevent delivery to Hellen, a *bona fide* purchaser from him will be protected.

Bank *v.* N. J. Steamboat Co., 59 N. Y. 510.

There was clearly error in declining to answer our points, and taking away from the jury all question of the bank's negligence, and the other questions which the Court declined to submit to the jury.

J. G. Johnson and *R. L. Ashhurst*, for defendant in error.

The delivery of the cotton to Hellen was unauthorized, and therefore could not divest the title of the plaintiffs; there could not be a proper delivery of the cotton except in accordance with the bill of lading; this is held by all the cases.

Dows *v.* Milwaukee Bank, 1 Otto, 618.
Stollenwerck *v.* Thacher, 115 Mass. 224.
Meyerstein *v.* Barber, L. R., 2 C. P. 38, 661.

There was no evidence to justify the submission of the points, the refusal to answer which is complained of, and therefore it was not error to decline to answer them.

May 5, 1879. THE COURT. The bills of lading taken by J. M. Morey & Co. for delivery to their order were symbols of property in the cotton, and when properly indorsed and delivered by them to Ball, Hutchings & Co. operated in law as a delivery of the cotton itself; thus investing the indorsees with a constructive custody, which served all the purposes of an actual possession, and so continued until there was a valid and complete delivery of the property under and in pursuance of the bill of lading to a person entitled to receive the same. The special property thus acquired by Ball, Hutchings & Co. was transferred by them to the National City Bank of New York for collection of the drafts to which the bills of lading were attached, and by it in turn to the Farmers and Mechanics' National Bank, defendant in error. There was no dispute as to the material facts of the case. It was clearly shown, *inter alia*, that the cotton was purchased by J. M. Morey & Co. of Galveston, Texas, for account and by direction of J. F. Hellen, of Philadelphia, and shipped *via* New York from the former to the latter port; that Morey & Co. not having been provided with funds, requested Ball, Hutchings & Co. to advance money to buy the cotton, which they agreed to do, upon the express condition that they should be furnished with the insurance certificates, and drafts drawn on Hellen for the price, together with the bills of lading, and that they should hold the latter as well as the cotton until the drafts were not only accepted but paid; that, with the funds thus advanced on the faith of this arrangement Morey & Co. purchased and shipped the cotton in their own name, drew on Hellen at thirty days' sight for the amount, and according to agreement, indorsed the drafts and bills of lading to Ball, Hutchings & Co., who transmitted them duly indorsed to the bank in New York, by which they were sent to the defendant in error; that both banks were instructed to retain the bills of lading until actual payment of the drafts, to each of which was attached a bill of lading with a slip of paper on which was written "Hold bill of lading until draft is paid;" that the drafts with the bills of lading thus attached were duly presented to and accepted by Hellen, who neither then nor afterwards demanded the bills of lading; that in due time the cotton arrived at Philadelphia, and was delivered by the Express Steamboat Co. to Hellen, without the knowledge of the bank or presentation of the bills of lading; that Hellen immediately stored

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the cotton with the plaintiff in error, and received an advance thereon of $10,000, and as soon as the bank learned that the cotton had been delivered and stored, the writ of replevin was issued.

The Court after calling the attention of the jury to the testimony as to the terms on which Morey & Co. procured the money with which the cotton was purchased, and what was done in pursuance of their agreement with Ball, Hutchings & Co., instructed them that if they believed this testimony and found the facts as indicated by it, their verdict should be in favor of the plaintiff below; and they so found. As already stated the material facts referred to by the Court were not controverted, and the jury under the instructions of the Court could have found no difficulty in rendering the verdict they did.

On the facts established by the verdict, the delivery to Hellen was unauthorized, and the possession acquired by the misdelivery of the cotton, gave him no higher or better right than he had before, viz., the right to the bills of lading, and consequently to the cotton, upon payment of his acceptances, to which the bills were attached as already stated. Numerous authorities might be cited in support of these views; among which are the following: Dows et al. *v.* National Exchange Bank of Milwaukee (1 Otto, 618), in which a very able and exhaustive opinion was delivered by Mr. Justice STRONG; Stollenwerck *v.* Thatcher (115 Mass. 224); Alderman *v.* Eastern Railroad (Id. 233); Meyerstein *v.* Barber (2 Law Rep. C. P. 38, 661); Turner *v.* The Trustees, etc. (6 Exch. Rep. 543); Jenkyns *v.* Brown (14 Q. B. 496); Henry *v.* The Warehouse Co. (31 P. F. S. 76); Benj. on Sales, §§ 381, 382, and note. Meyerstein *v.* Barber (*supra*) was a case in which advances had been made on cotton shipped from Madras to London, and bills of lading, delivered to secure the lender. It is there said by Chief Justice ERLE, "If it were established that a bill of lading, one of the most frequent securities for advances amongst mercantile men, becomes exhausted and ceases to be a security when the ship has reached her destination, and the goods which it represents have been landed and warehoused, what a wide door would be opened for fraud! It is scarcely possible to exaggerate the evil consequences which would be likely to flow from such a doctrine. There is no authority for it." In a concurring opinion it is said, "There can be no complete delivery of the goods under a bill of lading until they come into the hands of some person who has a right to the possession under it." Dows *v.* National Exchange Bank (*supra*) is in point, and rules the main question in this case.

It follows from what has been said, supported by the authorities above cited, that Hellen had no interest or right of possession which he could transfer to the plaintiff in error, to the prejudice of the bank, and therefore the latter could maintain the replevin, unless there was something in the case affecting the rights of the parties which was improperly excluded from the consideration of the jury.

It is complained that the Court declined to answer the points presented by the defendant below. If, as we think was the fact, there was no sufficient evidence to justify the submission of some of them, and the others were irrelevant, the learned Judge very properly declined to answer them. (Wasser *v.* Coryell, 5 W. & S. 60; Covert *v.* Irwin, 3 S. & R. 283; Kline *v.* Johnston, 12 Harris, 72). It frequently happens in the trial of a cause that facts are elicited which in the end have no legitimate bearing on the case. It is entirely proper for the Court to exclude the irrelevant facts from the consideration of the jury, and if there is no dispute as to the relevant and material testimony, to instruct them as to its legal effect. (Graff *v.* The Pittsburg and Steubenville Railroad Co., 7 Casey, 489; Johnston *v.* Gray, 16 S. & R. 361; Dows *v.* The National Exchange Bank, *supra*). In the present case there was really no material fact in dispute. The testimony as to the inception of the transaction, and previous course of dealing, how the bills of lading came to be taken in the name of J. M. Morey & Co., and by them indorsed to Ball, Hutchings & Co., and what occurred subsequently, was undisputed and consistent, but still it was submitted to the jury with proper instructions as to its legal effect in case they believed it to be true.

They were told that the question was not what Hellen desired Morey & Co. to do, but what they had done; that inasmuch as Hellen claimed the transaction was a sale of the cotton to him, and insisted upon his rights as a purchaser, he would have to take it subject to such terms as Morey & Co., who were acting for him, were able to make in order to procure the money to pay for it.

There was no error in this. Hellen had never advanced or paid a cent on the cotton, and if he claimed the benefit of the purchase as made by him, through his agents, he could not repudiate the arrangement made by them to secure and pay for the cotton.

There was no evidence of any laches on the part of the bank by which the plaintiff in error was induced to receive the cotton and make the advances thereon.

The testimony was undisputed that the bank was instructed to hold the bills of lading until the acceptances were paid; that it knew nothing of Hellen's having obtained possession of the

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cotton, by the unauthorized act of the Steamboat Co., until after it was stored with the plaintiff in error, and the money had been advanced. Nor was there anything in the circumstances under which previous deliveries had been made to Hellen by the carrier, that was calculated to affect the bank. It was in no way a party to these unauthorized transactions, and so far as appeared was ignorant of his having thus obtained wrongful possession of the cotton on former occasions. In every case the bank had been instructed to retain the bill of lading until the accompanying draft was paid, and this instruction was always literally carried out. The bills of lading provided for the storage of the cotton by the carrier, in case it was not called for, and the bank might reasonably suppose that this had been or would be done.

We find nothing in any of the assignments of error that would justify a reversal of the judgment. It is unfortunate that the plaintiff in error should lose the amount he advanced in apparent good faith; but similar results often happen when property is purchased from one who has no title or right to sell. The trouble in this case was brought about by the unwarranted act of the carrier in putting Hellen in possession of the cotton, but for this the defendant in error was in no way responsible.

Judgment affirmed.

Opinion by STERRETT, J.

July '78, 24. Jan. 21, 1879.

Dungan's Appeal.

Execution—Sheriff's sale of grantor's interest in land fraudulently conveyed—Liens of prior and of subsequent encumbrances—Liens for taxes on equitable interest in land.

A sheriff's sale made by virtue of a lien acquired after a conveyance by the debtor, vests in the purchaser the rights of creditors to attack the conveyance for fraud; liens attaching to the grantor's interest after the conveyance are payable out of the fund arising from such sheriff's sale; liens against the grantor's interest prior to the conveyance are not divested by the sale.

Judgment was recovered against A., who afterwards acquired an equitable interest in certain lands. He, then, in December, 1876, caused the lands to be conveyed to B, for the purpose, it was alleged, of defrauding his creditors. Execution on the judgment issued in February, 1877, and the land was levied upon and sold by the sheriff as A.'s property. The fund arising from the sale was claimed by the judgment creditor, and by the city for taxes assessed for 1877:

Held (affirming the decree of the Court below), that the taxes were payable out of the fund.

Vanarsdalen's App., 3 WEEKLY NOTES, 463, followed.

Appeal from the Common Pleas No. 1, of Philadelphia County.

Appeal of Dungan from a decree sustaining exceptions to the report of an auditor appointed to distribute a fund arising from a sheriff's sale of real estate upon an execution on a judgment obtained by Dungan against Mountjoy.

From the auditor's report the following facts appeared: Dungan obtained a judgment for $893.76 against Mountjoy in 1875. At that time Mountjoy had no interest or title in the premises in question. Subsequently, in June, 1876, one Singerly, being then the owner of said premises, conveyed them to one Mann, in pursuance of a verbal agreement between Singerly and Mountjoy and Mann, for the purposes of a building operation, whereby Mann was to take the legal title to premises and to execute mortgages to secure the purchase-money and advances, (which he did), and Mountjoy was to erect buildings on the premises, sell them, and have the net profit of the transaction after paying the price or value of the land and the advances. Mountjoy at this time was insolvent and had judgments to a large amount recorded against him. Mountjoy's enterprise proved a failure, and by his consent and at Singerly's request, Mann, on Dec. 29, 1876, conveyed the premises to one Harring, who did not appear to have had notice of Mountjoy's equitable interest. On Feb. 3, 1877, a fi. fa. was issued on the judgment of Dungan against Mountjoy, and the above premises were levied on as the property of Mountjoy; subsequently a writ of venditioni exponas issued, under which the premises, on April 2, 1877, were sold to Harring, to whom they had previously been conveyed by Mann.

Before the auditor, the proceeds of the sale, $900, were claimed by Dungan, the execution creditor; and by the city of Philadelphia, for unpaid taxes assessed in 1877. Harring also claimed that the money should be applied to the payment of taxes.

The auditor held that the taxes for 1877 were not payable out of the fund, which he awarded to Dungan, the execution creditor. Exceptions to this report were filed by the Receiver of Taxes, and by Harring, because the auditor found that the taxes were not payable out of the fund, and because he awarded the fund to the execution creditor. These exceptions were sustained, and Dungan took this appeal, assigning that order of the Court below for error.

Pierce Archer, Jr., and *F. F. Brightly*, for the appellants.

Under the facts found, there was no title to the premises in Mountjoy at the time of the sale under execution, therefore the taxes were not discharged and could not be paid out of the fund.

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Byrod's Appeal, 7 C. 241.
Fisher's Appeal, 9 Id. 294.
Mix *v.* Ackla, 7 W. 316.
Fisher *v.* Lyle, 8 Phila. 1.

E. Spencer Miller (with him *C. Kneass*), contra.

When there is a conveyance, alleged to be a fraud on creditors, and a sheriff's sale of the fraudulent grantor's interest on a judgment recovered after the conveyance, the liens against the grantor prior to the conveyance are not divested by the sale, or paid out of the proceeds; but liens accruing subsequently to the conveyance are discharged, and paid out of the fund. The title remaining in the fraudulent grantor, and the title of his grantee, are distinct and adverse. A sale on a judgment against the grantor sells his title only, and discharges only those liens which have fastened upon this new title.

Hoffman's App., 8 Wr. 95.
Jacoby's Appeal, 17 Sm. 434.

The lien of taxes is against every interest, legal or equitable, in the land upon which they are assessed.

Vanarsdalen's Appeal, 3 WEEKLY NOTES, 463.

May 5, 1879. THE COURT. The fund in contention was produced by a sheriff's sale of the real estate of George Mountjoy. He never held a legal title to the lands, but acquired an equitable interest under these circumstances: He was insolvent, and judgments to a large amount were standing against him. Singerly owned the lands now in question, and houses were in process of erection on them. It was verbally agreed between Singerly and Mountjoy that the former should convey the lands to one Mann, who should execute mortgages thereon to secure the price or value thereof, and the advances, and that Mountjoy should erect buildings thereon and sell them, and have the net profits after paying the price or value of the lands, and advances. The conveyance was made and the mortgages executed under this agreement. Mann had no interest other than as trustee of the legal title for the use of Mountjoy. The purpose was to enable the latter to realize something out of the transaction. His enterprise proved a failure. He gave up all the hope of realizing a profit. On the 29th December, 1876, by consent of Mountjoy and request of Singerly, Mann conveyed the lands to Harring. It does not appear that Harring had any notice of Mountjoy's interest in the premises.

The judgment on which the sale was made was recovered against Mountjoy before he had any interest in the land, and was not revived. In February, 1877, execution issued thereon, the land was levied on, and in April following it was sold to said Harring. The taxes for 1877 being unpaid, the City of Philadelphia claimed them out of the proceeds of the sale, and the appellant claimed the proceeds should be applied on the judgment in his favor, on which the sale was made. The Court below decreed the fund to the payment of the taxes, from which this appeal was taken.

At the time of the conveyance to Harring the appellant had no lien which could be enforced against a good faith purchaser. The lien of the levy attached after that conveyance. The object of the sheriff's sale, when the title was thus in Harring was manifestly with the intention of questioning the good faith of his purchase. As he became the purchaser at the sheriff's sale his title then became undoubted.

It is true it has frequently been held that a sheriff's sale made by virtue of a lien acquired after a conveyance is the means of vesting in the purchaser the right which a creditor has to attack the good faith of the prior conveyance, but has no effect on undisputed liens existing prior to the conveyance sought to be impeached. (Byrod's Appeal, 7 Casey, 241; Fisher's Appeal, 9 Id. 294; Hoffman's Appeal, 8 Wright, 95.) It therefore follows that the fund raised by such a sale must be applied on liens which attached after the conveyance.

Under the Act of Assembly of 3d February, 1824, all taxes which may be lawfully assessed on real estate situate in Philadelphia are declared to be a lien on the said real estate, and "said lien shall have priority to, and shall be fully paid and satisfied before any recognizance, mortgage, judgment debt, obligation or responsibility."

This was so far modified by Act of 11 April, 1835, as not to deprive a first mortgage of the benefit of its primary lien, nor cause it to be discharged by a sheriff's sale under a junior incumbrance.

The Act of 1824 does not in express terms declare the precise time when the lien for taxes shall attach; yet we think the clear meaning is, as soon as they are "lawfully imposed or assessed." Nothing in the Act indicates that the lien shall be postponed to any future time. As soon as the liability of the land for the specific tax arises, the lien must attach. Hence it was said in Camac *v.* Beatty (5 Phila. Rep. 129): "We are clearly of the opinion that the tax is a lien from the time of its assessment." While this was said by the Judge of an inferior court, yet it is entitled to great consideration. Thus it appears that the lien of the city for taxes as well as the lien of the appellant's execution, both attached after the conveyance to Harring. If the lien of the taxes attached at the beginning of the year for which they were laid, they were prior in time to the levy. If prior in time, but after the conveyance to Harring, the lien was prior to the levy on the interest sold by the

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sheriff. The tax lien was the first after the alleged fraudulent deed to Harring. If so, it was entitled to be paid before the judgment of the appellant. The fact that his judgment was used as the instrument to effect the sale did not give him a preference over prior liens on the title or interest which he sold. (Hoffman's Appeal, 8 Wright, 95; Jacoby's Appeal, 17 P. F. Smith, 434.) If in fact the lien of the taxes attached after the lien acquired by virtue of the levy on the execution, yet the Act of Assembly makes the taxes a preferred lien, and directs them to be paid before the judgment of the execution-creditor. If the taxes were a lien at the time of the sale, their payment is preferred.

The lien of the taxes was not restricted to the particular interest or title of any one person, but was a charge on the whole land. The lien was therefore on all the interest or title sold by the sheriff. The fact that an equitable interest only was sold, did not prevent the city from claiming the taxes laid on the whole estate, out of the proceeds of the sheriff's sale. (Vanarsdalen's Appeal, 3 WEEKLY NOTES, 463.)

The decree of the Court below is affirmed, and the appeal is dismissed at the costs of the appellant.

Opinion by MERCUR, J.

March 10, 1879.

Ballard v. Ward.

Adoption of children—Adoption by deed—Act of April 2, 1872—Constitutional law—Retrospective legislation, when unconstitutional—Frauds and perjuries, statute of—Parol gift of land.

There is no right of adoption of children at common law. It is based entirely upon the Acts of May 4, 1855, providing for adoption by decree of the Court of Common Pleas, and the Act of April 2, 1872, providing for adoption by deed.

By deed of August 11, 1863, A. agreed to "adopt B. as his daughter;" in May, 1870, he died intestate:

Held, that, as under the law as it stood in 1870 the deed of 1863 gave B. no right to share as a child in A.'s estate, the retrospective provisions of the Act of April 2, 1872, could not give her any such right, or divest the title to the estate which vested in A.'s children immediately on their father's death.

In order to take a parol gift of land out of the Statute of Frauds, improvement incapable of pecuniary compensation must combine with possession by the donee.

Error to the Common Pleas of Bradford County.

Ejectment, for a house and lot in the borough of Troy, by Henry Ward and Ellen Ward Miller, children and heirs of C. L. Ward, against F. L. Ballard and Lizzie Ballard, his wife.

Upon the trial it appeared that C. L. Ward purchased the property in suit of Wm. Hoffman in the summer of 1869, for $3000; paid $1000 on the contract, and died intestate in the following May, leaving a wife, H. Charlotte Ward, and two children, E. W. Miller and Henry Ward. The remaining $2000 were paid by Mrs. Ward, administratrix, out of her husband's estate, and she took the deed from Hoffman to herself, E. W. Miller and Henry Ward. Mrs. Ward died on April 23, 1872.

The defendants, who were put in possession by C. L. Ward in the summer or fall of 1869, and who have remained in the house ever since, offered various witnesses to prove that Mr. Ward said he was purchasing the property for Mrs. Ballard, and that he told her that if she would move in he would give it to her as her own property. This evidence was objected to because it was offered to prove a parol gift of real estate without an offer to prove anything that would take it out of the Statute of Frauds. Objection sustained. Exception.

The defendants then put in evidence the following letter:—

TOWANDA, Aug. 25th.

Dear Sir: I have been absent from home for some time; and not being very well, I will go to the new Springs (Minnequa) near Canton, for a week—starting to-morrow, and remaining there over Sunday.

I intended before I received yours of the 23rd inst., to have gone over to Troy on the 1st day of September to meet you and draw up articles of agreement, and pay the first instalment of the purchase-money. I have called in some money due me from my settlers, to be paid in to Pomeroy & Brothers on that day.

I have no objection to Mrs. Ballard's taking possession at any time. Our understanding being so plainly in writing *you* would run no risk in letting her in. Be assured, the money will be ready on the day stated; and I will either meet you then at Troy or Elmira, as you prefer, or at Minnequa Springs any day before that, as I go there to-morrow (Thursday) night.

Very truly, yours,
C. L. WARD.

W. HOFFMAN, Esq., Elmira.

The defendants then, in order to prove that Mrs. Ballard was entitled to at least one undivided third part of the property, as an heir, under the intestate law, of Mr. Ward, put in evidence a certified copy of the following deed:—

I hereby offer to her father, Charles H. Ward, in regard to my niece, Elizabeth, and bind myself to fulfil the proposition in every respect, that I will adopt her as a daughter, educate, clothe and maintain her suitably and well, in sickness and in health, and assume in respect to her all the duties and liabilities in regard to such clothing, education and maintenance, releasing and relieving him from all such responsibility under all circumstances that may arise. I will also, at my own discretion and judgment, in case she should marry, make her a suitable and respectable outfit in life, and in all respects guard and protect her as fully as a natural parent would be bound to do. I am to have the advisory place and power in regard to her studies and the length of time necessary for her to remain at

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school, which is to be not less than one year. She is to be at liberty during her minority to visit the home of her natural parents agreeably to her own choice in the premises.

Witness my hand and seal, if accepted, Aug. 11, 1863.

In presence of } C. L. WARD [Seal].
A. MCWILLIAM. }

I hereby give my consent to the proposition here made, and desire the same may be carried into effect.

Witness my hand and seal the Aug 11, 1863.

In presence of } CHAS. H. WARD [Seal].
A. MCWILLIAM. }

Further parol evidence was offered to show that Mr. Ward from the date of the deed until his death always treated Mrs. Ballard as a daughter. Objected to as irrelevant. Objection sustained. Exception.

MORROW, P. J., said in his charge: . . . . . "The evidence all shows a parol gift with but a single act on the part of the defendants, to wit: taking possession. This is not enough to give them the character of purchasers, and unless they have that character there could be no decree for a conveyance. . . . .

"With regard to Mrs. Ballard's heirship. (1) I am unable to see how Mr. Ward could impart to his niece inheritable blood *by deed*, so as to make her capable in law of inheriting his property as a natural child. (2) The alleged deed is but a proposition to adopt, followed by an agreement for maintenance, etc., and it was to that *proposition* her father assented, and I think it was not an adoption. . . . . And, therefore, ... we think the defence fails in both respects, and you are directed to find for the plaintiffs."

The jury accordingly found for the plaintiffs and judgment was entered thereon. The defendants thereupon took this writ, assigning for error the rulings of the Court upon the evidence offered, and the portion of the charge quoted.

J. O. Parker (with him *J. W. Maynard* and *E. B. Parsons*) for the plaintiffs in error.

The rejected evidence as to the circumstances attending the purchase of the house, together with Mr. Ward's letter of Aug. 25, 1869, to Mr. Hoffman, is sufficient to take this case out of the Statute of Frauds and establish the right of the plaintiffs in error to a conveyance.

McFarson's Appeal, 1 Jones, 503.
Lowry *v.* Mehaffy, 10 Watts, 387.
Wilson *v.* Clarke, 1 W. & S. 554.
Tripp *v.* Bishop, 6 Sm. 424.
Johnston *v.* Cowan, 9 Id. 275.
Ackerman *v.* Fisher, 7 Id. 457.
Syler *v.* Eckhart, 1 Binn. 378.
McKee *v.* Phillips, 9 Watts, 85.
Lee *v.* Lee, 9 Barr, 169.
Pugh *v.* Good, 3 W. & S. 56.
Moore *v.* Small, 7 Har. 461.

Under the Act of April 2, 1872 (Purd. Dig. 62, pl. 2), the deed of adoption invested Mrs. Ballard with all the rights of a daughter. She is therefore undeniably entitled to an undivided third of the property in question.

M. F. Elliott (with him *B. S. Bentley*, *D. Rockwell* and *E. Smith*), contra.

Mrs. Ballard is not entitled to a conveyance, for to take a parol gift of lands out of the statute requires the clearest evidence of a present gift, accompanied by exclusive possession and valuable improvements not to be compensated in damages.

Hugus *v.* Walker, 2 Jones, 173.
Miller *v.* Hartle, 3 Sm. 111.
Stewart *v.* Stewart, 3 Watts, 255.
Moore *v.* Small, 7 Har. 461.

The Act of 1872 could not invest Mrs. Ballard with the right to share as a child in Mr. Ward's estate, for immediately on his death in 1870 it vested in his children, and no retrospective law can operate to disturb vested rights.

Underwood *v.* Lilly, 10 S. & R. 101.
Shonk *v.* Brown, 11 Sm. 327.

March 24, 1879. THE COURT. Adoption in the Roman law was an act by which a person undertook to rear the child of another and appoint such child as his heir. The eleventh title of the first book of the Institutes of Justinian is "De Adoptionibus," and the first placitum of that title declares that "Adoption is made two ways, either by imperial rescript or authority of the magistrate. The imperial rescript empowers us to adopt persons of either sex who are *sui juris* and this species of adoption is called arrogation. But it is by the authority of the magistrate that we adopt persons actually under the power of their parents or grandparents." Before the time of the empire, arrogation was authorized only by a vote of the people, and ordinary adoption by an edict of the prætor. (Encyclc. Univ: *ad verbum.*) It is evident that even according to this system some special authority of law was necessary to constitute an adoption. So also by the *Code Napoleon* it can only be effected by the intervention of the Judge (Code. Civil, liv. I, title viii. p. 98, sec. 2). It never was in the power of an individual, by the common law of England or this State, to adopt the child of another as his own until the Act of Assembly of May 4, 1855 (Pamph. L. 430), by the seventh section of which it was authorized by the decree of the Court of Common Pleas of the county where the person desirous of adopting such child may be resident.

The plaintiff in error, Mrs. Ballard, was not adopted by Mr. Ward according to the provisions of this Act. He died on the 14th May, 1870, and the premises immediately descended to his two children, the defendants in error. An Act of Assembly was subsequently passed April 2, 1872 (Pamph. L. 31), which declared: "that in all cases heretofore as well as hereafter, where the common law form of adopting a child by deed has been practised or done it shall be lawful, on proof of due execution of the deed, to have the

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same recorded in the proper office for the recording of deeds, in the county where the adopting parent resides at the date of its execution, and a duly certified copy thereof shall be received in evidence with the same force and effect as the record of adoption would have in the mode provided in the Act to which this is a supplement." This Act was plainly intended to be retrospective and whatever might have been its operation in giving effect to the instrument of August 11, 1863, assuming that to have been "the common law form of adopting a child by deed," it is too plain for argument that a proceeding under it could not divest the estate of the defendants in error which had vested by the death of their father. (Shonk *v.* Brown, 11 P. F. Smith, 320.)

As to the alleged parol gift by Mr. Ward to Mr. Ballard there was nothing to take it out of the Statute of Frauds. Possession delivered or taken in pursuance of it was clearly insufficient under all the cases. Besides such possession there must be improvement not capable of compensation in damages. (Stewart *v.* Stewart, 3 Watts, 253; Moore *v.* Small, 7 Harris, 461; Miller *v.* Hartle, 3 P. F. Smith, 108.) The letter of Mr. Ward to Mr. Hoffmann dated August 25 was no memorandum in writing of a gift, but merely declared that he had no objection to Mrs. Ballard's taking possession at any time; apart from the parol evidence it tended to prove nothing beyond its terms.

Judgment affirmed.

Opinion by SHARSWOOD, C. J.

Jan. '79, 90. March 26, 1879.

National Bank of Oxford v. Kirk.

Contract—Illegal consideration—Bills and notes—Note given in compounding a felony is void—Duress.

Where the consideration of a promissory note is a promise by the payees to abstain from prosecuting the son of the maker for forgery, the note is void.

Fulton *v.* Hood, 10 Casey, 365, explained.

Error to the Common Pleas of Chester County.

Assumpsit on a promissory note for $5000, by the National Bank of Oxford against Joseph Kirk. Plea, the general issue.

On the trial, before BUTLER, P. J., the defendant's testimony was that he went to Oxford and met Mr. Fulton, one of the officers of the bank, who said that the bank held a good deal of defendant's paper; that defendant denied this; that he went to the bank and was shown two notes, one for $4000 and one for $1500 signed by his son, James S. Kirk, and bearing his name as indorser. That he denied having signed his name, or having authorized his son to sign it for him. That the officers of the bank (Dickey and Fulton) requested him to sign the notes, but he declined. On the following day the officers sent for him to come again to the bank. He went. They told him that they could arrange to reduce the debt to $5000 by the sale of certain stock belonging to James, and that unless he (Joseph) signed a note for that amount they would have his son arrested on a charge of forgery. That if he did sign as requested, James would probably pay the note, and that "no one should know anything about it." The defendant was corroborated in every allegation by his son Elisha, who accompanied him on each occasion to the bank. The defendant was upwards of 82 years of age.

The President and Cashier of the bank, called by the plaintiff in rebuttal, testified that James S. Kirk having said that he had signed his father's name, but by his authority, they got him (Joseph) to come to the bank, and after showing him the notes he placed his signature below the ones already on the notes. That he did not say whether the signatures were his own or not, but that he signed his name without any comment. That subsequently when the proposition was made to reduce the debt, and for the defendant to sign the note in suit, he again came to the bank and did as requested.

The Court below charged the jury (after a very full recital of the evidence), *inter alia*, as follows: ["If the consideration was such as the defendant here alleges, or if this constituted any part of the consideration, his indorsement, and the note subsequently given (the note in suit), created no obligation] . . . . . If, on the other hand, the transaction was simply the settlement of a dispute or uncertainty respecting the defendant's previous liability, the consideration was lawful and good, and the defendant became bound for the debt, though he may not have been liable before, and the plaintiff may, therefore, recover."

Verdict and judgment for defendant. Plaintiff took this writ, assigning as error the portion of the charge inclosed in brackets.

Wm. Darlington (*S. D. Ramsey*, with him), for plaintiff in error.

It has been held that threats to do nothing more than resort to a court of law do not constitute such duress as will avoid a contract.

Fulton *v.* Hood, 10 C. 365.

The evidence disclosed nothing more than a fair compromise between the parties, and the charge of the Court was calculated to do injustice to the plaintiffs.

Wayne McVeagh (*Oliver Sidwell*, with him), for defendant in error.

It is difficult to see wherein lay the error of the Court below in charging the jury that an open,

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undisguised, and flagrant violation of the criminal laws of the Commonwealth (Act March 31, 1860, P. L. 387), was an unlawful consideration for the note in suit. Fulton *v.* Hood (*supra*) is the only authority that has been brought forward to sustain the position of the plaintiff in error. There the Court held that false representations as to the intention of third parties did not constitute duress; the decision went no further.

May 5, 1879. THE COURT. By the 10th section of the Act of March 31, 1860 (Pamph. L. 387), it is provided that "if any person having a knowledge of the actual commission of any forgery shall take money or promise thereof to conceal" the said crime, the person so offending shall be guilty of a misdemeanor. Now, it was fairly submitted to the jury by the learned Judge below, whether such a concealment was not the consideration upon which defendant executed the note sued on. Fulton *v.* Hood (10 Casey, 365) does not, as the learned counsel for the plaintiffs in error contend, rule this case. That was a false representation that other persons threatened prosecution, which was held not to constitute duress *per minas*, and bears no resemblance to the law as applied to the facts of this case.

Judgment affirmed. PER CURIAM.

Quarter Sessions.

Q. S. of Lycoming Co. April, 1879.

Road in Cogan House Township.

Road law—Viewers—Act of May 14, 1874—Their duty to obtain releases, or assess land damages—When report set aside.

Sur exceptions to report of viewers.

This was a petition filed July 10, 1878, by certain citizens of Cogan House Township for a public road from certain points therein named. The Court appointed viewers to view, and, if proper, to locate the road as prayed for. The viewers made return that they had viewed the proposed road, and returned that it be laid out as a public highway.

The report did not state that releases had been obtained from the land-owners over whose land the road passed, nor that the viewers had assessed any damages for the right of way.

Various citizens of said township filed exceptions to the report.

C. Bartels, Jr., for the exceptions

H. T. Ames, contra, cited and relied upon—

Boyer's Road, 37 Pa. St. 257.
Road in Middle Creek, 9 Pa. St. 69.
Road from App's Tavern, etc., 17 S. & R. 388.
Miller's Road, 9 S. & R. 35.

May 5, 1879. THE COURT. The report of the viewers in this case is fatally defective in this, that it does not appear that releases were obtained from the land-owners, nor that the viewers considered the question of damages.

The Act of Assembly of May 14, 1874 (P. L. 164) provides as follows: "Hereafter it shall be the duty of all persons appointed in the several counties of this Commonwealth to view and review any public or private road or bridge, if they shall decide in favor of locating said road or bridge, to endeavor to procure from the persons over whose land such location may be made, releases from all claims for damages that might arise from the opening of such road or the building of such bridge, and in every case where said viewers shall fail to procure such releases, and it shall appear to them that any damages will be sustained, it shall be their duty to assess the damages, and make report thereof, signed by a majority of their number, and return the same, together with all releases obtained, to the Court of Quarter Sessions."

The order to the viewers in this case plainly set forth the duties of the viewers under this Act of Assembly. The report of the viewers is silent on the subject of damages and releases, and in this is fatally defective, and is therefore set aside.

Opinion by CUMMIN, P. J.

Common Pleas—Law.

C. P. No. 1. April 18, 1879.

Dickerson v. Labe.

Where plaintiff's counsel put a case on the trial list before issue joined, plaintiff cannot subsequently, after issue joined and judgment obtained, recover witness fees for attendance of witnesses while the case was wrongfully on the trial list—Practice.

Appeal from the prothonotary's taxation of costs.

The case was an appeal from the judgment of a magistrate, taken in 1874. It was put on the trial list, by order of plaintiff's attorney, and, not being reached, was carried forward from term to term, his witnesses being in attendance. When the case was finally called for trial, it was

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discovered to be not at issue, for want of a replication, and on this ground was continued.

The plaintiff having filed a replication, judgment was confessed by defendant, and notice given to plaintiff's attorney to have costs taxed, which was accordingly done, the prothonotary allowing a large bill for witness fees.

T. J. Diehl, for appellant.

The plaintiff is not entitled to recover witness fees for their attendance before the case was at issue.

Hartley *v.* Lee, 6 WEEKLY NOTES, 560.

L. Hirst, contra.

By not moving to strike the case from the list, when it was not at issue, defendant waived his right to object to costs for witness fees.

THE COURT. The case not being at issue, the plaintiff had no right to put it on the list, and therefore cannot recover costs for the attendance of his witnesses. The appeal is sustained.

Per BIDDLE, J.

C. P. No. 3. April 26, 1879.

Haskins v. Dill, defendant, and the Bank, garnishee.

Practice—Sheriff—Attachment execution—Service—Amendment of return after the expenditure of money on the faith of its correctness.

Rule by sheriff for leave to amend his return.

Two writs of attachment execution against Dill, defendant, and the bank, garnishee, were placed by the same counsel in the sheriff's hands on May 11, 1878, one in favor of the plaintiff, Haskins, and the other in favor of one Snow, who had a judgment against Dill in C. P. No. 4, the one in favor of Haskins being first handed to the sheriff with directions that it should be served first. The sheriff returned that he had served both writs at 10.11 A. M.; and to the plaintiff's interrogatories the garnishees answered that both writs were served at the same time. Subsequently, on a case stated in C. P. No. 4 (see 6 WEEKLY NOTES, 330) Snow obtained judgment against the garnishees for a *pro rata* portion of the deposit in the bank, the sum being insufficient to satisfy both creditors. The sheriff, finding that a mistake had been made in the return in this case, took this rule eleven months after the return was made. The affidavit of the deputy sheriff who had served the writs averred that the return made in the case of Haskins *v.* Dill was incorrect, and should have been that it was served at 10.10 A. M., it having been delivered to the teller of the bank before the writ in Snow *v.* Dill.

Winship, for the rule.

Sharp (with him *Alleman*), for Snow.

The sheriff should not be allowed to amend his return at this late day, without very clear proof of error. Snow took all the trouble and expense in the case stated believing that he would share in the proceeds, and it would be unjust now to deprive him of a share. Moreover Haskins has his remedy against the sheriff. Snow's judgment against the garnishees in No. 4 still stands, and that Court may be unwilling under the circumstances to strike it off.

Pugh, for Haskins.

Rule absolute.

[*Cf.* Baldwin's Appeal, 5 WEEKLY NOTES, 457.]

C. P. No. 4. June 3, 1879.

Techner v. Karpeles.

Magistrate's judgment—Execution—Transcript not merely a lien against real estate—Act of 1810 only restricts the prothonotary from issuing fi. fa. without magistrate's certificate of return "nulla bona;" and under a fi. fa. issued by the Court, after such a return, personal property can be levied upon—Wheeler v. *Moore*, 6 WEEKLY NOTES, 270, *and Bradley* v. *Ward*, *Id. 366, dissented from.*

Rule to set aside execution against personal property.

Fi. fa. issued by the prothonotary upon a transcript from the judgment of a magistrate, on which execution had been issued and returned "no goods."

Knittel, for the rule.

The transcript is filed under the Act of March 20, 1810, and the fi. fa. mentioned in that Act is against real estate only. The Court of Common Pleas has thereby no jurisdiction over the personalty. The object of filing a transcript being to create a lien against the real estate, for all other purposes the judgment still remains before the magistrate.

Wheeler & Wilson Co. *v.* Moore, 6 WEEKLY NOTES, 270.

Bradley *v.* Wood, Ibid. 366, and cases there cited.

Tim, contra.

C. A. V.

June 7, 1879. THE COURT. The defendant seeks to set aside this fi. fa. for the sale of his personal property, notwithstanding the transcript of the magistrate's judgment, of record in our Court, shows that the magistrate duly issued execution on the judgment, which execution has been returned "no goods;" upon the ground that this Court has no authority to issue a fi. fa. upon such transcript judgment for sale of personal property; that the transcript is placed of record merely for the purpose of becoming a lien against the defendant's real estate, and if the plaintiff desires to sell the defendant's personal property, he must procure an execution for that purpose from the magistrate.

In support of this view the defendant relies upon the Act of March 20, 1810 (Purd. Dig. 863, § 100), and the cases of Wheeler *v.* Moore, (6

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WEEKLY NOTES, 270), and Bradley *v.* Ward (Id. 366). These cases undoubtedly decide the question in accordance with the defendant's views; and if we reached the same conclusion we would decide this case upon the authority of those cases without supplementing that authority with any reasoning of ours; but we are constrained to declare a different result.

There is nothing in the Act of 1810 which prohibits the Court issuing execution upon such judgment, for the sale of either personal or real property, after an execution has been issued by the magistrate and duly returned "no goods." The negative or prohibitory words of the Act are these: "But no *fieri facias* shall be issued by any prothonotary until a certificate shall be first produced to him, . . . stating therein that an execution had issued to the proper constable, as directed by this Act, and a return thereon that no goods could be found sufficient to satisfy said demand." Except for this prohibition the prothonotary might have issued the fi. fa. immediately after the transcript of the magistrate's judgment was filed of record in his office, for the reason that the transcript became a judgment of record, and being a judgment of record it possessed all the incidents and attributes possessed by any other judgment, except as to the restriction already referred to. We must keep in mind that this is a final judgment, forever concluding the parties to it, and it loses none of its incidents by being transferred to the record of the Court. The Court must aid in executing it in accordance with the Act, and in all ways, not repugnant to the Act, that any judgment on its record may be executed. It is a mistake to assume that the transcript is merely a lien against the defendant's real estate. It is more than that; it is a *judgment* against the defendant, final, conclusive, and irreversable. If it were a lien merely against real estate, a writ of fi. fa. would not lie to enforce it; and to make such a lien available the plaintiff would have to resort to the writ of scire facias, which is the appropriate writ to enforce liens; as the lien of a mortgage, mechanic's lien, and even that of a judgment itself where the lien only is the subject of the proceeding. The writ allowed by the Act is the writ of fieri facias, which is the appropriate writ to execute a judgment, by levying upon and the sale of personal property, as well as for the condemnation of real estate. Observe, the use of the fi. fa. by the prothonotary is not restricted to real estate. The restriction is that the prothonotary shall not issue the writ at all, until it has been certified to him that an execution has been issued by the Justice, and returned "no goods." Where such execution has been issued and has been so returned, the prohibitory part of the Act has been complied with, and the Act is then to be read as if such prohibition were not in it.

If the theory contended for by the learned counsel for the defendant be correct, in many cases it would be in the power of the defendant to drive the plaintiff to a degree of circuity of proceeding not only at variance with the directness which the law encourages, but which would be, at the same time, totally repugnant to common sense, as if, when the sheriff were proceeding upon the fi. fa. to condemn real estate, the defendant were to say to him, "Sir, I forbid you to proceed further against my realty, as I have a superabundance of personal property with which to satisfy this judgment, and here it is; and by the provisions of the Act of June 16, 1836, section 19, my real estate cannot be taken in execution, if satisfaction can be obtained from my personal estate." Should the sheriff take him at his word, and proceed to levy upon the personalty, he could be told by the defendant, "True, I have pointed out to you my personal estate to prevent your selling my realty, but the judgment obtained against me is upon a transcript of the magistrate, and that being so, the magistrate alone can issue execution upon such judgment to sell personal estate, and such execution must be executed by a constable, therefore, notwithstanding I have both real and personal estate sufficient to satisfy the judgment, you have no lawful authority to levy upon either."

It is, therefore, apparent that if the construction put upon the Act by the learned counsel for the defendant be the true one, then the hypothesis just detailed becomes a reality, notwithstanding its manifest injustice. Such palpable evasion of justice as this circumlocution would practically produce in the administration of this law, is the best proof that the law-makers never meant such a course should be pursued.

This Act is now sixty-nine years old, and the uniform interpretation put upon it by the practice of the profession, and by the decisions of the Courts, as often as the same has come before the Courts, prior to the cases of Wheeler *v.* Moore and Bradley *v.* Ward (*supra*, and 35 Leg. Intel. 456, 490), has been that a fi. fa. may be issued by the prothonotary for the seizure of personal estate, after an execution has been issued by the Justice and returned "no goods." This was decided in 1841, by the Supreme Court in the case of Hitchcock *v.* Long (2 W. & S. 169), and again in 1844, by the Court of Common Pleas for this county, in the case of Hamilton *v.* Dawson (2 Clark, 357).

In Hitchcock *v.* Long, an attachment was issued out of Court after the Justice's return of "*nulla bona*," and the garnishee moved the Court to quash the proceedings. In passing on the question the Supreme Court said: "By the Act as it now stands, he (the plaintiff) files the transcript immediately, which has all the effect of

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a judgment in the Court of Common Pleas, except that he is restrained from issuing execution upon it until there has been a return of *nulla bona* before the Justice. But after certificate filed, according to the fair interpretation of the Act, the party is at liberty to issue a fieri facias in common form, commanding the sheriff to levy on the goods and chattels, lands and tenements of the debtor, without any special restriction. And this, we apprehend, has been the practice, and it is certainly founded on convenience." It is true, the writ in that case was not technically considered a fi. fa., yet it was process to enforce payment and satisfaction of the judgment from the defendant's personal estate, and not from his real estate, and this made the question there precisely analogous to the one we are considering, and that decision, till overruled by the Court that made it, we consider as binding upon us, and rules this case.

In Hamilton *v.* Dawson a fi. fa. was issued from the Court, as in this case, after the Justice's return of *nulla bona.* The motion was to set aside the writ of fi. fa., upon the ground, *inter alia*, that such writ for the seizure and sale of personal estate could not be issued out of the Court. After an elaborate and learned argument by the late Mr. Norton for the motion, and by the (now) learned President of this Court against it, the motion was discharged.

It thus appears, that from a fair interpretation of the Act itself, as well as from the uninterrupted practice of the profession, and the decisions referred to, this rule should be discharged. Rule discharged.

Opinion by BRIGGS, J.

Orphans' Court.

June 17, 1879.

Clendaniel's Estate.

Auditor's report—Demand for an issue—When granted—Where prima facie case is made out, an issue only becomes necessary where the evidence against it, if believed, would overcome it—Auditor should report to Court the evidence on which the award of an issue is based—Practice.

Sur exceptions to auditor's report.

An auditor was appointed sur petition of the heirs of Jehu Clendaniel, deceased, and citation issued to Robert S. Patterson, administrator *d. b. n.* of Charles Moore, deceased, to state an account of all moneys due by Charles Moore, deceased, administrator of said Clendaniel to the said Clendaniel at the time of his death. It was claimed on behalf of F. Schmidt, assignee of the heirs of Clendaniel, that Moore, the administrator of the decedent, admitted (1) That he was indebted to Clendaniel in the sum of $4000; (2) That said Moore embezzled five one thousand dollar bonds belonging to the estate of Jehu Clendaniel, deceased. Robert S. Patterson, administrator *d. b. n.* of Charles Moore, deceased, and Jas. S. Patterson, guardian of the minor children of Charles Moore, petitioned the auditor to award an issue to the Court of Common Pleas to determine these disputed facts. The auditor did not refer to the evidence before him, but briefly reported that there were material facts in dispute, and recommended to the Court that an issue be granted.

Exceptions were filed to the finding of the auditor on behalf of Richard F. Schmidt, assignee of the heirs of Jehu Clendaniel, deceased.

A. H. Hepburn and *H. F. Hepburn*, for exceptant, contended that there was not sufficient evidence in rebuttal taken before the auditor to raise an issue of fact.

Hannis and *Hanson*, contra, contended that where it became apparent there would be an issue of fact that they were entitled to an issue, without going fully into the evidence before the auditor.

Beehler's Estate, 3 Phila. R. 254.

July 5, 1879. THE COURT. That the Courts of Common Pleas may not be unduly burdened, and that the estates of decedents may be speedily settled, we must take care when an issue is demanded in the Orphans' Court that it shall be granted only where it clearly appears that the matter is one which should properly be submitted to a jury, and as to which their finding either way ought not to be set aside as unwarranted by the evidence.

Even in cases where an issue is of right, there must be a fact in dispute; and, as was said in Knight's Appeal (7 Harris, 493), a mere naked allegation without evidence, or against the evidence, cannot create a dispute within the meaning of the law, for, says BLACK, C. J., in that case, "if it could, a party might stop the distribution whenever he chooses to make a groundless claim." (See also De Haven's Appeal, 25 Smith, 337; Shaw's Estate, 1 WEEKLY NOTES, 332.)

To enable us to judge, therefore, whether we shall grant an issue, especially in a case like the present, where it is within our discretion whether to do so or not, we must be informed what the evidence is, both against and in support of the claim. If a *prima facie* case be made out on the one side, an issue can only be necessary where the evidence against it is sufficient, if believed, to overcome it.

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The auditor should therefore proceed with the testimony, and, when both parties have taken enough to show that the case is a proper one for a jury, make report to the Court, stating the substance of the evidence on either side, with his own views as to the propriety of granting the issue, and annexing the testimony to his report.

Report recommitted for further proceedings in conformity with this opinion.

Opinion by PENROSE, J.

July 12, 1879.

Hattrick's Estate.

Over-payment to distributees by executor—Petition for bill of review—Special injunction granted to prevent payment of such funds pending argument—Practice.

Sur petition for special injunction.

The petition of Collins West, executor of Elizabeth H. Hattrick, deceased, set forth: That the decedent died December 4, 1878, and that on May 6, 1879, the petitioner's account as executor was audited by the Court (HANNA, P. J.); that after the audit and confirmation of the account the petitioner found that he had overcharged himself with $1061.88 as executor; that said money was his own private funds, and that the four distributees were overpaid by so much; that the petitioner made petition to the Court for a citation to the distributees to show cause why the account should not be reviewed and corrected; that the Fidelity Insurance, Trust, and Safe Deposit Company, trustee for one of the distributees, has filed a demurrer to the said petition, and the petition and demurrer will be upon the next argument list of the Court. The petition further averred that the distributees are totally irresponsible persons, and prayed an injunction to restrain the Philadelphia Saving Fund Society and the Fidelity Co., depositaries of the distributees, from disposing of the said moneys received by them from the said distributees until the petition for review has been determined.

John Scollay, for the petitioner.

Eo die. THE COURT granted the prayer of the petition.

May 19, 1879.

McCarven's Estate.

Decedent's estate—Donatio causa mortis—What constitutes.

Sur exceptions to adjudication.

The account of the executors of Philip McCarven having come before the Court (ASHMAN, J.) for audit, the following facts appeared: Philip McCarven died December 26, 1875, leaving a will by which he devised his estate to his nephew James McCarven. The day before his death he directed his wife's sister to take a key which opened a certain cupboard in his house, which he handed her, directing her to obtain therefrom a box containing certain cash, and to give it to his wife, saying "she will need it." There were about $350 in the box. It was claimed for the widow that this was a *donatio causa mortis*, and that she was entitled to her $300 exemption in addition. The Court declined to award the latter, on the ground that she had already obtained more than this sum from the estate, as the gift of the $350 was not a *donatio causa mortis;* she was also disallowed credits for certain expenditures she made for the "wake." To the ruling of the Court the widow excepted.

Rhoades (with whom was *A. M. Beitler*), for the exceptant.

Carroll, for the accountants.

Guilbert, for James McCarven.

May 31, 1879. THE COURT dismissed the exceptions, and confirmed the adjudication.

[*Cf.* Walsh *v.* Kennedy, 2 WEEKLY NOTES, 437.]

U. S. Circuit Court—Equity.

June 18, 1878; Feb. 5, 1879.

Prevost v. Gorrell, Torrey, Healy, Audenried, et al.

Equity practice—Multifariousness—Bill by judgment-creditor, in aid of execution, against judgment-debtor and numerous grantees from him.

A bill filed by an execution-creditor, in aid of execution, against his judgment-debtor and others who have fraudulently combined with him to conceal his property, is not multifarious, although there is no averment of a common conspiracy between all the defendants, and though it is not alleged that each defendant was cognizant of the fraudulent acts of any of his co-defendants, other than those in which he himself took part with the judgment-debtor.

Sur demurrer to bill.

Bill in equity, in aid of execution at law, filed by Prevost, setting forth the following facts:—

The complainant had obtained a large judgment against Gorrell, and had then issued execution against all of his discoverable property, real and personal within the State of Pennsylvania, the sale of which left a large part of the judgment

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unsatisfied. The bill alleged that Gorrell had owned large quantities of real estate, which, during the pendency of Prevost's suit against him, and prior to judgment therein he had fraudulently transferred to the other defendants respectively, without consideration and with notice of his fraudulent intention, for the purpose of evading payment of that judgment. The bill stated specially various instances of these alleged fraudulent transactions, and averred a general fraudulent intention on Gorrell's part directed to the accomplishment of the particular fraud of injuring the complainant by depriving him or delaying him in collecting his judgment debt. The bill did not, however, allege a common conspiracy between all of the individuals who had received the alleged fraudulent conveyances, merely stating that Gorrell, the debtor, had carried out his general unlawful purposes by fraudulently conspiring with each of the other defendants separately as to each of their conveyances respectively.

The bill alleged the impossibility of adequate relief without discovery, and prayed discovery and such reconveyances as the Court might direct after taking testimony and a hearing, and the complainant submitted himself to such directions as the Court might order, that an equitable division of the debtor's estate amongst creditors might be made. The defendants filed a demurrer on the ground of multifariousness.

The case was first argued before CADWALADER, J., and subsequently re-argued before MCKENNAN, J.

McMurtrie and *James Ryan* (with them *L. W. Smith*, *Swain*, *Kaercher*, *Mann*, and *Brightly*), for the demurrer.

The bill is multifarious because it joins distinct claims together in one suit. This proceeding, which is for discovery, joins with the principal debtor Gorrell, twenty-four other persons between whom no common conspiracy to defraud the complainant is alleged, and to whom no common fraudulent motive is imputed. This is a bold attempt, not only to condense twenty-four proceedings in one, but to obtain as against each defendant whatever advantage has accrued to the complainant from any other defendant's testimony. Counsel will attempt to use the declarations and testimony of one complainant against the rest; and if it be answered that this cannot be done until the common fraud is shown, the demurrer is at once shown to be well founded, for the test of whether the bill is good, is whether the defendants are so connected that one's testimony will affect the others. Moreover if no damage were to result from testimony applicable in one case being used in another, observe the hardship. Each defendant must provide himself with counsel, and watch the testimony taken at each meeting whether it relate or not to the allegations against him. The cost, labor, and time wasted are ill compensated by the costs of the case if the complainant fails, and even if he succeed each defendant is unjustly treated by joining with his case a score of others. In Maryland (Dunn *v.* Cooper, 3 Md. Ch. 46), the difficulty was felt and the principle recognized, though the decision was, for special reasons, in the complainant's favor; and in Metcalf *v.* Cady (8 Allen, 587), the very point was decided in our favor. In that case a bill in equity was filed by the assignee of an insolvent debtor against several defendants to set aside mortgages upon different parcels of real estate executed to them respectively to avoid the provisions of the insolvent law: the bill was held multifarious.

A. Sydney Biddle (with him *Hughes & Farquhar*, *Bartholomew*, and *Geo. W. Biddle*), contra.

The rule is admittedly one of convenience, and the question in each class of cases is therefore on which side do the advantages preponderate (1 Daniel's Ch. P. & Pr. 334). Where one general right only is claimed by the bill, it matters not that the various defendants have distinct interests, as in the well-known fishery case (Mayor of York *v.* Pilkington, 1 Atk. 282, cited Ld. Red. 182), and see City of London *v.* Perkins (3 Bro. P. C. ed. Tom. 1, 602.) But where the bill is by a creditor to enable him to obtain satisfaction of a judgment at law, which he has been hindered in doing by the acts of the judgment-debtor combining with the other defendants respectively, the objection for multifariousness has always been overruled.

Brinkerhoff *v.* Brown, 6 Johns. Ch. 139.
Fellows *v.* Fellows, 4 Cow. 682.
Boyd *v.* Hoyt, 5 Paige, 65.
Chase *v.* Searles, 45 New Hamp. 511.
Trego *v.* Skinner, 42 Md. 432.
Jacobus' Ex. *v.* Jacobus, 20 N. J. 49.
Gibbs *v.* Larrabee, 23 Wis. 495.
Gaines *v.* Chew, 2 Howard, 642.
Snodgrass *v.* Andrews, 30 Miss. 472.
Lorde, Foley & Co. *v.* Carlon, 1 Younge, 373.
Bartel *v.* Tompkins, 4 Sneed, 636.
Randolph *v.* Daly, 1 C. E. Green, 314.
Jones *v.* Frost, *In re* Fiddey, 42 L. J. R. Ch. 47.

And the reason is that in such a case the proceeding is in reality an equitable execution. The property of the judgment-debtor is still his, wherever the title may be, to satisfy the plaintiff's execution. The wrong is *one* although perpetrated by many hands. It is the judgment-debtor's fraudulent treatment of his property to injure the plaintiff. Again, if the complainant were to sue the principal debtor in twenty-four separate suits, the debtor might justly complain that an action had been split up into a great number, and might plead to each for the non-joinder of essential parties. Granted the inconvenience to

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these defendants in this proceeding, is it not outweighed by the difficulties in the plaintiff's way, if he were to separate his suits, and would not the judgment-debtor be a loser by such a mode of procedure?

Feb. 5, 1879. THE COURT. This case was once argued at great length before CADWALADER, J., in my absence, and although he at first entertained considerable doubt whether the objection of multifariousness was not well founded, he was afterwards convinced that the objection was untenable, and communicated his views to me. That fact would have great influence with me in determining a matter belonging to a branch of jurisprudence in which Judge CADWALADER was so pre-eminently skilled. But after hearing the arguments of counsel I must say that my own judgment concurs entirely with his in this matter. The rule is one of convenience. Defendants must not be oppressed by permitting the joinder of independent causes of action in one bill. This is the case where there is but one defendant, and he is sued for matters wholly distinct in their nature. But as has frequently been said, there is no absolutely unvarying rule upon the subject, and whether the bill is multifarious must be determined in each case. Now where the complainant, a judgment-creditor, seeks the aid of a court of equity against his debtor, showing that by the latter's fraud he is unable to proceed successfully at law, there is but one cause of action, though the debtor may have put the property beyond his control by conveying it to many different hands. What matters it that each co-defendant was unaware of the details of the conduct of the other co-defendants, provided he united with the judgment-debtor to defraud the complainant? Each separate fraudulent conveyance was part of the one general act complained of, and the complainant was bound to proceed against all the debtor's property, it matters not in whom the nominal title might be, in one proceeding, if he could do so.

The demurrers are overruled, and the defendants are ordered to answer in thirty days.

Oral opinion by MCKENNAN, Cir. J.

April 12, 19, 1879.

Prevost v. Healy.

Equity jurisdiction—Bill to remove a cloud from title—Demurrer—Practice—Entry of "judgment nisi, four days;" meaning of.

An entry of "judgment *nisi*, four days," was made in the U. S. Circuit Court in a common law suit, upon the day of the verdict for the plaintiff. This judgment was subsequently made absolute, a motion for a new trial being dismissed. In the interval, the judgment debtor conveyed to a stranger realty situated in the U. S. District where the judgment was entered. The plaintiff having subsequently purchased his debtor's title at a Marshall's sale under his own execution, brought a suit in equity against his debtor's grantee for the cancellation of the deed of conveyance, as being a cloud on his title. The bill averred that the complainant was in possession. On demurrer—

Held, that the complainant had shown a sufficiently good *prima facie* uncontradicted title, to support the bill.

Bill in equity, filed by Prevost *v.* Daniel Healy, averring that complainant had purchased at Marshall's sale, on December 21, 1877, under a judgment obtained by him on July 7, 1877, against one Gorrell, certain real estate in Clarion County, therein described. The judgment of July 7, 1877, was entered upon the day of the verdict, and was in the following form: "Judgment nisi, 4 days." A motion for a new trial was dismissed and the judgment made absolute on the 18th of August, 1877. On the 14th of July, 1877, Gorrell conveyed this real estate to the defendant Healy, as the bill alleged fraudulently, to avoid paying the complainant his judgment. At the time the judgment was obtained, and from thence to the filing of the bill, the premises had been in the hands of lessees, who had complied with the conditions of the lease, and given the owner no ground for re-entry. The bill, however, averred possession in the complainant, and alleged that the outstanding title to the premises, in Healy, the conveyance to whom by Gorrell had been recorded in Clarion County, was a cloud on the complainant's title, and prayed that the Court would direct Healy to deliver it up to be cancelled, etc.

Demurrer for want of equity.

L. W. Smith and *James Ryan* for the demurrer.

This is an attempt to have the title of the complainant to this land determined by a bill in equity, instead of by an ejectment. As a matter of fact the complainant has never been in possession of this land, nor has he received any rent for it. The original lessees paid the rent to Healy after the judgment of July 7th, and afterwards, in consequence of this litigation, have paid it into court.

[BUTLER, J. Do these facts appear in the bill, which the demurrer admits to be true?]

No, but a reference to them is necessary that the position of the parties may be understood. Now it is well settled that the relief sought for here cannot be obtained unless the complainant is in possession, and then only where the outstanding title is not actively pressed. It is only where the title in the complainant to the land is clear, and connected with possession, that he has a right to ask in equity for a removal of the cloud.

Orton *v.* Smith, 18 Howard, 265.

Polk *v.* Pendleton, 31 Md. 124.

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Harrington *v.* Williams, 31 Tex. 460.
Bunce *v.* Gallagher, 5 Blatch. 488.

And see also—

Bispham's Equity, 515.
Story's Equity Jur. 700, note.
Munson *v.* Munson, 28 Conn. 582.

Here the title asserted is bad on the face of the bill. The complainant alleges a judgment *nisi* on July 7th. The meaning of that entry is this: "Judgment for the plaintiff, unless in four days a motion for a new trial is made." Such a motion *was* made within four days, and, although afterwards dismissed, it discharged the judgment *nisi*. The complainant's title, therefore, rests upon the judgment of August 18, 1877, prior to which time Healy had purchased the land from Gorrell, viz., July 14, 1877.

[McKennan, Cir. J. The meaning of the entry of "judgment *nisi* four days" is not what you suppose. Its effect is that unless a motion for a new trial is made within four days, *which is succeeded by an order for a new trial*, the judgment is to stand from its date, instead of from the date when the motion is dismissed or the rule is discharged.]

The entry was irregular. It is not known in practice, and there is no rule of the United States Courts authorizing it.

[McKennan, J. The practice is a common one in the United States Court in the Western District of Pennsylvania.]

A. Sydney Biddle (with him *Lin Bartholomew*) contra.

(1) As for the objection that this is a substitute for an ejectment the answer is that the bill asserts the plaintiff to be in possession, and this is admitted by the demurrer. The defendant could have raised the defence by setting the facts up on a plea. (2) As for the second argument we admit that unless the plaintiff's title as set forth in the bill is clear and indisputable, the bill must be dismissed. But the complainant's title is plain. He bought on December 21, 1877, at Marshall's sale, Gorrell's title to realty, under a judgment obtained July 7, ~~1871~~. The purchase vested the property in the purchaser, so as to avoid all intervening encumbrances since the judgment, and of course avoided Healy's title, even if his purchase had been *bonâ fide*, as the conveyance to him was dated July 14, 1877.

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April 19, 1879. The Court. We are satisfied that the demurrer must be overruled. The only question of importance is whether the complainant's bill avers possession, and shows a clear title. This we think is the case. It may be that the complainant is not really in possession, and so, though entitled to the ownership, has begun this suit prematurely. But this the record, which alone we can look at, does not show. The bill avers possession, and this is admitted by the demurrer.

Demurrer overruled.

Oral opinion by Butler, J. McKennan, J., concurred.

April 30, 1879.

Prevost v. Gorrell et al.

Practice—Testimony, taking of—Place of taking testimony, under special circumstances, where witness resides in a different place from the examiner.

Sur motion by one of the defendants to have his testimony taken in Philadelphia.

This was a proceeding in equity in which the matter had been referred by the Court to the official stenographer of the Schuylkill County Court, as examiner to take testimony. The examiner and two of the complainant's counsel lived in Schuylkill County; the other counsel of the complainant resided in Philadelphia. This defendant, Mr. Audenreid, lived in Philadelphia and being subpœnaed by the complainant to appear before the examiner at Pottsville, that his testimony might be taken on behalf of the complainant, he refused to appear, and made affidavit to the foregoing facts, and further stated that his going to Pottsville for the time necessary to have his testimony taken would greatly injure his business and would greatly embarrass and annoy him, and cause him much loss.

McMurtrie, for the motion.

Two of the complainant's counsel live here. It would be very unjust to compel this defendant to go to Pottsville when he can be examined here quite as readily, and his going there would greatly injure his business.

A. Sydney Biddle and *G. W. Biddle* (*Hughes & Farquhar* and *Bartholomew* with them), contra.

The question is merely one of convenience. Our colleagues who are conducting this examination live in Pottsville, and if Mr. Audenreid is examined here they must come here for that purpose. The examiner resides in Pottsville.

The Court. (McKennan, J.) The witness must appear before the examiner unless the Court excuse him. Ordinarily this would not be done, but here there are special reasons stated in the affidavit, which are uncontradicted, from which it appears that the witness would be subjected to severe loss if he were forced to go to Pottsville. As some of the complainant's counsel live in Philadelphia, which is not only the witness' residence, but the place of holding Court in the district, and as no inconvenience in taking Mr. Audenreid's testimony here before a commissioner is shown, the motion is allowed.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, AUG. 21, 1879.* [No. 17.

Supreme Court.

May, '79, 29. May 19, 1879.

Commonwealth v. Wickersham.

Constitutional law—Mandamus to a State officer—Constitution of Pennsylvania—Article V., sections 1 and 3—Act of April 7, 1870—Jurisdiction of Dauphin County Common Pleas—Common schools—Qualifications of county superintendent of—How determined—Acts of April 17, 1865 and April 9, 1867.

The Constitution of Pennsylvania of 1873 deprived the Supreme Court of power to issue writs of mandamus to State officers, and jurisdiction in such cases was not, under Article V., section 3, of said instrument, conferred by inference on the lower Courts.

The Act of April 7, 1870 (P. L. 57), did not confer upon the Court of Common Pleas of Dauphin County such jurisdiction.

The fact of having served as county, city, or borough superintendent of common schools is not, under the Act of April 9, 1867, an absolute test of qualification upon a new election of the same person.

Error to the Common Pleas of Dauphin County.

Petition, filed by Jeremiah E. Hawker, for a mandamus commanding James P. Wickersham, Superintendent of Public Instruction of the State of Pennsylvania, to issue a commission to the petitioner as City Superintendent of Common Schools of the City of Scranton.

The petition averred (1) that the petitioner had on previous occasions been elected and commissioned and had served as county superintendent of common schools of Wayne County, Penna., and as borough superintendent of common schools for the borough of Hyde Park, in Lackawanna (late Luzerne) County. (2) That "being thus legally qualified to fill the office of county or city superintendent of common schools," the petitioner was, on June 29, 1878, duly elected, by the school controllers, city superintendent of common schools of and for the city of Scranton, for the term of three years; of which election a return was filed in the office of James P. Wickersham, superintendent of public instruction, on July 16, 1878. (3) That it was the duty of the respondent to issue a commission to the petitioner within thirty days (no valid objection thereto having been made), but he had refused to do so, though requested, etc., and prayed for a mandamus.

The answer of the respondent denied the jurisdiction of the Court to issue a mandamus, on the ground that the Superintendent of Public Instruction is, under the Constitution of Pennsylvania (Article IV., section 1), a State officer, appointed by the Governor, by and with the advice and consent of two-thirds of the Senate, and is a member of the executive department of the Commonwealth; and therefore is not within the provisions of the Act of June 14, 1836 (P. L. 626), authorizing the issuing of writs of mandamus to "all officers and magistrates elected or appointed in or for the respective county, or in or for any township, district, or place within such county."

The respondent further averred, that soon after the filing of the certificate of the election of the petitioner, he received a written statement of objections against the issuing of a commission to the relator, preferred by eight citizens and taxpayers, who were also members of the board of school controllers of the city of Scranton, who averred, *inter alia*, that although the relator had received a majority of votes at the election (10 to 9), "he does not possess the literary and scientific acquirements demanded by the common school law of the State and required by the present condition of the public schools in this city." And the objectors requested that, "for the purpose of ascertaining the facts in the premises, a committee may be appointed, as provided for in section 13 of the Act of April 9, 1867 (P. L. 56), to examine the said J. E. Hawker in all the branches embraced in the course of study in the schools of said city;" that in pursuance of such request the respondent had appointed a committee, who had certified, with the concurrence of the deputy Superintendent of Public Instruction, that after a careful examination they believed that the relator "does not possess the literary qualifications specified by law, and which are required for the successful discharge of the duties of the office."

After argument the Court dismissed the petition for want of jurisdiction; PEARSON, P. J., delivering the following opinion:—

"The answer in this case raises two important questions: First, as to the jurisdiction of the Court to issue the writ. Second, as to the merits of the case. If we have no jurisdiction, it is unnecessary to inquire further. By the common law the writ of mandamus was looked upon as a high prerogative writ, which could be issued out of the Court of King's Bench alone, where the king was originally supposed to be sitting in person. The power to issue it did not exist in any nferior tribunal, and generally it

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was only allowed to prevent a failure of justice when the relator had no other legal remedy or one attended with great delay. By an early statute, Act of 22d of May, 1722, the Supreme Court of this State was authorized to administer justice as fully and amply, to all intents and purposes whatsoever, as the Justices of the Court of King's Bench, Common Pleas and Exchequer at Westminster, or any of them, may or can do. That law continued in force, and the process of that Court to run throughout the State to secure justice to all men until the convention for forming a new Constitution, in the plenitude of its wisdom, abrogated the power altogether without conferring it on any other tribunal. The 3d section of the 5th Article gives authority to issue writs of mandamus to all inferior Courts, but takes away original jurisdiction in all other cases. See Butler *v.* Hartranft, Governor (27 Smith, 154). No inconvenience was ever felt from the exercise of the power by the Supreme Court. We never heard of its abuse. The Courts of Common Pleas in the State never were authorized to issue the high prerogative writ of mandamus until it was conferred in a very limited form by the 18th section of the Act of June 14, 1836, which declares that they shall, within their respective counties, have the like power with the Supreme Court to issue writs of mandamus to all officers and magistrates elected or appointed in or for the respective county, or in or for any township, district, or place within such county, and to all corporations being or having their chief place of business within such county. It is in these cases, and over these persons and corporations alone that the Courts of Common Pleas have jurisdiction.

"The Superintendent of Public Instruction is not an officer elected or appointed in or for the respective county, or for any township, district, or place within such county, nor is he a corporation having his chief place of business within the county of Dauphin. He is a State officer appointed by the Governor under the 8th section of the 4th article of the Constitution, by and with the advice and consent of two-thirds of the Senators, for a general State purpose, and the jurisdiction of his office extends throughout the Commonwealth, and we have precisely the same power over the Attorney-General or Secretary of the Commonwealth. The Legislature never intended to give any such power to the inferior Courts over the State departments. If this is thought necessary, in order to bring the cases before the appellate Court, it must be done by direct legislation. Original jurisdiction cannot be conferred on the Supreme Court in such cases. It is interdicted by the Constitution. The want of jurisdiction in this Court to us is so clear and plain that we would not have considered it necessary to say a word on the subject but for an expression to be found in the opinion of the Supreme Court, in Butler *v.* Hartranft, Governor, already cited, where the Judge, in very properly lamenting the want of jurisdiction in the Supreme Court, as always theretofore enjoyed, says: 'This must drive every one to the seat of government, into a local Court, to maintain the rights of the people against State officers, subject to all the delays which flow from the right of appeal.'

"We have no doubt that in writing the sentence in the haste of delivering an opinion, that generally very accurate Judge did not advert to the fact that the Court at the seat of government had no common-law jurisdiction over such officers, and that none was conferred by statute, therefore there was no possibility of getting the case into the Supreme Court by appeal. Although the books say that it is the business of a good Judge to enlarge or amplify his jurisdiction, yet he must certainly not assume it, where it clearly never was conferred, and if there is a denial of right and a wrong without a remedy, yet in the present case it is clearly attributed to the Constitution.

"The peremptory mandamus is refused, and petition dismissed for want of jurisdiction."

"Since writing the foregoing opinion, my attention has been directed to the first section of the Act of April 7, 1870, enlarging the jurisdiction of this Court (P. L. 57–8), which had been overlooked by the Court and counsel on both sides, and is supposed to have a bearing on the case. We are asked by the plaintiff's counsel to reconsider our opinion. The section declares 'that the Court of Common Pleas of the County of Dauphin is hereby clothed with jurisdiction throughout the State, for the purpose of hearing and determining all suits, claims, and demands whatever at law and in equity, in which the Commonwealth may be party plaintiff, for accounts, unpaid balances, unpaid liens, taxes, penalties, *and all other causes of action, real, personal, and mixed.*' Does that confer the power to issue writs of mandamus, or enlarge the limited power already conferred? Every part of the Act, in all of its sections, clearly relates to the money concerns of the State, unless the words 'all other causes of action, real, personal, and mixed,' which we have italicized, are designed to confer the authority. We can scarcely infer that the ordinary language used to give jurisdiction to collect money, recited in the other portion of the section, was intended to embrace a writ never used for such purposes, but to compel the performance of a duty where the party has no other legal remedy. It has been held, 'that, if several words of a statute follow an

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enumeration of particular cases, they are to apply only to cases of a like kind with those enumerated' (U. S. *v.* Irwin, 5 McLean, 178; Jacob *v.* U. S., 1 Brock, 526; U. S. *v.* Weise, 2 Wallace, Jr., 72). Here accounts, unpaid balances, unpaid liens, taxes, and penalties are the claims enumerated, and the words which follow, we conceive, relate to matters of a like character; not to authorize the Court to use a high prerogative writ to oblige a co-ordinate branch of the government to perform what we might consider a duty, or to do an act in a particular way. Such a power should be clearly conferred in express language before it can be assumed. The second section enables a foreign attachment to be issued by the Commonwealth to secure the collection of its claims, and the third imposes a *percentage*, to be paid by delinquent debtors to the officers of the State who have been at the trouble of making the collections. All relate to money matters due the Commonwealth.

"The title of the Act furnishes little aid in its solution, for although entitled 'An Act to enlarge the jurisdiction of the Courts of Dauphin County, in cases where the Commonwealth may be plaintiff, and to provide for the issuing of writs of foreign attachment in such cases,' yet, the enlargement is to enable all suits to be brought at the seat of government instead of suing at the residence of the debtor, or where he might be found. The character of the enlarged jurisdiction is stated in the Act itself.

"When the statute, or its title, speaks of the Commonwealth as plaintiff, it certainly refers to ordinary actions for the collection of money, not to the high prerogative writs authorized to be sued on the relation of an injured party, and although the name of the Commonwealth is used, yet in such cases the public is not the plaintiff, unless the State alone is interested. In such cases we well might apply the legal maxim that laws treating of persons or subjects of an inferior nature shall never be applied to those of a superior.

"The Legislature, in 1870, when this law was enacted, never thought for a moment of giving the Court of Common Pleas of Dauphin County jurisdiction over State officers, for at that time it was fully vested in the Supreme Court, whose power extended throughout the Commonwealth. The jurisdiction of the county Courts over this writ was extremely limited. It might now, with great propriety, be enlarged, as the only mode of reaching the Supreme Court under the Constitution is by appeal. On the whole, I am of opinion, as before decided, that we have no power to issue the writ as prayed.

"No costs can be allowed to the defendant in this case, as it is a universal rule, except when changed by express statute, that where there is no jurisdiction there is no right to costs."

The petitioner took this writ, assigning as error the above decision of the Court.

Francis Jordan, for plaintiff in error.

(1) Section 1, Article 5, of the Constitution, conferred the whole judicial power, which includes the power to issue mandamus, on certain Courts, and section 3 of the same article only excluded mandamus from the *original* jurisdiction of the Supreme Court. Clearly the original jurisdiction in mandamus must exist in the lower Courts.

Commonwealth *v.* Hartranft, 27 Sm. 154.

That jurisdiction is conferred by Act of April 7, 1870 (P. L. 57), upon the Common Pleas of Dauphin County.

(2) The Act of April 9, 1867, section 13, "Provided that serving as county, city, or borough superintendent shall be deemed a sufficient test of qualification;" hence there was no occasion for the committee to act in this case.

Lyman D. Gilbert, Deputy Attorney-General (*Henry W. Palmer*, Attorney-General, with him), for defendant in error.

The words "judicial power" have never had the wide meaning given them by the plaintiff in error. The argument that some Court must have *original* jurisdiction because the Supreme Court has *appellate* jurisdiction in the present case, is overthrown by the language of section 3, Article 5, of the Constitution, which provides that the Supreme Court shall have appellate jurisdiction by appeal, *certiorari*, or writ of error, in all cases, *as is now or may hereafter be* provided by law. At that time they had no appellate jurisdiction of mandamus to State officers, and none has since been conferred.

An examination of the law shows that the Courts of Common Pleas *never* had the right to issue writs of mandamus to State officers.

Wolf *v.* Com., 14 Sm. 254.

The whole object of the Act of April 7, 1870, as to the Common Pleas of Dauphin County, was to assist the Commonwealth in collecting its indebtedness.

June 21, 1879. THE COURT. Upon the question of the jurisdiction of the Court of Common Pleas of Dauphin County to issue a mandamus to a State officer we adopt the opinion of the learned President of the Court below.

Apart from this question we think, even if the Court had jurisdiction, the relator did not show himself entitled to the mandamus for which he prayed. It is true that by the Act of April 9, 1867, it was provided that serving as county, city, or borough superintendent shall be deemed a sufficient test of qualification, but the Act also provides that if, upon examination of the evidence of competency, it shall not prove to be such as is required, or if objection be made in conformity with the 4th section of the Act of

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April 17, 1865, the Superintendent of Common Schools shall appoint two competent persons, himself being the third, to examine the person elected, and if, upon such examination, his qualifications are found insufficient, the commission shall not issue. The answer of the respondent shows that such objections were made, the committee appointed, and a report made unfavorable to the relator. It is clear, we think, that it is only where no objections are interposed that the proviso that serving as county, city, or borough superintendent shall be deemed a sufficient test of qualification applies. Such service may have shown that the candidate was entirely disqualified.

Judgment affirmed.

PER CURIAM. PAXSON, WOODWARD, and STERRETT, JJ., absent.

July, '76, 125. Feb. 14, 1879.

Guillou v. Peterson.

Partnership — Limited partner — Liability of, when general — Liability of partnership for trust funds fraudulently loaned to firm, and lost in its business — Trustees — Cestui que trust, when not affected by knowledge of trustee — Notice.

Where a limited partnership fails to record, in the manner prescribed by the Acts of Assembly, an agreement for a renewal of the partnership, the liability of the special partner becomes general.

A partnership to whom a trustee, who is also a copartner, fraudulently loaned the assets of the trust estate, which were lost by the firm in the course of its business, is liable to the trust estate for the value of the securities so lost, if the partners have knowledge that such securities were not the individual property of the trustee so loaning them; *aliter*, if the firm have not such knowledge.

Cestuis que trustent are not prevented from recovering against a special partner in such a firm, whose liability has become general by a failure to comply with the requirements of the Limited Partnership Act, by the fact that their trustee had knowledge of an agreement between the partners that the liability of such special partner should be limited to the capital invested in the business.

Cestuis que trustent are not bound by acts done or knowledge possessed by a trustee when acting beyond the scope of his authority, much less when his acts are fraudulent and criminal.

Error to the Common Pleas No. 2, of Philadelphia County.

Assumpsit, by René Guillou, administrator *c. t. a.* of the estate of Samuel L. Haven, deceased, against Pearson S. Peterson, Edward W. Gould, Theodore R. Strong, and Jesse White, Jr., late copartners, trading as Gould, Strong & Co. The writ was returned "served" as to P. S. Peterson, and "nihil habet" as to each of the other defendants, and the case was proceeded in against Peterson alone.

The plaintiff in his narr. claimed to recover the sum of $28,437.50, being the proceeds of sale of $25,000 United States 5–20 bonds, and also the sum of $45,314.09, being the proceeds of sale of 471 shares of the stock of the Pittsburgh, Ft. Wayne & Chicago R. R. Co., belonging to the estate of Samuel L. Haven, deceased, sold by the firm of Gould, Strong & Co., and applied to the use of the firm. The defendant pleaded generally, non-assumpsit, and specially, that he was a special partner of the firm of Gould, Strong & Co., having contributed in cash the sum of $20,000, under articles of partnership for the transaction of a banking and brokerage business in the city of New York, pursuant to the provisions of the Acts of the Legislature of the State of New York in reference to limited partnerships, which limit the liability of a special partner to the amount of capital contributed by him.

The plaintiff traversed the plea of special partnership, and joined issue.

The suit was originally brought in the Old District Court, and was tried before BRIGGS, J., who upon motion of the defendant's counsel entered a non-suit. A rule was afterwards granted to show cause why the non-suit should not be taken off, which, upon argument before a full bench, was discharged. (Reported 1 WEEKLY NOTES, 118.)

No writ of error was taken at that time, but after the establishment of the present Courts of Common Pleas, suit was again brought in the Common Pleas No. 2. Upon the trial, before PRATT, J., the following facts appeared in evidence:—

Edward W. Gould, Theodore R. Strong, and Jesse White, Jr., of the city of New York, and Pearson S. Peterson, of the city of Philadelphia, formed a limited partnership Nov. 7, 1866, pursuant to the provisions of the Acts of the Legislature of the State of New York in reference to limited partnerships, under the firm name of Gould, Strong & Co., for the transaction in the city of New York of the business of buying and selling stocks and gold on commission, making loans, and collecting promissory notes, drafts, and bills of exchange. Peterson contributed as special partner the sum of $20,000 in cash, to which, by the articles of partnership, his liability was limited. In the articles of partnership it was provided, *inter alia*, that Peterson should not transact any business on account of the partnership, nor be employed for that purpose as agent, attorney, or otherwise, and further, that the general partners should not engage in any speculation of any kind, without the consent in writing of the copartners. The partnership was to com-

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mence on Nov. 10, 1866, and to terminate on Nov. 10, 1867, when it was renewed for another year. The renewals—of which there were five—were in writing, and signed by all the parties to the original articles, but were not recorded.

Theodore R. Strong and Thomas S. Shepherd were appointed executors of the will of Samuel L. Haven, of the city of New York, who died in the fall of 1865. Strong, as the acting executor, had possession of the assets of the estate, took charge of the books, kept the accounts, and signed as executor. Among the assets which came into his hands upon the decedent's death were 300 shares of the stock of the Pittsburgh, Ft. Wayne & Chicago R. R. Co., subsequently increased to 513 shares by the terms of the lease to the Penna. R. R. Co., and $29,000 U. S. 7-30 Treasury notes, which notes (except $1000, sold) were loaned the firm of Gould, Strong & Co., by Strong, as executor, during the month of Feb. 1867, to be used by them as collateral security for loans of money, which the firm were unable to obtain upon their own collaterals. The 7-30 notes were returned by the firm on June 19, 1868, and were, during July of the same year, converted into United States 5-20 bonds. On July 8, 1868, Strong loaned the firm, as executor, $25,000 of these bonds, which were sold by Gould to Jay Cooke & Co. Dec. 14, 1871, for $28,437.50, to pay a loan for the security of which they were pledged by the firm. On Sept. 28, 1869, Strong loaned the firm, as executor, 513 shares of the stock of the Pittsburgh, Ft. Wayne & Chicago R. R. Co., which were transferred to Gould, Strong & Co. on the books of Winslow, Lanier & Co., the transfer agents of the company, which the firm frequently used as collateral for loans, and of which 471 shares, which were pledged to the City Bank for a loan of $45,000, were sold on January 22, 1872, by the firm for $45,314.09, with which they paid the bank. The remaining 42 shares were transferred by the firm to Shepherd, who then first became aware of these loans of the assets of the estate. These stocks and bonds were used during the years they were held by the firm as collaterals to raise money, which was used in their business of carrying stocks for their customers. They were entered upon the firm's blotter as having been received from Strong, as executor, and were posted in the Stock Ledger under the heading of "T. R. S. Ext." The dividends and coupons were collected by the firm, and credited in the general ledger to Strong as executor. The loan of the stocks and bonds was made with the knowledge of all the *general* partners, and Peterson himself was informed of the loan of the 7-30 treasury notes either by Strong or Gould in a conversation between them in April, 1868, when the firm was in trouble arising from the panic in Atlantic Mail Stock, but he was not directly informed of the loan of the stock or bonds. Peterson did not go over to New York often, but monthly statements of the business of the firm were sent him, and one of the firm corresponded with him every day. Peterson drew nothing from the firm the first two years beyond the interest on his capital, according to the terms of the articles of partnership. But by the renewal of Nov. 10, 1868, his interest in the firm was changed, and he was permitted to draw out an amount equal to that drawn out monthly by Gould or Strong. Accordingly on Nov. 10, 1869, in addition to the interest on his capital, and the usual monthly credits, he drew out the sum of $6000, to equalize the amount drawn out by Gould or Strong to that date, but he did not replace it with additional capital. On Jan. 10, 1872, the ledger account with "Pearson S. Peterson, Special," shows that he had drawn out the sum of $22,500. The firm of Gould, Strong & Co. failed on January 16, 1872, in consequence of losses in stock speculation, but the evidence as to the time when they began to speculate was indefinite.

The statutes of New York in reference to limited partnership limit the liability of the special partner for the debts of the partnership to the amount of cash contributed by him to the capital, and further provide that every renewal or continuance of such partnership beyond the time originally fixed for its duration, shall be certified, acknowledged, and recorded, and an affidavit of a general partner be made and filed, and notice given, in the manner required for its original formation, and that every such partnership which shall be otherwise renewed or continued shall be deemed a general partnership.

And further that no part of the sum which any special partner shall have contributed to the capital stock shall be withdrawn by him, or paid or transferred to him in the shape of dividends, profits, or otherwise, at any time during the continuance of the partnership; and if such capital be withdrawn the special partner shall be liable to return it.

The counsel for the defendant, at the close of the plaintiff's evidence, moved for a non-suit, which the Court entered, and upon motion refused to take off, entering judgment for the defendant.

The plaintiff took this writ of error, assigning for error the entry of non-suit.

Samuel Dickson and *John C. Bullitt* (with them were *Robert H. McGrath* and *Victor Guillou*) for plaintiff in error.

At the end of the first year of the partnership the defendant became a general partner, because the certificate of renewal of the partnership was not recorded as required by the statutes in refer-

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ence to limited partnership. But even without that, he became a general partner, for he remained in business after the alteration of the articles of partnership in 1868. Conducting business after such alteration converts the partnership into a general one.

Lachaise *v.* Marks, 4 E. D. Sm. 610.

The action is for money had and received by the defendant's firm, and is based upon the receipt of the bonds and stocks by the firm, the use of them in their business for years, the transfer and sale of the stocks and bonds, and the appropriation of the proceeds to partnership purposes. No attempt was made to proceed in tort, but the action is an equitable one, and, as a bill in equity would lie to recover the bonds and stocks, in specie, if in possession of the firm, all the partners are equitably liable for the conversion, the proceeds having been used for their benefit and relief. The case is within the principle of—

Marsh *v.* Keating, 2 Cl. & Fin. 250.
Stone *v.* Marsh, 6 Barn. & Cress, 551.
Sadler *v.* Lee, 6 Beavan, 324.

Ex parte Heaton (Buck, 386) and *ex parte* Apsey (3 Bro. Ch. C. 265), cited on the other side, are distinguishable, for the moneys were appropriations by guilty partners to partnership purposes, and not, as in this case, loans to the firm of funds which came fraudulently into the possession of the firm and were then appropriated by the firm to their own use.

It was not a case of felony on the part of Strong, who held the assets rather as a trustee than as an executor, and the loan of the assets, though made at his risk, does not defeat his action for their recovery. The ground of the action is the receipt by the firm of the proceeds of sale of these securities.

When a partner borrows money generally, without saying for whom, the fact of its being used in the firm is *prima facie* evidence upon which to sustain an action against the firm.

Jaques *v.* Marquand, 6 Cowen, 497.

Where one partner in the firm name but without the actual authority of his partners, obtains money, and applies it to the use of the firm, the firm becomes liable the instant the application of the money to firm purposes is made.

Hogan *v.* Reynolds, 8 Ala. 60.
Manufacturers' and Mechanics' Bank *v.* Gore & Co., 15 Mass. 75.
Boardman *v.* Gore, 15 Id. 331.
Harper *v.* Lamping, 33 Cal. 649.

The defendant is liable, for he had both actual and constructive knowledge of these loans. His actual knowledge of the use of the trust funds was derived from the conversation with the two partners in 1868. These transactions were continuous, and his knowledge extends to all. It is admitted that his three co-partners knew of the loan of the securities, which they frequently used in their business. Notice or knowledge of any one partner is notice or knowledge affecting all the rest, or rather the partnership as a whole.

Parsons on Partnership, 196.

The defendant had constructive knowledge, for a general partner is presumed to know all the business of the firm. Assuming that he was a special partner, by the articles of partnership, the books of the firm were open to his examination, which showed the entry of these loans from Strong, as executor, and the defendant knew of the trouble of the firm arising out of the Atlantic Mail panic. He had the means of information at hand, and it was his duty to have availed himself of it.

If knowledge of fraud can be imputed to the other partners—if they knew, or ought to know that trust moneys are being employed in the partnership business—they will be bound, and will be liable for a breach of trust in case of their misapplication.

Lindley on Partnership, 328.

The limitation of the defendant's liability in the articles of partnership could not affect the rights of third persons.

Leggett *v.* Hyde, 58 N. Y. 272.
Ontario Bank *v.* Hennessey, 48 N. Y. 545.

That the defendant was deceived will not avail him, as against the plaintiff, who may recover if Strong cannot.

Bohlen's Estate, 25 Sm. 304.

David W. Sellers and *Sharp* (with whom was *Alleman*), for defendant in error. The defendant is not responsible for the use of the securities by his partners in the business of the firm, because by the articles of partnership his liability is limited to the amount of capital contributed by him, and the terms of the articles were known to the executor when the securities were loaned. Haven's Estate is therefore chargeable with knowledge of the terms of the articles of partnership. The plaintiff succeeds to the rights of the estate as they stood upon the failure of Gould, Strong & Co., and stands in Strong's shoes. But Strong's knowledge precludes an action for recovery. To hold the contrary would amount to the admission of the doctrine of implied authority in one partner to bind his copartners, when by the articles of partnership they expressly dissent from being so bound. Such a doctrine is repudiated in—

Yeager *v.* Wallace, 7 Sm. 365.
Feigley *v.* Sponeberger, 5 W. & S. 564.
Spooner *v.* Thompson, 48 Vt. 259.
Alderson *v.* Pope, 1 Camp. 404 (note), a.
Batty *v.* McCundie, 3 C. & P. 202.
Gallway *v.* Matthew & Smithson, 10 East, 264.
Parsons on Partnership, 95.
Story, Id. 128.

Assuming that the defendant withdrew his capital, the plaintiff does not pursue the appro-

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priate remedy which is by bill in equity against the firm to enforce the return of the capital withdrawn.

The defendant is not liable because he was not a party to the embezzlement of the securities. The general proposition that all the members of a firm are liable for property embezzled by one or more of its members is not sustained in—

Ex parte Heaton, Buck, 386.
Ex parte Apsey, 3 Bro. Ch. Rep. 266.
Jaques *v.* Marquand, 6 Cowen, 497.
Grubb *v.* Cottrell, 12 Sm. 23.
Clay *v.* Cottrell, 6 H. 408.

To charge the firm with liability all its members must be implicated in the breach of trust. All the partners must either know whence the money came or know that it did not belong to the partner using it.

Lindley on Partnership, 327.

The case is one in which two parties have trusted a third, and both have been deceived. Strong was trusted by Haven's Estate and by his partner. The securities were not borrowed upon the credit of the firm, for the defendant neither expressly nor impliedly assented to be liable for their value. The defendant is within the principle, where a loss must fall upon one of two innocent persons, both being free from blame, *melior est conditio defendentis.*

Grubb *v.* Cottrell, 12 Sm. 23.

Marsh *v.* Keating (2 Cl. & Fin. 250), is not in conflict with the view contended for. Fountleroy, who was not trustee, used the stocks lawfully in possession of the firm. The embezzlement was committed by him after the liability of the firm had arisen upon a lawful contract within the scope of the partnership business and known to all the partners.

In Stone *v.* Marsh (6 B. & C. 551) the firm received the proceeds of estate under a forged power of attorney. The felony committed was forgery only.

In Hogan *v.* Reynolds (8 Ala. 60) there was no pretence of embezzlement. The answer to the argument that the defendant is liable because he had actual and constructive knowledge of the fraudulent use of these securities is found in the evidence. Gould testified that the defendant, although he knew of the loan of the 7–30's, was not aware of the subsequent loans. And Strong declared that the books of the firm were not in the defendant's possession after the failure, and were at no time submitted to his inspection. And further the account with Strong as executor shows that these transactions were those of a deposit and brokerage account, showing no evidence of a loan of the securities to the firm.

May 7, 1879. THE COURT. The Court below having entered a judgment of non-suit against the plaintiffs upon the trial, we have but to consider the single question whether there was sufficient evidence to entitle the case to go to the jury.

The case of the plaintiffs, as presented, was this: On the seventh day of November, 1866, the defendants, Edward W. Gould, Theodore R. Strong, and Jesse White, Jr., of the city of New York, and Pearson S. Peterson, of the city of Philadelphia, entered into articles of copartnership, under the name of Gould, Strong & Co., for the purpose of "buying and selling stocks on commission, making loans, collecting promissory notes, drafts, and bills of exchange." The partnership was in the form of and was intended to be a limited partnership, the three gentlemen first named being the general partners, residing in New York, where the business was to be conducted, and the said Peterson being the special partner, and contributing the sum of $20,000 as cash capital. The partnership was renewed annually to 1871 inclusive; but, by an admitted informality in the renewals, Peterson became a general partner at the end of the first year, so far as the public are concerned, and continued so until its termination. As between the partners it remained a special partnership. The agreement further specified that the general partners should not engage in speculations of any kind; that Peterson, the special partner, should not in any event be liable for the debts or obligations of the firm beyond the amount of capital ($20,000) contributed by him, and that he should transact no business for the firm, nor be employed for that purpose as agent, attorney, or otherwise. Mr. Peterson seldom visited New York, and appears to have taken little, if any, part in the business.

Theodore R. Strong, one of the partners, was one of the executors of Samuel L. Haven's will. Mr. Haven resided in New York, and died in the autumn of 1865. The other executor, Thomas S. Shepherd, took but little charge of the estate. Mr. Strong was practically the acting executor. In the month of February, 1867, Gould, Strong & Co. borrowed from Mr. Strong $28,000 of the United States treasury notes, known as seven-thirties, which he held as executor, and which belonged to Samuel L. Haven's estate. These notes remained in the possession of the firm, and were used by them for the purpose of raising money, until June, 1868, when, having been called in by the Government, they were, on the 19th of that month, converted into other bonds, known as five-twenties. Whether the conversion was by Strong or the firm is not clear. In Strong's account as executor with the firm he is credited, on July 6, 1868, with $28,000 seven-thirties at $109, less commission, $31,453.80, and on the same day he is debited with $28,000 five-twenties new, at $108¾, $30,485. Within a few days

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thereafter $25,000 of these five-twenties were entered on the blotters and ledger of the firm as loans from Strong. They were used for the business of the firm, as stated by Mr. Strong, "to pay for stocks that we were carrying for our customers," and, again, "these stocks and bonds were used during the years they were held by Gould, Strong & Co. as collaterals to raise money; this money was used in our business." The five-twenties thus loaned to the firm, and thus used by them, were never returned to Strong, but were sold to Jay Cooke & Co., by Mr. Gould, on December 14, 1871 for $28,437.50, and the proceeds used to pay a loan for which they had been pledged by Gould, Strong & Co. For the like purpose of raising money, the firm borrowed from Strong, in 1869, 513 shares of the stock of the Pittsburgh, Fort Wayne, and Chicago Railway Company, belonging to the said estate, which said stock was continuously used as collateral to raise money until January 8, 1872, when the firm borrowed the sum of $45,000 from the City Bank upon this 513 shares of stock. The bank was repaid, about January 22d of the same year, $45,314.09, by the sale of 471 shares of said stock, and the balance thereof, 42 shares, were delivered to Mr. Shepherd, the other executor, who appears to have then learned for the first time of Mr. Strong's *misapplication* of the securities belonging to Mr. Haven's estate.

Gould and White were cognizant of all these transactions, and were active participants therein. There was evidence, and for the purposes of this case it must be taken as true, that Mr. Peterson knew of the transaction of the seven-thirties. Strong says "he (Peterson) knew of the loan of the treasury notes. *He knew they belonged to me as executor.* He got that information from either Mr. Gould or myself, we were both present. I don't know which of us told him. That was in April, 1868."

No question has been made, indeed none could be made, as to the liability of Strong, Gould, and White to Mr. Haven's estate upon this state of facts. Strong, the executor, was guilty of fraud upon the said estate, and Gould and White were participants therein. It was a *misapplication* of the assets of the estate, to use the polite and considerate term in general use to express a breach of trust. In the language of the law and of common honesty it was an *embezzlement*. It was not the case of a loan of unemployed funds by an executor to his firm, for the purpose of gaining interest for his *cestuis que trustent*, but of the loan of interest-bearing securities to enable the firm to carry on its operations. Such breaches of trust have become so frequent and so startling the last few years, that we would fail in our duty were we to omit to mark them when they come before us with the seal of our stern condemnation.

It remains to consider the question of Mr. Peterson's liability. The right of the plaintiff to waive the tort, and sue in assumpsit for money had and received, is too well settled to need either argument or the citation of authority. It is alleged, however, that Mr. Peterson is not liable, for the reason, among others, that "by the terms of the partnership articles he was to be liable only to the extent of the capital he had contributed, and the terms of those articles were known to the executor of Haven's will when the securities were delivered for use." This position concedes Peterson's liability to the extent of $20,000. It assumes, however, that the estate of Mr. Haven is in no better position than Strong, the executor, would be? Is this position sound? I concede that if Strong had advanced his own money or his own securities to the firm, he would be bound by the limitation in the agreement between the partners. But this suit is not by Strong or for his benefit. The securities he loaned the firm were not his property. They belonged to Mr. Haven's estate. In the ordinary legitimate dealings of an executor with the assets of an estate, the parties in interest are bound by his acts, and perhaps affected with notice. In such case he may, in a qualified sense, be regarded as their agent. But surely this principle cannot apply where an executor is acting in fraud of the rights of the estate. It is opposed to every well-settled principle applicable to trust funds. Trust property squandered by a faithless trustee can be followed wherever found, and, if ear-marked, equity will lay its strong hand upon it, and restore it to its rightful owner; such owner is not bound by what his trustee has done or omitted to do, and may repudiate or rescind his contracts, saving of course the rights of innocent third parties. Mr. Strong was not acting for his *cestuis que trustent* when he loaned these securities to his firm; he was acting in direct antagonism to them; he was embezzling their securities; he was doing that which was a sufficient cause for his removal by the court having jurisdiction of his accounts. We think that the owners of the securities loaned by the executor to his firm occupy a very different position from the executor himself, and that they are not to be affected with his knowledge of the private understanding or agreement between the partners. That the acts of a trustee in excess of his powers are not binding upon his *cestuis que trustent* was decided in Bohlen's Estate (25 P. F. S. 304). Much more so when the act is not a mere excess of power, but a clear and fraudulent abuse of it.

It is said, however, that Mr. Peterson is not liable, for the further reason, that the power of one partner to bind the others is at most an implied power; that each partner is the agent of his copartners only when acting in the scope of

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his power and in the usual course of the business of the firm, and that when his agency is denied or forbidden by his copartner, with notice to the party assuming to deal with him, as the agent of the firm, his act is not that of the firm, but his individual act only. As an abstract proposition this is correct. (Story on Partnership, sections 128 and 130, and n. 1, p. 218; Parsons on Partnership, 95; Gallway *v.* Matthew, 10 East, 264; Spooner *v.* Thompson, 48 Vermont, 259; Fiegley *v.* Sponeberger, 5 W. & S. 564; Yeager *v.* Wallace, 7 P. F. S. 365.) It does not apply to this case as it stood before the jury when the judgment of non-suit was entered. The cause has been argued upon the theory that the securities were borrowed for the purpose of using the money in wild speculations prohibited by the agreement of partnership. The evidence is not so. The money was used in the business of the firm, carrying stocks for their customers, etc.

It is true the failure of the firm was caused by speculations in stocks in 1872, but there is no evidence that they were engaged in such speculations at the time the securities were borrowed, or that the securities were used for any such purpose. The borrowing of securities may be regarded as the equivalent of borrowing money so far as the responsibility of the firm is concerned. This has always been considered as among the implied powers of partnership, and when exercised by a partner in the name of the firm, for the business of the firm, and the proceeds so applied, it has always been held to bind the firm unless actual notice can be traced to the person loaning the money that the partner had no authority for such purpose. Our own books are meagre in authority upon the question of the responsibility of a firm under such circumstances. It has been largely discussed in England, however, in a series of cases growing out of the forgeries of one Fauntleroy, who was convicted and executed for his offence. Marsh *v.* Keating (2 Clark & Fin. 250), is the leading one of those cases. There the stock, the proceeds of which went into the firm, was sold upon a forged power of attorney.

The firm of Marsh & Co. had certain certificates of stock belonging to Keating, one of their customers. Fauntleroy, a partner in the banking house of Marsh & Co., forged a power of attorney and caused the stock to be sold. The receipt of the proceeds of the sale of the stock was not entered in any of the ordinary books of the defendant's firm, nor did the sum ever come into the yearly balances of the firm. It was entered only to the credit of the bank, in a pass-book kept between them and their agents, Martin & Co., and it was the duty of Fauntleroy, as between himself and copartners, to have entered the said sum in the books of Marsh & Co., if he intended it for their account. Fauntleroy also continued to make regular entries of credit to Keating for dividends collected on the stock, as if these dividends had been regularly received from time to time. The partners of Fauntleroy were ignorant of the fraud, but the Court said they might with common diligence have known it, and held them responsible, though, in point of fact, the money had not been received by them, but was embezzled by Fauntleroy. Stone *v.* Marsh (6 Barn. & Cres. 551), was another case growing out of the same series of forgeries. Here Fauntleroy was one of the trustees of the stock sold, as well as a partner in the house of Marsh & Co. He executed a power of attorney to transfer the stock, and forged the names of his co-trustees. The stock was sold under this forged power, and the proceeds received by Marsh & Co. in the same manner as has been described in Marsh *v.* Keating. Lord TENTERDEN, C. J., held that it was the duty of the banking house to place the money to the credit of the trustees, and that no ignorance on the part of any of them, nor any neglect on the part of the house arising from a misplaced confidence reposed by them in one of themselves, to which the plaintiffs were no parties, can deprive the plaintiffs of their money. In Sadler *v.* Lee (6 Beavan, 324) the facts were similar, except that there was no forgery. The stock was clandestinely sold upon a genuine power of attorney by one of the partners and a credit given to the firm for the proceeds. The sale was concealed from the other partners, and the dividends accounted for as if actually received. The plaintiff's trustees were not regular customers of the firm, but Lord LANGDALE held that the difference was immaterial. The partners were held liable, on the ground that the bankers received the proceeds of the sale. It was attempted to distinguish these cases from the one in hand by the fact that in each of them the stocks were received by the firm in the regular course of business. I am unable to see the distinction. The wrong done here on the part of the firm was in converting the securities. It is manifest they had the custody of them for Strong and collected the interest and dividends for him. The account shows this. Afterwards they borrowed the securities from Strong. This did not authorize their conversion. It imposed an obligation to return them in specie. If sold, it was the duty of the firm to have carried the proceeds to Strong's credit as executor. Instead of doing so, Gould sold the five-twenties, and with the proceeds paid a debt of the firm, while the railway stock went to pay the $45,000 due to the bank. For both these debts Mr. Peterson as a general partner, was individually liable. It is entirely in the course of the regular business of the firm to pay its own debts. I regard the

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case in hand as stronger than those cited, for the reason that the firm got the benefit of every dollar realized from the securities, while in Marsh *v.* Keating and Stone *v.* Marsh, Fauntleroy cheated his firm as well as the owner of the stock by appropriating to his own use the money received from the sale of said stock.

It is not meant to advance the broad proposition that where one abuses his trust and thereby obtains the means to advance money to a partnership, he thereby raises a contract between the partnership and the person whose money has been so used. The rule is thus laid down in Lindley on Partnership, at page 327:—

"If a partner, being a trustee, improperly employs the money of his *cestui que trust* in the partnership business, or in payment of the partnership debts, this alone is not sufficient to entitle the *cestui que trust* to obtain repayment of his money from the firm." To the same point are Ex parte Heaton (Buck. 386); Ex parte Apsay (3 Bro. Ch. C. 266); Jacques *v.* Marquand (6 Cowen, 497). If Mr. Strong had sold the securities belonging to Haven's estate and placed the proceeds in the firm as his share of the capital, or had loaned it to the firm as his own money and without knowledge on their part that it was trust-money, they would not have been liable to an action by the representatives of Haven's estate. Here the securities belonging to the estate were sold by the firm, with knowledge of the true ownership, and the proceeds used to pay its debts. This, under the authorities treating Mr. Peterson as a general partner, which we think he is, would make him liable without notice or knowledge on his part of the borrowing of the securities or their conversion by his partners.

But even if we treat Mr. Peterson as a special partner so far as Haven's Estate is concerned, this judgment must be reversed. As before observed, the right to recover against the general partners is undoubted. It is equally clear as to Mr. Peterson if he had notice of these transactions, or might or ought to have known them. There was evidence that he did not know. Not as to all, perhaps, or to the full extent of their operations; but he knew in April, 1868, that his firm had borrowed $28,000 of the securities of the Haven estate from the executor. Then was the time for Mr. Peterson to speak. Had he spoken then, as he should have done, Mr. Haven's estate might have been saved from ruin, his firm from the subsequent insolvency, and his own estate from the peril of this litigation. A man who is brought face to face with such an irregularity as this on the part of his firm cannot shut his eyes and refuse to see it. Whether we regard the transaction as a wrong to the estate, or a violation of the partnership agreement in regard to speculation, it was ample to put Mr. Peterson upon inquiry as to the nature of the transactions of his firm, and if he chose to sleep upon such a disclosure, he has no one to blame but himself. It is no answer to this to say that the seven-thirties were returned, and that he had no subsequent notice. It was for the jury to say whether the alleged return was anything more than a matter of bookkeeping, and for any other purpose than that of exchanging the form of the securities. In any event, he had a right to examine the books, and after the irregularity referred to, it was his duty to have done so. Such examination would have disclosed the conversion of the securities belonging to the Haven estate, and the application of the proceeds to the payment of the debts of his firm. He must now be charged with the knowledge he might and ought to have acquired.

We are of opinion that the case should have gone to the jury, and that it was error to enter a judgment of non-suit.

The judgment is reversed, and a *procedendo* awarded.

Opinion by PAXSON, J.

[NOTE.*—An agreement for a limited partnership which is not properly advertised or otherwise brought within the terms of the statutes upon that subject is, as to third parties, a general partnership. On the other hand, it is binding in all its limitations upon the partners themselves, notwithstanding the failure to comply with the statutes.

There are, however, two states of circumstances suggested by the principal case affecting parties *sui juris* where a question as to the general liability of a special partner could arise, first: Where a credit is given by one having knowledge of the existence of such articles of copartnership, *but without knowledge that the law has not been complied with, when in fact it has not been;* and, second: Where credit is given by one with knowledge of the articles, *and with the further knowledge of a failure to comply with the law.* It might well have been thought in the early administration of the limited partnership law, that where a creditor at the time of giving credit had knowledge of the existence of an agreement for a limited partnership, but no knowledge of a failure to comply with the law, and the failure to comply with it was only, so to speak, in an immaterial matter (such, for example, as an omission to advertise), that he could not treat the partnership as a general one, and we are not aware of any decided case, even at this day, where this precise state of facts existed, and the partnership was held to be a general one. It is plain, however, both upon reason, and the authority of Andrews *v.* Schott (10 Barr, 47), that an omission to comply with the statute in so material a respect as the failure to contribute the capital stipulated for, would make the partnership a general one, *if the creditor did not know, when the credit was given, that the capital had not been paid in.* If, on the other hand, he did know of this fact, it would not seem unreasonable to hold that his action must be first against the copartnership as a limited one, and then in equity to compel the special partner to contribute the capital agreed for. The opinion in the case of Andrews *v.* Schott is doubtless to the effect that a failure of such a character to comply with the statute will create

* Contributed by Isaac S. Sharp, Esq., of counsel for defendant in error.

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a general liability as to a creditor having knowledge of the existence of a special partnership agreement. But the facts in that case were very different from those suggested by us. A limited partnership was there formed consisting of Harvey W. Andrews, a general partner, and one Harris, a special partner—the latter contributing $10,000 as his capital in the business. Fifteen days after this partnership had expired, a new limited partnership was formed, consisting of said Andrews and John L. Wilson as general partners, and Harris as a special partner, it being stipulated that the latter should contribute $10,000. Harris never did contribute the money to the latter firm, but the old firm having turned over all its assets to the new (the former, however, still owing debts), Harris and his partners considered that in that way he had paid in the $10,000 to the latter firm; and his defence was that the plaintiffs *knew when they gave the credit that he was a special partner.* The affidavit of defence, however, did not set up that the creditor knew the true state of the facts above set forth. The language of the opinion is broad enough to cover the case put by us, but the facts do not warrant so broad a statement of the principle, and the opinion has since been much criticised in argument, and in Mr. Troubat's "Law of Limited Partnership," p. 65, note (2), and pp. 114–122 and 596.

That a creditor having knowledge of the terms of an agreement between partners is bound by it, would seem to be sustained by the weight of authority, and Batty *v.* McCundie (3 C. & P. 202), well illustrates this principle. The defendants in that case became shareholders in a newspaper, the prospectus of which stated that they were not partners, *and were not to be liable for more than their subscriptions.* The plaintiff firm sued for the price of stock furnished to the newspaper. One of them had had knowledge of the terms of the prospectus, and PARKE, J., said to the jury: "If you believe the evidence, . . . I tell you that in point of law the plaintiffs cannot recover."

Now whilst the opinion in the above-reported case recognizes this principle, it is said that it cannot apply when an executor is acting in fraud of the rights of his testator's estate. But it is submitted that this should make no difference *if the acts constituting the fraud are not known of by the copartner defendant.* If Peterson knew when the stocks were used that they were trust funds, or, if, during their use, he should have learned the fact, and did not do so; or, if he did learn of it, or should have done so, and did not do what he could to remedy the wrong done the trust, but concurred in concealing the fraud, he should be held liable for the loss. The action might doubtless be in assumpsit, though scientifically the ground of recovery would seem to be more appropriately referable to the fraudulent participation in the use of trust funds and sound in tort.

It is submitted, moreover, that Bohlen's Estate (25 P. F. Smith, 304) does not apply to the case under discussion. There A. and B. were trustees. B was in Europe, and gave A. a power of attorney to act for him in the management of the trust. A. acting for himself and B., under the power from the latter, transferred stocks belonging to the trust and embezzled the proceeds. It was held that the joint action of all the trustees being necessary to a valid transfer, and the power of attorney being void, as being a delegation of a discretion, the transfer was void, and the company making the transfer was held liable to the trust estate. It will be seen from an examination of the case, however, that if all the trustees had joined in making the transfer (the legal right to convert into other securities being conceded) and they had then embezzled the proceeds, no action could have been sustained against the corporation—its officers being ignorant of the fraudulent design.

As to liability for embezzled assets. This subject has been little discussed in this country. Even in the case of Jacques *v.* Marquand (6 Cowen, 497), what was said upon the subject was, in strictness, not necessary to the conclusion reached. The same may be said of Clay *v.* Cottrell (6 Harris, 408). The opinions in these cases, however, do not recognize the principle first laid down in *ex parte* Heaton (Buck, 386), and afterwards in *ex parte* Apsey (3 Bro. Ch. C. 265). It may be stated, in almost the very words used by Lord THURLOW, in *ex parte* Apsey, thus: when one by abusing his trust, advances the trust funds to his partnership, that will not raise a contract between the partnership and the person whose money it is—the partners being ignorant of the breach of trust. On the other hand, it was admitted in *ex parte* Heaton, that if the partners of the trustee had known or had had the means of knowing that the funds used were those of a trust, they would have been liable. We cannot see, however, and we do not understand the cases to decide, that the simple fact of being informed of the use of trust funds in the firm's business makes it liable. The partner who is not a trustee must have done some act amounting to a ratification of the acts of the trustee partner; or, have been guilty of some fraud; such, for example, as concealment of the wrongful act from those interested in the trust funds. The contrary theory would manifestly have no good reason to support it.

It is also well established by Marsh *v.* Keating (2 Cl. & Fin. 250) and kindred cases, that if the trust funds come to the possession of the partnership in the usual course of their business, as, for example, by a deposit of securities with them for safe keeping or for sale, and after the liability of the firm has attached one of the partners embezzles the funds, the firm will be responsible. The distinction between the two classes of cases would seem to be plain. In the one case the primary act is one of embezzlement on the part of the partner. In the other the primary act is one of lawful contract with the firm, and, of course, in the latter case, it can make no difference after the contract with them is made, what becomes of the property for which the firm had become liable.

In the principal case the main point decided by the Court would seem to be that there was enough evidence to go to a jury of Mr. Peterson's knowledge of the use of the funds of the trust, and of his acquiescence in their use; or, at least, of his silence when he should have informed the parties in interest of the matter, to involve him in the fraud of the embezzling partner.]

Jan. '78, 302. March 28, 1879.

Reese v. Reese.

Rules of Court—Power of Court to make and interpret—Expert testimony as to handwriting—Cannot be based on knowledge acquired for the purpose of testifying—Comments by Court on evidence.

It is within the power of a Court to make and enforce a rule allowing the admission in evidence of an instrument sued on without proof of its execution, unless notice is given to the other side of an intention to impeach it.

An expert cannot be admitted to give his opinion as to whether an instrument was written by a certain person, when his acquaintance with the person's handwriting was obtained for the purpose of testifying.

Where one party alleges that the body and signature of an instrument were written by the same person, and the

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other party the contrary, it is admissible to ask an expert witness whether, in his opinion, the two parts are in the same handwriting.

Although parts of a charge, when taken alone, may seem erroneous and may clearly show the opinion of the Court as to the questions of fact at issue, yet it is not error if, taking the charge as a whole, the questions are fairly left to the jury.

Error to the Common Pleas of Chester County.

Debt, by Margaret Reese against John Reese, on a sealed note for $993, dated March 17, 1857, and drawn by defendant in favor of plaintiff.

This, in the Court below, was an appeal from an award by arbitrators in favor of plaintiff for $1997.04. Defendant filed an affidavit of defence in which he averred that the note on which suit was brought was never executed by him. Pleas, *non est factum* and set-off.

On the trial, before BUTLER, P. J., the plaintiff offered the note in evidence; defendant objected because no proof was made of its execution by defendant, whose plea of *non est factum* required it. The Court overruled the objection because no notice had been given of an intention to impeach the execution of the note, in accordance with Rule of Court No. XIX., which reads as follows:—

In all cases where the plaintiff's cause of action or the defendant's set off, is founded in whole or in part on any bond, note, or other instrument in writing, and stated specially in the pleadings, or notice given fifteen days before the first day of the term at which the cause is set down for trial, the same may be given in evidence without proof of its execution, unless the opposite party shall, at least eight days before the first day of said term, give notice to the party offering such instrument that he requires such proof to be produced.

Plaintiff then closed, and defendant testified that he had never executed the note, nor seen it before trial. Other witnesses testified that the plaintiff had in their presence said defendant owed her nothing. Defendant called E. H. Rauch, an expert witness, and offered to ask him whether, in his opinion, the same person executed the signature that executed the body of the note. Objection sustained; exception.

The same witness, after he had testified that he was unacquainted with defendant's handwriting until shortly before the trial, when it had been shown him—he supposed for the purpose of preparing the case—was asked whether, in his opinion, the signature to the note was in defendant's handwriting. Objection sustained; exception.

The defendant, in rebuttal, produced witnesses who swore they had seen defendant sign the note; the body of the note was admitted to be in the handwriting of a third party.

The Court, in the general charge, speaking of the evidence of the statement made by plaintiff that defendant owed her nothing, said, *inter alia*, as follows: ["As she was talking to strangers she was under no obligation to tell them the truth about her business] . . . . . I only suggest these thoughts; they arise naturally out of the evidence and must be considered by you in reaching a correct conclusion. They are for you entirely. In respect to them, the Court does not mean to bias your minds in the least.

Speaking of the testimony of Rauch, the expert, the Court said: "You will say what weight shall be attached to his testimony. . . . . [I say to you that to such testimony, in my judgment, little weight should be attached.] . . . . The case presents questions of fact only. You will consider them with care. . . . . I submit the case to you."

Verdict for plaintiff for $1511.20, and judgment thereon. Defendant took this writ, assigning for error, *inter alia*, the admission of the note without proof of its execution, the rulings on evidence above given, and the portions of the charge above quoted in brackets.

C. H. Pennypacker, for plaintiff in error.

The construction of the rule by the Court below worked injustice to defendant, and can be revised here.

Stirling *v.* Ritchey, 17 S. & R. 263.
Magill's Appeal, 9 Sm. 430.
Brennan's Estate, 15 Sm. 16.

Moreover, the notice required was given by the affidavit of defence; the plea also denied the execution of the note.

The testimony of experts that the whole of an instrument was written by the same hand is receivable.

Fulton *v.* Hood, 10 C. 370.
Burkholder *v.* Plank, 19 Sm. 225.
Ballentine *v.* White, 27 Sm. 26.
Power *v.* Frick, 2 Grant's Cases, 307.

The charge was so strongly against us as to be clearly error.

Wm. B. Waddell (with him *H. H. Gilkyson*), for defendant in error.

The Court had the power to make the rule and to interpret it, and this Court will not interfere in the construction of rules of practice.

Snyder *v.* Bauchman, 8 S. & R. 336.
Rundel *v.* Keeler, 7 Watts, 237.
Frank *v.* Calhoun, 9 Sm. 381.
Coleman *v.* Nantz, 13 Ibid. 178.
Carey *v.* Comm., 4 Brewster, 62.
Andrews *v.* Bank, 25 Pitts. L. J. 133.

The opinion of the expert as to whether the body of the note and the signature were in the same handwriting was inadmissible, as there was no standard by which to judge of defendant's handwriting; the body of the note was admittedly in another's handwriting.

The recognized rule as to comments on evidence is that a Judge may express opinions, provided the case is not withdrawn from the jury.

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Williams *v.* Carr, 1 Rawle, 420.
Ditmars *v.* Comm., 11 Wr. 335.
Mahoney *v.* Evans, 1 Sm. 84.
Ralston *v.* Groff, 5 Sm. 278.
Burke *v.* Maxwell's Admrs., 31 Sm. 139.

May 5, 1879. THE COURT. The rule is within the power of the Court to make, and filing an affidavit of defence is not the requisite notice to put a party to proof of execution of the writing. There can be nothing in the allegation that "the construction of the rule by the Court worked injustice to John Reese," nor was it a favor to Margaret Reese. The first witness called by the latter testified that she saw the former sign his name to the note. With that witness present, both parties having knowledge of what she would say, the whole contention would seem to have been to obtain a construction of the rule, and we are not convinced that there was error or hardship in the interpretation. It would be an extreme case which would require reversal because of error in admitting a writing without preliminary proof of signature, when, in a subsequent stage of the trial, positive evidence was given of its execution. (Hannay *v.* Stewart, 6 Watts, 487; Gaskell *v.* Morris, 7 W. & S. 32.)

The last four assignments are to portions of the charge. By themselves, some of these seem erroneous; but are not, taken with the context. For instance, the sentence "As she was talking to strangers, she was under no obligation to tell them the truth about her business," is in the midst of remarks of which the Judge says: "I only suggest these thoughts; they arise naturally out of the evidence, and must be considered by you in reaching a correct conclusion. They are for you entirely. In respect to them the Court does not mean to bias your minds in the least." Again, the subject of the eighth assignment is not "relative to the testimony of experts," but to the particular testimony of the witness quoted immediately preceding the alleged erroneous words. The jury were expressly told that it was for them to say what weight should be attached to the testimony of the expert, Mr. Rauch. Although the charge, as a whole, very decidedly exhibits the learned Judge's opinion in favor of the plaintiff, supported by able argument, it is not assigned that the jury were misled thereby. He submitted every question to the jury, saying, in conclusion: "The case presents questions of fact only; they are entirely for you to determine."

Rauch, while waiting as a witness for John Reese, saw him write several times; he wrote at request of his counsel. From knowledge of Reese's handwriting thus acquired, the witness was incompetent to testify his belief as to the genuineness of the signature in question. It has never been the practice in Pennsylvania to permit a witness to give an opinion when taught in that manner. In Stranger *v.* Searle (1 Esp. 4), the witness had seen the defendant write his name several times previous to the trial, for the purpose of showing to the witness his true manner of writing. Lord KENYON rejected the testimony, saying: "The defendant might write differently from his common mode of writing his name through design." The only error appearing is the overruling an offer to prove by an expert whether, in his judgment, the body of the note and signature were written by the same hand. "It was ruled in Fulton *v.* Flood *et al.* (10 Casey, 365), that the testimony of experts is receivable, in corroboration of positive evidence, to prove that in their opinion the whole of an instrument was written by the same hand, with the same pen and ink, and at the same time. This case, indeed, is the converse of that, but the principle is undoubtedly the same, whether the evidence is of experts to attack or support the instrument." (Per SHARSWOOD, J., Ballentine *v.* White, 27 P. F. Smith, 20.) John Reese had previously testified that he did not sign the note. Confessedly, he did not write the body of it. When one party alleges that the body and signature were written by the same hand, and the other the contrary, what can be more clearly admissible than testimony of one so skilled as to be able to determine the point by inspection? Just here, if anywhere, is the testimony of an expert competent and valuable. It is certainly true that the positive declaration of a witness that she saw the party write his name, if believed, cannot be overcome by the opinion of an expert; nor can it by any other kind of evidence. Peradventure, such declaration may not be credited by the jury, and therefore evidence pertinent to the issue shall not be rejected by the Court.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by TRUNKEY, J.

Quarter Sessions.

June 21, 1879.

In re Port Wardens' Line at Point Breeze.

City of Philadelphia—Wharf lines on river Schuylkill—Who may object to plans—Act of April 6, 1860.

In a proceeding under the Act of April 6, 1850 (P. L. 371), to establish wharf lines on the river Schuylkill, after

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the plans have been made by the Board of Surveyors and approved by the Board of Port Wardens, objections thereto before the Court can only be made by riparian owners. Parties using the river for commercial purposes have no status.

Sur exceptions to city plan.

The Board of Surveyors of the city of Philadelphia in pursuance of the Act of April 6, 1850 (P. L. 371), surveyed parts of the river Schuylkill at two localities, near Point Breeze, and made plans thereof with wharf lines, which were approved by the Board of Port Wardens of the port of Philadelphia, and returned to the office of the clerk of the Court of Quarter Sessions. The lines were not opposite each other, nor were lines established on the shore opposite the lines in the question.

Section 1, of the said Act provides:—

"That the principal or assistant surveyor of the city of Philadelphia, and the recording or other legally appointed surveyors of the districts of Spring Garden and Moyamensing, and the surveyor of the township of Blockley, be and they are hereby authorized and empowered, as soon as convenient after the passing of this Act to survey, lay out, and take proper soundings of the channel on each side of the river Schuylkill from Fairmount to the river Delaware, for the purpose of establishing wharf lines thereon, and make a correct plan thereof, with all necessary explanations, which plan, when approved by the Board of Port Wardens of the port of Philadelphia, shall be returned into the office of the clerk of the Court of Quarter Sessions for the County of Philadelphia, and the said Court shall thereupon appoint a time and place to hear any objections that may be made thereto *by any owner of property adjoining said river* who may think him or herself aggrieved thereby, of which at least ten days' notice shall be given by advertisement in two or more newspapers published in the city of Philadelphia. and if *any person shall appear and object* to the survey and wharf line so marked and laid out, it shall be the duty of the said Court of Quarter Sessions to decide upon such objections, and whether any and what alterations shall be made therein, and further direct the said plan, with their adjudications thereupon, to be recorded or filed in the office of the clerk of the said Court, which survey and wharf lines shall thereupon be and remain unalterable."

The 2d section of said Act authorized lines of portions of the river to be established from time to time in the manner above provided, and with the same effect as if one general plan had been made.

On notice being given according to the Act, objections to the surveys and lines were filed by S. & J. M. Flanagan, and the matter was referred to an examiner by whose report it appeared that the objectors used said river for the purpose of towing, etc., but were not owners of property adjoining the river. Also that the lines fixed would decrease the width of the river.

J. Warren Coulston, for the exceptants.

The Act authorizes the Court to hear "any person who shall appear and object." The objectors represent large commercial interests that will suffer by a decreased width of the river. The plans are insufficient in not showing the soundings and the opposite lines.

E. P. Smithers, Assistant City Solicitor, contra. The objectors, owning no property on the river, have no *status*. The Act in terms confines the objections to "any owner of property adjoining said river." The Board of Surveyors guard the channel of the river; the Port Wardens conserve the interests of commerce; and the Court protects the rights of the riparian owner.

C. A. V.

June 25, 1879. THE COURT. Exceptions dismissed.

Common Pleas—Equity.

C. P. No. 2. March, 1879.

Fidelity Co. v. Huber.

Equity—Appointment of receiver—Trust funds, not ear-marked, in the possession of a former agent—Practice.

Where trust property of a character which passes by delivery (*e. g.*, government coupon bonds and cash) is in the hands of a *de facto* trustee, against whom a bill for an account has been filed by the rightful trustee, the Court will appoint a receiver, though no fraud or misconduct of the respondent be alleged.

Sur petition for appointment of receiver. The facts were as follows:—

Frederick Gaul, Sr., died in June, 1831, possessed of considerable property. By his will, dated August 1, 1825, he appointed Frederick Gaul, Jr., William Gaul, and Clarissa Gaul, trustees. The last survivor of them (Frederick) died in 1871, having by his will appointed Mary Ann Gaul his executrix. During the lifetime of these trustees certain securities of the estate passed into the hands of Henry Stiles as "the bailee or agent" of the trustees; and afterward, in 1863, the same passed into the possession of James S. Huber. This arrangement was apparently in accordance with the wishes of the persons beneficially interested in the estate. In 1868 litigation was begun to determine what portion of the estate of Frederick Gaul, Sr., did not pass under his will (it being conceded that there was considerable after-acquired real estate), who was entitled to the estate, and in what proportions. This litigation proved protracted and complicated, and has not yet been terminated. In April, 1877, the Fidelity Company was appointed trustee; they filed the present petition,

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setting forth that there was a large amount of government coupon bonds and cash, the proceeds of bonds redeemed at the call of the government, in the hands of Huber, not ear-marked, and for which no security had been given by Huber; and the petitioners, therefore, prayed the appointment of a receiver. Certain of the respondents concurred in the application.

The answer of the other respondents set forth that a considerable portion of bonds and money so held was not trust property, but they made no more definite objections.

John G. Johnson, for petitioners (with whom were *F. Wolfe*, *Victor Guillou*, *C. S. Pancoast*, and *Geo. W. Biddle*), for respondents in favor of the petition.

The Court will appoint a receiver before the evidence closes if it appear that the defendant is the custodian of property belonging to the plaintiff, and that there is probable peril to the property.

Ins. Co. *v.* Kellogg, 5 WEEKLY NOTES, 477.
2 Dan. Ch. Practice, 1771.
Kerr on Receivers, 29.

There is no doubt that the property covered by the present application is of a character to be jeopardized by being in the custody of a person who has given no security.

Murray *v.* Lardner, 2 Wall. 110.
Carpenter *v.* Rommel, 5 Phil. 34.

R. L. Ashhurst and *Chapman Biddle*, contra.

The object of a receiver is to preserve property *in statu quo* during a contest.

Schelecht's Ap., 10 Sm. 174.

No such necessity has been shown here.

High on Receivers, 1.
Kerr on Receivers, 8.

It has not been alleged that the present custodian of the property is acting so as to endanger its safety.

April 21, 1879. THE COURT. It appears by the admitted facts in this case that Huber is the actual custodian of the property, much of which is in coupon bonds and other investments not ear-marked as trust property, and that he became such custodian without any interest in the property, by no decree or order of any Court, but by the agreement and at the solicitation of the parties in interest in the year 1863, when they were all upon friendly terms.

It also appears that since 1868 a most protracted and unfortunate litigation has arisen upon all branches of these trust estates, which finally became so complicated, and threatened to be so disastrous, as to force all parties to an agreement to refer all the matters in dispute under all the trusts, to a Master for final decision. Even this reference, however, does not seem yet to have produced harmony in the conflicting interests, and an occasion for change in some of the investments having arisen by the call of the United States for certain bonds, this application has been made.

We think the order asked for is reasonable, and its tendency will be in the direction of alleviating the rancor of this unfortunate litigation.

The property consists largely of coupon bonds and cash, the product of the called bonds of the United States; it is not identified or ear-marked in any way as trust property, and probably until the Master's report it could not well be definitely so marked with reference to any of the trusts in litigation. It is, therefore, not to speak of other dangers, subject to the contingency of passing into the hands of a stranger to all the trusts upon the death of Mr. Huber, whose executor or administrator might, without intentional wrong, deem it only prudent to retain it until administered in the regular course of the estate, and thus subject the real owners to further delay, if not actual loss. This is a condition of danger with which no prudent business man would be satisfied, and which certainly a Court of Equity, bound to protect property in its charge from possible as well as probable perils, cannot sanction.

We understand that Mr. Huber, while absolutely denying that the bonds are in any actual danger, nevertheless desires to be relieved of a troublesome and thankless duty. The only real objection comes from some of the parties, who appear to think their interests imperilled by the grant of anything their opponents ask for, and others who make opposition to this petition the basis of seeking a special advancement, or speeding of their own part of the controversy. We think none of these objections of any weight.

Without, therefore, any imputation of any kind upon the present custodian, Mr. Huber, and without in any way prejudicing the title of any of the claimants to any part of the property, we think the facts present a case where the actual property should be put in the hands of a receiver or trustee, to hold for the benefit of all parties, until the Master has reported, or the rights of the parties have been otherwise finally ascertained.

With regard to the petition of Edwin M. Lewis, trustee of Martin Gaul, we think it not advisable to make any order at the present time. The subject matter is part of what is already before the Master, and it is desirable that he should be untrammelled by any indication in advance of the opinion of the Court upon any single branch of the large and complicated matter referred by general consent to his decision.

A trustee will therefore be appointed, in accordance with the prayer of the petition.

Opinion by MITCHELL, J.

[The Guarantee Trust and Safe Deposit Company was appointed Receiver.]

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Common Pleas—Law.

C. P. No. 2. June 14, 1879.

Weir v. Shaw.

Witness fees—Mileage—Witnesses residing within the city limits are entitled to mileage—Act of Feb. 22, 1821—Doctrine of "contemporanea expositio optima est et fortissima in lege."

Appeal from prothonotary's taxation of costs.

There had been a verdict in this case for the defendant. The prothonotary, in taxing costs, allowed mileage to witnesses residing in Roxborough, within the city, and nine miles from the court-house. The defendant took this appeal.

J. W. Patton, for the appellant, cited—

Act of Feb. 22, 1821, 7 Sm. Laws, p. 377, viz: "That the fees to be received by witnesses shall be as follows, viz., each day's attendance when the witness does not reside in nor within one mile of the county seat 62½ cents; each day . . . where the witness resides in or within one mile of the county town 50 cents; . . . mileage, each mile circular in travelling to and from, 3 cents."

The witnesses all live in the county town, and would seem to be excluded by the words of the Act.

Bennett, contra.

It has been the uniform practice to allow claims like the present, and there is certainly nothing in the Act to negative the right.

[MITCHELL, J. Where the practice has been uniform under an Act of Assembly more than fifty years old it would not be wise to disturb it, unless good cause were shown.]

Patton, in reply.

The question becomes of increasing importance with the increased size of the city. The erroneous practice has grown up simply because it has not been questioned.

THE COURT. Appeal dismissed.

C. P. No. 2. June, 1879.

Meyers v. Elkins et al.

Amendments—Act of May 4, 1852, P. L. 574—Wrong parties—Non-suit—Where an action has been brought against defendants as members of an unincorporated society, and it afterwards appears that the association was incorporated, the Court will not allow an amendment.

Motion for a rule to take off non-suit.

This action was brought against William L. Elkins, Geo. W. Middleton, Daniel Underkoffer, and several others (naming them) "trading as The Dunlap Creek Oil Company." On the trial the defendants produced the charter of the Dunlap Creek Oil Company, and the Court, declining to permit the plaintiff to amend, entered a non-suit.

Staake, for the motion, cited—

Leonard *v.* Parker, 22 Sm. 236.

THE COURT. Rule refused.

C. P. No. 3. July 11, 1879.

Snyder v. Hensel.

Practice—Transcript from alderman's docket—Non pros—When transcript treated as a narr.—Notice.

Rule to strike off a *non pros.*

This was an appeal by defendant from the judgment of an alderman, obtained August 11, 1877, for $95.

The docket entries were as follows:—

Sept. 17, 1877. Copy of instrument filed.
Sept. 22, 1877. Affidavit of defence filed.
Oct. 6, 1877. Rule for judgment for want of a sufficient affidavit of defence filed.
Oct. 27, 1877. Rule discharged.
Mar. 29, 1879. *Non pros.* for want of a *narr.* by order of defendant's attorney filed.
July 9, 1879. Rule to strike off *non pros.*

No notice was given to the defendant by the plaintiff of his intention to treat the transcript as a *narr.*

A. L. Hennershotz, for the rule.

C. Davis, contra.

Rule discharged.

C. P. No. 3. July 11, 1879.

Wood et al. v. Ward et al.

Affidavit of defence law—Book entries, when not within the Act.

Rule for judgment for want of a sufficient affidavit of defence.

The instrument filed was as follows:—

Copy from book of original entries of plaintiff, being his sales book—

May, 1878.

Buyer.	Invoice number.	Millville H. B.	Malaga H. B.	
Ward & Co.	66	1001		1,885 11
Ward & Co.	67	2005	221	3,992 02
Ward & Co.	68	1502		2,760 59
etc.	etc.	etc.		
			Total	10,646 28
The defendants are entitled to a credit of				6,326 42
			Leaving due	4,319 86

with interest from July 1, 1878.

S. S. HOLLINGSWORTH,
Att'y for plaintiffs.

The affidavit of defence suggested that the instrument filed was not such as entitled the plaintiff to judgment for want of an affidavit of defence.

G. H. Fisher (with him *S. S. Hollingsworth*), for the rule.

C. M. Husbands, contra.

Rule discharged.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, AUG. 28, 1879.* [No. 18.

Supreme Court.

Jan. '78, 84. Jan. 8, 1879.

Thompson v. Adams et al.

Unincorporated associations—Philadelphia Board of Brokers—Character of seat—Rights of members—Distribution of funds derived from sale of seat of deceased member—Rights of secret equitable owner of seat as against members of the Board—Creditors of deceased legal owner.

The Constitution and articles of a voluntary association, such as the Philadelphia Board of Brokers, are law as to its members.

A seat in the Philadelphia Board of Brokers is not property in the eye of the law, and cannot be seized in execution for the debts of the members; it is the mere creation of the Board, and is to be held and enjoyed with all the limitations and restrictions which the Constitution of the Board have put upon it.

Under the Constitution and By-laws of the Philadelphia Board of Brokers, the secret equitable owner of a seat therein has no right, as against members of the Board, who are creditors of the legal owner, to share in the proceeds of the sale of the seat on the death of the legal owner.

Error to the Common Pleas No. 4, of Philadelphia County.

Case stated, showing the following facts:—

The Philadelphia Stock Exchange (late Board of Brokers) is an unincorporated association, governed by a Constitution and By-laws. Originally a seat in the Board of Brokers (*i. e.*, the collective privileges of a full member of the Board) was valuable only during the life or membership of its owner; subsequently, by an amendment to said Constitution, members were allowed under certain conditions, to transfer their seats for value, and subsequently to that a clause was added to the Constitution, giving value, upon certain conditions, to a member's seat after his death.

Section 12 of the Constitution is as follows:—

. . . "Any member shall have the right to sell his membership, subject to the following conditions: When a member wishes to sell his membership, the name of the proposed purchaser shall be submitted to the standing committee, and on the approval of two-thirds of said committee, the transfer may be made, provided the member selling has no unsettled contracts or claims against him for stock differences or borrowed money. But any member may demand a vote on such admission and the applicant shall then be received, provided not more than fifteen black-balls be cast against him, and not less than fifty balls be cast.

"Where a member dies his seat may be sold by the secretary, and after satisfying the claims of the members of the Board, the balance shall be paid to his legal representatives."

Section 11 of the By-laws is as follows:—

"Any member who fails to comply with his contracts, or who becomes insolvent, shall immediately inform the President of the Board of the fact, whose duty it shall be to give notice forthwith from the chair, of the failure of such member, and in case of the refusal or neglect of such delinquent to make such report to the president, it shall be the duty of any member having the knowledge of the fact to report the same forthwith to the standing committee or the president, who shall thereupon appoint a committee of three members, to inquire into the fact and report thereon without delay; and if said committee report the charge to be true, and the Board confirm the report, said member shall be suspended; and it shall furthermore be the duty of the standing committee upon receiving information thereof, or having, directly or indirectly, any knowledge of such failure on the part of any member to comply with his engagements, as above stated, to report the same without delay to the president, and ask for the appointment of a committee, as before provided. And in case of the insolvency of any member, he shall within three (3) days make good to the full amount thereof all friendly loans of cash or stock from members, or any overdraft on any bank. But seven (7) days shall be allowed him in which to settle stock contracts.

"On application for readmission, a suspended member may be restored to his seat by ballot, provided, not less than fifty votes are cast, and not more than fifteen black balls appear against him; but such application shall first be referred to the standing committee, whose duty it shall be to ascertain that the applicant has settled and arranged his affairs to the satisfaction of his creditors, and that his present situation affords a reasonable security in future transactions.

"It is expected from the applicant that he will give the committee full explanations on any disputed or unsatisfactory transactions, and at their request free access to his books and papers for that purpose.

"A suspended member shall, if reinstated, pay all fines due at the time of his suspension.

"A suspended member presenting a certificate of discharge in full of his debts under the United States Bankrupt Law, becomes eligible under the rules reinstating suspended members.

"If any suspended member fails to settle with his creditors within one year from the time of his suspension from the Board, his seat shall be sold by the secretary, and the proceeds shall be paid *pro rata* to his creditors in the Board.

"No expulsion or suspension of a member shall affect the rights of creditors as provided for in the Constitution and By-laws."

Section 9 of the Constitution is as follows:—

"On the first Monday of January of each year, there shall be elected a Standing Arbitration Committee, to consist of seven (7) members, whose duty it shall be to investigate and decide all claims and matters of difference arising between members of the Board, and also to adjudicate such claims as may be preferred against members by non-members when such non-members agree in writing to abide by its decision. The decision of this committee shall be final, except in cases involving a difference of $500, or over, when either may appeal within three (3) days

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to the Board for final adjudication; provided further, that upon the application of three members of the committee, any decision shall be referred to the Board for final action."

Subsequently to the passage of the foregoing sections of the Constitution and By-laws, Samuel A. Richards became a member of the Board of Brokers, a seat having been duly transferred to him by a then member of the Board of Brokers, upon the payment to the latter of a valuable consideration for the same.

The said Richards remained a member of the Board until his death, in May, 1876. Shortly prior thereto and at the time of his death, he was indebted to various members of the Board of Brokers in the sum of $5377.17.

The seat of said Samuel A. Richards was duly sold for a price less than sufficient to satisfy his indebtedness to the members of the Board. Upon the request of Mr. John Moss, Jr., member of the Board of Brokers, and a creditor of said Richards, a meeting of the Standing Arbitration Committee was held on the first day of June, 1876, pursuant to notice, at the Philadelphia Exchange Building, notice having been duly given to Mr. Richards's personal representatives, and to Mr. Samuel Gustine Thompson, the plaintiff, who was present and represented himself. Business was transacted at the said meeting as follows, as appears by the following copy of the minutes of the said meeting:—

In the matter of the seat of Samuel A. Richards, deceased, sur claim of creditors.

JUNE 1st, 1876.

The committee met at the request of John Moss, Jr., Esq., a creditor of said Richards, deceased, at 3 o'clock P. M., notice having been duly given to Samuel G. Thompson, who was present for himself, and to the personal representatives of Mr. Richards. Mr. A. Sydney Biddle was present as the attorney of the Philadelphia Stock Exchange (late Board of Brokers).

Mr. Biddle stated that Mr. Richards had recently died owing to various members of the Stock Exchange (late Board of Brokers) $3190.88, which was the balance due his creditors in the Board, after deducting from the sum $5377.17—the whole amount owing by him to them—the sum of $2186.29, which latter sum had been placed in his (Moss's) hands, as treasurer of the creditors of Mr. Richards.

Mr. Samuel G. Thompson then stated that the money with which the seat of Mr. Richards had been purchased, had been furnished by him—Mr. S. G. Thompson's brother being a partner of Mr. Richards. When the firm of Richards & Thompson was dissolved, Mr. Richards was given permission by him, Mr. S. G. Thompson, to use the seat for one year, and at the end of that time this permission was renewed, Mr. Richards at the dissolution of the partnership having given a bill of sale of the seat, and a power of attorney to transfer to Mr. S. G. Thompson, which the latter still held. The seat had until Mr. Richards's death, always been in Mr. Richards's name, and no notice that the seat did not belong to said Richards, or claim that it belonged to any one else, or that it had been paid for with the money of another, had ever been brought to the attention of any of the officers or members of the Board, or was known to any member or officer of the society except to the said Richards. Mr. Thompson desired that the committee should not take jurisdiction of the case, but that it might be settled in court, before it had been settled by the Standing Arbitration Committee.

The committee decided, however, to hear the claim of the creditors of S. A. Richards, and to allow Mr. Thompson to make any claim before them if he desired to do so. Mr. Moss, on behalf of the creditors of Mr. Richards, submitted a detailed statement, showing in an itemized form the sums due by Mr. Richards at his death to his various creditors in the Board, amounting in all to $5377.17, to the liquidation of which said Richards had paid $2186.29, leaving a balance due by him to his creditors of $3190.88. On motion of Mr. Backman, the committee unanimously decided that the claims, so as aforesaid presented by Mr. Moss against Mr. Richards's seat were correct, separately and in the aggregate, and decided that the said Samuel A. Richards, at his decease owed these sums respectively to the various creditors mentioned in the statement, subject to the aforesaid credits, amounting to $2186.29, paid by him as aforesaid, making a total indebtedness, by him at his death to members of the Board, of $3190.88. On motion of Mr. Stevenson, a member of said committee, it was—

"*Resolved*, That the committee has passed upon these claims with the full knowledge that Mr. S. G. Thompson claims to be the equitable owner of the seat of Mr. S. A. Richards, deceased."

A copy of the statement of the debts and credits presented as aforesaid by Mr. Moss to the committee is hereunto annexed, and forms part of the minutes of this meeting. JOHN S. CAPP, Secretary.

In reality Mr. Samuel Gustine Thompson, the plaintiff, had advanced to Mr. Richards the sum, to wit, $1000, with which the latter's seat in the Board was purchased and the seat had been allowed to continue in the name of Mr. Richards without notifying any officer or member of the Board of Brokers, that he, Thompson was the owner of said seat, or that Mr. Richards had not paid therefor out of his own money. In fact no member or officer of the Board of Brokers except Mr. Richards knew, or supposed or had any ground to suppose, that the said Richards, was not (in every respect) the owner of said seat, or that he had not paid for the same wholly out of his own money.

In July, 1873, upon the dissolution of the firm, consisting of the said Richards and William E. Thompson, brother of said Samuel Gustine Thompson, a power of attorney authorizing a transfer of, and a bill of sale of said seat were handed by said Richards to the said plaintiff, dated July 3, 1873. No notice of this transfer of these documents, or any allusion thereto, was ever made by the said plaintiff, or by any one else to any member or officer of the Board of Brokers, until after the death of the said Richards, at which time the aforesaid debts found to be due by the Arbitration Committee had fully accrued, nor until that time was the fact known to or suspected by any member of the Board of Brokers.

The administratrix of said Richards has duly received notice of all the facts herein contained,

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and waives any right to interfere in this proceeding, and hereby by her attorney expressly agrees and assents, that the said seat or the proceeds arising from the sale thereof may go to and become the property of said Samuel Gustine Thompson, if this Court shall be of opinion that he is entitled to the said seat or to the proceeds thereof, as against Richards's aforesaid creditors in the Board of Brokers.

The question for the decision of the Court is, whether or not upon the above facts the said plaintiff is entitled to the proceeds or any part thereof, of the said seat either in full or *pari passu* with the other creditors of said Richards, who at his decease were members of the Board of Brokers, or whether the latter's claims are paramount to, and until satisfied, exclusive of any claim of said plaintiff.

The Court entered judgment for the defendants, ELCOCK, J., delivering the following opinion (after alluding to the facts*):—

The ownership of a seat or membership by a person other than the occupier thereof, or the actor in the business, is not contemplated either from the nature of the business or the Constitution and By-laws of the Board. If this association was to permit such a holding, one of its great objects would be gone, and the mutual protection given to the claims of members in case of failure, insolvency, or death of a co-member, would be defeated.

Membership can only be constituted in accordance with the Constitution of the Board. Richards was, therefore, the member holding the legal title to the seat, and by reason of such legal membership, subject to all the duties and liabilities attaching thereto.

A seat in the Board is a species of property, encumbered with conditions. It is not a matter of absolute purchase, for it never was freed from the conditions and duties of the Constitution and By-laws.

The plaintiff's title can be but an equitable one, and, as between himself and the Board of Brokers, his title would be subject to all claims against it created by the laws of the association by reason of Richards's legal membership. His equitable title cannot rise above the legal, or be freed of the duties or liabilities imposed upon it.

It would have been impossible for plaintiff to have had a transfer either by agreement or by legal enforcement, except under the terms of Article XII. of the Constitution, which provides that the sale shall receive the assent of two-thirds of the committee, and that all contracts or claims against Richards for stock differences or borrowed money should be settled.

A secret holding could not affect the rights of the Board, without whose authority the seat or membership could not be held or transferred.

It is ingeniously argued by plaintiff's counsel that, under Rule 9, the Arbitration Committee can investigate and decide only upon "differences arising between *members* of the Board," that this cannot relate to cases where members have died, thus leaving no authority to determine the claims of the co-members. This might have some weight were it not for the portion of Section 12 of the Constitution, which provides: "Where a member dies, his seat may be sold by the secretary, and after satisfying the claims of the members of the Board, the balance shall be paid to his legal representatives."

In Singerly *v.* Johnson (3 WEEKLY NOTES, 541), ALLISON, P. J., decided in a case somewhat similar that the decision of the Arbitration Committee was final as to the existence, validity, and amounts of the creditor's claim.

The jurisdiction of the Courts cannot be ousted by contract, but any person may covenant or agree that no right of action shall accrue until a third person has decided on any difference that may arise between himself and the other party to the covenant. The leading case upon this subject and followed in Pennsylvania, is Scott *v.* Avery (5 House of Lords Cases, 811).

This doctrine is particularly applicable to membership in associations; and where a by-law provides for a disposition of the seats on the death of a member by action of a committee or of the whole association it becomes the law controlling the estate or interest passing to the legal representatives.

The power to make sale of the seat is in the Board, and even a judicial sale of the seat could not divest the claim of the Board upon the proceeds, for their claim is a condition attached to the property and membership. The legal representatives have no claim upon any proceeds until the full duties of membership have been complied with in the payment of all debts due members.

It is argued that the power of the secretary to make sale of the seat is limited to the assent of the legal representatives of the deceased member. The word *may* in the section of the Constitution should, doubtless, be read *must*, because the settlement of the debts by the sale is compulsory. This right, of course, is subject to all the legal requisites of a fair sale.

The power of the Orphans' Court is restricted by the laws of the association over the balance remaining after payment of the debts due members of the Board, the legal representatives being only entitled to that, and having no right to active membership, or to make sale of the seat, except in the manner pointed out by the Constitution. The debts are not regarded as liens upon the seat,

* For the portion of the opinion of ELCOCK, J., here omitted, see report of the case in the Court below, 4 WEEKLY NOTES, 445.

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but their payment is a condition under which the membership was sanctioned or granted.

In Evans *v.* Wister (1 WEEKLY NOTES, 181; 32 Leg. Int. 354), the Supreme Court held that an attachment would not lie against the Board of Brokers for the proceeds of the sale of a seat of a member, he being indebted to the amount of the proceeds. This was an affirmance of Leech *v.* Leech (reported in 3 WEEKLY NOTES, 542, *note*).

And in Singerly *v.* Johnson, *supra*, it was held that the death of a member did not revoke any of the rules applied to membership.

In Hyde *v.* Woods (4 Otto, 523; S. C., 15 Nat. Bank. Reg. 518) the Supreme Court of the United States determined that a provision in the Constitution of the California Stock Exchange Board (similar to the one in question), that in sales of seats of delinquent members the proceeds should be applied to the benefit of the members of the Board, exclusive of outside creditors, was valid, and that such claim was not a lien, but a condition of membership.

The plaintiff invested his money trusting to the integrity of Richards. He permitted him to exercise the rights of membership, and thus to become liable to its penalties.

The indebtedness of Richards exceeding the proceeds of sale of the seat, judgment must be entered in favor of the defendants on the case stated.

The plaintiff took this writ, assigning for error the entry of judgment for the defendant.

F. Carroll Brewster, for plaintiff in error.

Section 12 of the Constitution of the Board does not create a lien in favor of creditors in the Board. The language is, that the *secretary may sell.* It simply *permits* him to make the sale with the assent of the legal representatives of the deceased member. The preceding part of the section requires a member, when *he wishes* to sell his seat, to submit the name of the proposed purchasers to a committee, and the *transfer* shall be made on the approval of two-thirds of the committee; but when death occurs, the secretary *may*, without reference to a committee, on the request of the representatives of the deceased member, sell the seat. It was intended to obviate the necessity of referring to a committee in the event of death.

The representatives of Richards never authorized or assented to a sale of the seat. If there was no sale of the seat, this section would not create a lien; and if the secretary has no authority from the representatives of the owner to make a sale, his making one without authority will not create a lien.

The seat is admitted to be property, and the Orphans' Court takes jurisdiction of it.

Linsenbigler *v.* Gourley, 6 Sm. 172.
Hammett's Appeal, 2 Nor. 392.

The seat at Richards's death was free from any lien. The title at his death was, it is admitted, in Thompson. It follows, then, as there was no lien upon the seat at the date of his death, and none was created by his death, and as the title was in Thompson, that he holds it free from any claims of the creditors of Richards in the Board. If they have claims, they must make them against the estate.

If the seat be property, as held in Hyde *v.* Woods (4 Otto, 523) the simple By-law that the secretary *may* sell, cannot create a lien.

N. Dubois Miller and *A. Sydney Biddle*, for the defendants in error.

There can be no recovery in this form of action. The plaintiff has brought a common law action, not against his personal representatives, but against a third person, whom at least he can only regard as garnishee.

The word *may* in Section 12 of the Constitution should be read *must*, because the settlement of debts by the sale is compulsory.

The seat has originally no nominal value. A moneyed value is given to it, not through its intrinsic nature, but by an agreement of the club members; but this value is the balance, not the whole of the new member's entrance fee.

An outside creditor cannot sell the seat of a member of the Philadelphia Stock Exchange against his will and that of the Exchange. Until the owner's liabilities to his fellow-members are settled, the seat remains the property of the Board. The owner is only entitled to the balance.

Pancoast *v.* Houston, 5 WEEKLY NOTES, 36.

The claims that were the subject of settlement in this case *arose between* members of the Board. No authority was ever assumed as to matters *arising* subsequent to the death.

January 27, 1879. THE COURT. The constitution and articles of a voluntary association such as the Philadelphia Board of Brokers, are law as to the members. The plaintiff below was not a member, but had furnished the money by which Richards obtained a seat. His contention is that he was the equitable owner of the seat, and had title to what was received for it, and that the defendant had no right to apply the proceeds to debts due by Richards to other members, in pursuance of the terms of the Constitution of the club. But why not? Richards was the member of the Board, the legal owner of the seat, and the plaintiff an entire stranger, unknown to the association. The members give credit to each other in part, no doubt, upon the faith of the liability of a member's seat to them for his debts. There is nothing unlawful or unreasonable in this regulation. The seat is not property in the eye of the law, it could not be seized in

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execution for the debts of the members. It is the mere creature of the Board, and of course was to be held and enjoyed with all the limitations and restrictions which the Constitution of the Board chose to put upon it.

Judgment affirmed. PER CURIAM.

Jan. '79, 80. March 19, 1879.

Phila. and Reading R. R. Co. v. Ramsey.

Contract — Common carrier — Railroad company — Contract to forward to destination over other routes, is a question of fact for the jury.

Whether a common carrier receiving express packages contracts to forward them to destination, or merely to deliver them safely to the connecting carrier at a point on its own line nearest and most convenient to destination, is a question of fact for the jury, dependent upon the circumstances.

Error to the Common Pleas of Schuylkill County.

Assumpsit, by William Ramsey against the Philadelphia and Reading Railroad Co., to recover damages for the loss of a package alleged to have occurred through the failure of the defendants to safely convey and deliver the same to the place mentioned in the address thereon. Plea: non-assumpsit.

Upon the trial, before PERSHING, P. J., it appeared that Ramsey had in July, 1873, taken a package to the express office of the defendants, in Mahanoy City, Pa., for the purpose of having it forwarded to Rehoboth, Del., the place mentioned in the address. The plaintiff testified: "I handed it to Mr. Hess and asked him to please send it to Mrs. Ramsey, at Rehoboth, and I wanted to pay the express charges, but he said he did not know what they would be. I said I wished he would find out, as I did not know how Mrs. Ramsey would be off for money, and I did not know as she would be there when the package arrived. I asked if there was any way he could get it down, and he said 'Yes, we can send it on and collect back to this office, and I will do that if you will pay me promptly the express charges when I get the return,' and I said Yes, I would do that. Then I left the package there. Thomas Hess was the name of the express agent."

The original way-bill was produced, by which it appeared that some time after the delivery of the package to the company, the plaintiff had paid forty cents for expressage, and that this amount was the rate to Birdsboro only.

The defendants proved the safe delivery of the package to the Wilmington and Reading R. R. Co. at Birdsboro, and that such was the usual route from Mahanoy City to Rehoboth.

The defendants presented the following points:

(1) If the jury believe the evidence of the defendants' witnesses, the acceptance and undertaking of defendants to deliver the package safely at the end of the route has been fully complied with. *Answer.* We think that it is a question of fact entirely for your consideration what the contract was; you will determine by your verdict whether the contract extended to Rehoboth or to the point on the Reading Road at Birdsboro, where the goods were transferred.

(2) If the jury believe the evidence that the defendants carried the package to the terminus of their route at Birdsboro, and there delivered it in a safe condition to the next connecting carrier, in the usual course of business, the defendants' responsibility there ended, and the verdict of the jury should be for the defendants. *Answer.* That is just as you determine from the evidence what the contract was; if it was a contract to carry to Birdsboro, then there could be no liability here; but if you find the contract was to deliver the package at Rehoboth, then the defendants would be responsible for the loss.

(3) The defendants' responsibility can only be for injury or loss occurring by their own negligence, or that of their employés, and the defendants are not responsible for the loss of the package while in the hands of another carrier. *Answer.* We give the same answer to that; it depends upon whether they made a contract which would include a connecting route.

(4) If the jury is satisfied from the evidence that the loss of the package occurred after it passed from the hands of the defendants, then the verdict of the jury should be for the defendants. *Answer.* Not unless you find that their contract terminated at Birdsboro.

(5) The defendants were common carriers to the end of their own route only, and beyond that held the relation to the plaintiff of forwarders only, and as such, having forwarded the package beyond their lines at the point nearest or most convenient to destination in the usual course of business, being in good condition when so forwarded, the plaintiff cannot recover in this action. *Answer.* We affirm this point if you find that the contract between the company and Mr. Ramsey was that the Reading Railroad Company was simply to forward the goods; that is, that the contract did not extend beyond Birdsboro, or the terminus of their own road, and that from that point they were simply forwarders of the goods through the agency of the other road. If you find that the contract was to convey the goods to Rehoboth, then this point would not apply.

If you find for the plaintiff you will assess the damages under the evidence submitted here. Mr. Ramsey, the plaintiff, has fixed the value of

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the goods as nearly as he can, and that amount, with interest upon it from the time of the loss, would be the usual measure of damages. If you find that this contract was not to extend beyond the point where the Reading Company connected with the other road, your verdict should be for the defendants. It is just as you determine this question of contract that you will be governed in forming your verdict.

In the charge the question of the contract was similarly left as a question of fact to the jury.

Verdict for the plaintiff for $178.20 and judgment thereon. The defendant took this writ, assigning for error the answers to his point.

James Ellis, for the plaintiff in error.

The proof must be clear that a carrier has bound himself to transport goods beyond the terminus of his own route.

Penna. R. R. Co. *v.* Berry, 18 Sm. 277.
Balt. and Phila S. S. Co. *v.* Brown, 4 Sm. 77.

Excepting that the package was addressed to Rehoboth, everything surrounding the transaction rebuts the presumption that the shipper understood or believed that the company was making itself responsible for the whole route.

Where there is no business connection between different carriers, the first carrier will not, by a mere acceptance of the goods marked to a point beyond its particular route, be considered in law as assuming any duty beyond safe transportation to the end of his route and delivery to the next carrier in the line of the transit of the goods.

2 Redfield Am. Railway Cases, 321.

This is the tendency of the decisions of this Court.

Penna. R. R. Co. *v.* Berry, *supra.*
American Exp. Co. *v.* Bank, 19 Sm. 394.
Mullarkey *v.* R. R. Co. 9 Phila. Rep. 114.
Union Exp. Co. *v.* Shoop, 4 Nor. 325.
Camden and Amboy R. R. Co. *v.* Forsyth, 11 Sm. 81.

Farquhar (*Hughes* with him), for the defendant in error.

The question of the contract was properly left to the jury.

2 Redfield on Railways, 116.
Chouteaux *v.* Leech & Co., 6 H. 224.
Balt. and Phila. S. S. Co. *v.* Brown, 4 Sm. 77.

There was sufficient evidence on the question of the contract for the submission.

Am. S. S. Co. *v.* Bryan, 2 Nor. 448.

May 5, 1879. THE COURT. We think there was evidence sufficiently clear to submit to the jury that the plaintiffs in error undertook to carry the package entrusted to them beyond the terminus of their own line and so become responsible for its safe delivery at Rehoboth. The agent of the company told the defendant that "they could send it on and collect back to this office, and I will do that if you will pay me promptly the express charges when I get the return." (Chouteaux *v.* Leech, 6 Harris, 224; Baltimore and Philadelphia Steamboat Company *v.* Brown, 4 P. F. Smith, 77). There was no error then in the answers of the learned Court to the points presented to him which have been assigned for error.

Judgment affirmed. PER CURIAM.

Jan. '79, 39. April 2, 1879.

Davis's Appeal.

Desertion — Discharge — Insolvent debtors — Right of person in confinement for deserting his wife and children to discharge under the insolvent law—Act of April 15, 1869, construed.

A mere surrender of property contemplated by the insolvent laws does not entitle a person in confinement for deserting his wife and children to his discharge; he must satisfy the conscience of the Court, after an actual confinement of three months, of his inability to comply with the order of the Court.

The Act of April 15, 1869, was intended to furnish a *different* remedy for the relief of a person committed to prison by the Court of Quarter Sessions in default of giving security to comply with the order of said Court, in a proceeding for the support and maintenance of his wife and children, instead of an *additional* one to that provided by the insolvent laws.

Appeal from the Common Pleas of Northampton County.

Edward H. Davis was committed to prison by the Court of Quarter Sessions in default of giving security to comply with the order of the said Court to pay a fine, maintenance, and costs of prosecution, in a proceeding for the support and maintenance of his wife and children, under section 2 of the Act of April 13, 1867. After a confinement of three months he filed his petition in the Court of Common Pleas for release from imprisonment upon his giving bond to appear at the next term and make application for the benefit of the insolvent laws. The petition was allowed, the bond given, and the petition for discharge under the insolvent laws was duly presented and dismissed, MEYERS, P. J., delivering the following opinion:—

. . . . That Davis is not entitled to relief under the 47th section is clear, as such relief is limited by said section, to a person in confinement under a sentence or order, "until he restore any stolen goods or chattels or pay the value thereof, or in which any person may be confined for non-payment of any fine, or of the costs of prosecution, or upon conviction of fornication and bastardy."

By the 1st section of the Act of March 26, 1814, every person was entitled to relief as an in-

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solvent debtor, "who shall be in actual confinement on *mesne* or final process for the recovery of money, or damages, or who shall be confined for the non-performance of any decree or sentence for the payment of money." Under the Act it was held, in the case of George Texas (1 Ash. 179), "that a person committed by the order of the Court of Quarter Sessions, until he shall comply with a sentence directing him to pay weekly a certain sum of money for the support of his wife and child, and to give security for the performance of the order, is entitled to his discharge under the insolvent laws."

The language of the clause in the 2d section of the Act of June 16, 1836, relative to insolvent debtors differs very little from that in the 1st section of the Act of 1814. The 2d section of the Act of 1836 confers jurisdiction in the case "of a person arrested or detained by virtue of any process issued in any civil suit or proceeding for the recovery of money or damages, or for the non-performance of any decree or sentence for the payment of money."

The objection made to the discharge of Texas was, that in addition to the decree or sentence for the payment of money, the petitioner was required to do a collateral act, viz., to give security for his future performance of the sentence of the Court. "This incident," says Judge KING, "cannot vary the nature of the principal obligation, as to make that a criminal offence, which without it was but a pecuniary obligation."

In support of the position taken by Judge KING, he relies upon the analogous case of a confinement under a sentence for fornication and bastardy, in which Judge RUSH, as early as 1816, discharged McColloch under the insolvent laws, though the Act *expressly* extending the provision of the insolvent laws to such cases was not passed until the 11th of April, 1825. Assuming that the Court had jurisdiction under the insolvent laws prior to April 15, 1869, in a case like the one under consideration, we are, however, met by the Act of that date which provides: "That whenever the Court of Quarter Sessions of any county in the Commonwealth shall, under the second section of the Act to which this is a supplement, commit the person complained of to the county prison, there to remain until he comply with their order or give security, etc., it shall be lawful for the said Court at any time after three months, if they shall be satisfied of the inability of such person to comply with the said order and give such security, to discharge him from imprisonment."

It would seem, therefore, that the Act of 1869 intended to furnish a different remedy for his relief instead of an additional one to that provided by the insolvent laws. While the Act is entitled "A supplement to the Act for the relief of wives deserted by their husbands in the County of Lancaster and other counties, approved the twenty-seventh day of February, one thousand eight hundred and sixty-seven," it was held, in Keller *v.* Commonwealth (21 P. F. S. 413), that this Act was intended as a supplement to the General Act relative to desertions by husbands, etc., passed April 13th, 1867. In proceedings for relief under the insolvent laws the applicant is required, *inter alia*, to execute an assignment of all his estate, property, and effects whatever, etc., but under no circumstances is he required to satisfy the Court in a case like this of his inability to comply with the order of the Court and give such security.

When the Act of 1869 was passed the Legislature must have intended that a mere surrender of his property contemplated by the insolvent laws ought not to entitle a person in confinement for deserting his wife and children to his discharge, but that he should be required to satisfy the conscience of the Court, after an actual confinement of three months, of his inability to comply with the order of the Court and give such security.

A person having little or no property, without the slightest inconvenience to himself might procure his discharge under the insolvent laws, yet he might be in a position by reason of his employment, social relations or otherwise, to be able to obtain the required security to comply with the order of the Court. Under such circumstances it seems reasonable that a person ought not to escape performance of his duty to support his wife and children, to prevent which I have no doubt was intended to be accomplished by the Act of 1869. For these reasons the discharge of Edward H. Davis is withheld.

A decree dismissing the petition was accordingly entered. The petitioner took this appeal, assigning for error the dismissal of his petition.

Edward I. Fox, for the appellant.

The appellant is within the provisions of the Act of June 16, 1836, section 2, for he was "detained" for the non-performance of a sentence for "the payment of money." The George Texas case (1 Ash. 175) should rule, for it was under a precisely similar Act.

The Act of 1869 does not expressly repeal the Act of 1836, and does not do so by implication unless there be a clear and strong inconsistency between the two enactments.

Street *v.* Com'th, 6 W. & S. 209.
Cohen *v.* Com'th, 6 Pa. St. R. 111.
Com'th *v.* Easton Bank, 10 Id. 442.
Egypt Street, 2 Gr. 455.

Henry W. Scott (with whom was *C. M. Anstett*, District Attorney), for the appellee.

The 6th section of the Insolvent Laws of Jan. 29, 1820, which the Criminal Insolvency Act of

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1836 was intended to embrace, is in these words: "The provisions of this Act shall not extend to discharge or relieve any defendant from any fine whatsoever set or imposed in any criminal prosecution." Therefore the precedent of Judge RUSH, in 1816, cited in the George Texas case, was not authority then, for the offence of fornication was indictable and punishable under the Act of 1705 as a criminal offence (1 Sm. 27).

If the appellant was entitled to discharge under the insolvent laws before the Act of 1868, that Act puts a further restriction upon his escape from a plain legal and moral duty. It is a repeal by implication of the old statute by the substitution of a new and different rule upon the same subject matter.

A subsequent affirmative statute is a repeal by implication of a former one, made concerning the same matter, if it introduces a new rule upon the subject, and be evidently intended as a substitute for the former law.

Johnston's Estate, 9 Cas. 511.
Gwinner *v.* Lehigh & Del. Gap R. R., 5 Sm. 126.
Dash *v.* Van Kleeck, 7 Johns, 497.
Livingston *v.* Harris, 11 Wend. 329.
Com'th *v.* Cromley, 1 Ash 179.
Ledlie *v.* Monong. Nav. Co., 6 Barr, 392.

The release upon giving bond was simply a temporary enlargement of liberty to enable Davis better to prosecute his right to a final discharge.

McDonough's Appeal, 1 Wr. 275.
Heilner *v.* Bast, 1 P. & W. 267.

May 5, 1879. THE COURT. The order of the Court below refusing to discharge the appellant as an insolvent debtor is affirmed upon the opinion of the learned President Judge. No point has been made as to the jurisdiction of the Court to review the order complained of either by appeal or certiorari, and we give no opinion on that question. In re Fletterer's Petition (2 WEEKLY NOTES, 650).

Order affirmed. PER CURIAM.

Jan. '77, 195. Feb. 19, 1879.

Salter v. Griffith.

Affidavit of defence law—Practice—Bail for stay of execution, sci. fa. sur recognizance of—When copy of record need not be filed—Acts of March 28, 1835, March 11, 1836, and March 12, 1842, construed.

Recognizances for stay of execution are records of the Court within the meaning of the Act of March 11, 1836, § 1; it is not necessary to file a copy of such an instrument in order to entitle the plaintiff to judgment under the affidavit of defence law.

Error to the Common Pleas No. 2, of Philadelphia County.

R. M. Griffith obtained a judgment, in an action on the case, against Daniel S. Mann; William F. Salter entered security for stay of execution; the judgment remaining unpaid, the plaintiff in due time issued a *sci. fa.* sur recognizance against Salter, who suggested in his affidavit of defence that the plaintiff was not entitled to judgment for want of an affidavit of defence, not having filed a copy of the instrument sued upon.

The Court entered judgment for the plaintiff for want of an affidavit of defence (reported 3 WEEKLY NOTES, 433), whereupon the defendant took this writ, assigning for error the entry of the judgment.

Arthur C. Selden and *George S. Selden* for the plaintiff in error.

The supplement of March 12, 1842,* which is especially a supplement to the 2d section of the Act of 1835 (the affidavit of defence Act), requiring a copy to be filed, dispenses with the filing of a copy. The intermediate Act of March 11, 1836,† dispenses only with the necessity of filing copies of a record, that is, necessarily, of the records then spoken of in the Act of 1835, which did not confessedly apply to *sci. fas.* sur recognizances of bail for stay of execution, which, at most, are only part of a record upon which the action is brought. A recognizance is but a short instrument, and, therefore, not within the reason and intent of the Act of March 11, 1836, fo neither it, nor its predecessor, the Act of 1835, embraced recognizances for stay of execution. A copy of the instrument must, therefore, be filed, to entitle the plaintiff to judgment for want of an affidavit of defence.

Allen *v.* Gatley, 2 WEEKLY NOTES, 98.

R. Alexander, for the defendant in error.

Bonds of sureties for stay of execution are expressly declared, by the second section of the Act of March 12, 1842, to be within the affidavit of defence law.

Purd. Dig. 497.

A bond for stay of execution is a record within the meaning of the Act of March 11, 1836. A mechanic's claim has been decided not to be a record, and yet it has always been considered a

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* Sec. 2 of this Act provides: "The second section of the Act to which this Act is a supplement, is hereby declared to embrace all actions brought in said Court on bonds or recognizances of bail in error, or bonds of sureties for stay of execution, and is hereby extended to all actions, etc. . . . . ."

† Sect. 1 provides: "In all actions which have been or shall be brought in the said Court, upon any record remaining therein, it shall not be deemed or held to have been, or to be necessary for the plaintiff to file in the office of the Prothonotary of the said Court a copy of such record, to entitle him to enter a judgment under the second section of the Act to which this is a supplement; provided he shall have complied with the other requisitions of the said Act."

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record *within the meaning* of the Act, and a copy of the claim is never filed.

Troubat & Haly's Pr., 381.

The *sci. fa.* is a writ and a declaration, and, as such, serves every practical purpose of a copy.

McKinney *v.* Mehaffey, 7 W. & S. 276.

March 17, 1879. THE COURT. The first section of the Act of March 11, 1836 (Pamph. L. 76) is sufficiently broad to include all actions thereafter to be brought upon any record remaining therein, so as to dispense with filing a copy thereof, and although at that time the Act of 1835 was thought by some not to extend to recognizances for stay of execution, yet the Act of 12 March, 1842 (Pamph. L. 66) was a supplement to the Act of 1835, and was in terms a declaratory statute. "The second section of the Act to which this Act is a supplement is hereby declared to embrace all actions on bonds or recognizances of bail in error, or bonds for stay of execution." The District Court of Philadelphia in 1840 had decided in Baker *v.* Olwine (2 Miles, 404), that a recognizance of bail in error was an instrument of writing for the payment of money under the Act of 1835. Of course, *à fortiori*, recognizances for stay of execution were within the Act. The Act of 1842 was passed to relieve a doubt resting on the mind of the then excellent President of that Court, which, however, was entertained by neither of his colleagues.

Judgment affirmed. PER CURIAM.

July, '77, 2. Wm. M. Hart Feb. 24 & 25, 1879.

Scott v. The Kittanning Coal Co.

Contracts, entire and severable—Pleading—Act of March 21, 1806, § 6, relating to amendments—Special plea of set-off, when to be filed—Plea of non-assumpsit, what evidence admissible under—Fraudulent substitution of other article than that contracted for—Vendor and purchaser—False representation by vendor of cost of article—Measure of damages.

A. contracted to deliver to B. 50,000 tons of a certain coal in a year, shipments to be at the rate of 6000 tons monthly, at the option of B., he to give notice by the 25th of each month of his requirements for the succeeding month.

Held, that the contract was clearly severable.

Evidence of a false statement by the vendor of the cost of the article sold is not admissible.

Where there has been part performance of a severable contract, and the thing received has been paid for and consumed, the fact that another article was substituted for that contracted for, does not give the right to rescind; the appropriate remedy is by set-off or action for damages.

Where, after the plaintiff had closed his case, the defendant moved to amend by pleading set-off specially:

Held, to be really a motion for leave to then give notice of special matter and to be within the discretion of the Court of Common Pleas, and not within the Act of 1806.

The plea of non-assumpsit entitles the defendant to prove anything which shows that the plaintiff *ex æquo et bono* ought not to recover. Therefore, in a suit on a severable contract for damages for non-acceptance of a portion of the article contracted to be taken, under the plea of non-assumpsit evidence is admissible that, in the part performance another article was fraudulently substituted for that contracted for and that the defendant thereby suffered injury, not as a set-off, but to show that the plaintiff has no right to recover.

The same evidence is admissible as tending to show that the plaintiffs were not ready and willing to deliver.

Compensation is the true criterion for damages in actions for breach of contract, and is ordinarily attained by taking the difference between the contract-price and the market-price at the time the contract ought to have been fulfilled, but this measure is not always sufficient; the true measure in this case considered.

Error to the Common Pleas No. 1, of Philadelphia County.

Case, by the Kittanning Coal Co. against J. C. Scott & Sons, to recover damages for the breach of a written agreement to take and pay for fifty thousand tons of coal. Plea, payment, to which the defendants on the trial added *non-assumpserunt*.

On the trial, before BIDDLE, J., the following facts appeared: On March 24, 1874, the plaintiffs and defendants had entered into a written agreement by which the plaintiffs agreed to deliver on board vessels at Greenwich wharves, beginning with March, 1874, and ending with February, 1875, fifty thousand tons of its best run of mine bituminous coal, denominated Excelsior Vein, from collieries in Clearfield County, at $4.60 per 2240 pounds; shipments to be at the rate of six thousand tons monthly, at the option of J. C. Scott & Sons; they to give notice on or before the 25th of each month of their requirements for the succeeding month. The plaintiffs proved the making of the contract, and that only eighteen thousand thirty-eight and one-half tons of coal had been called for by the defendants; further, that the notices agreed to be given by defendants on the 25th of each month had not been given, but that the amount delivered had been shipped on orders sent from time to time by defendants. On cross-examination of plaintiffs' witnesses, it appeared that the plaintiffs, when defendants sent notices as above mentioned and when vessels arrived at Greenwich ready to load, had bought coal from a neighboring mine in the same vein and shipped it to Greenwich; but they were unable to say positively whether any of this coal found its way to defendants' vessels or not, as the cars are entirely in the control of the Railroad Co., and on arriving at Greenwich are loaded into any vessel which is ready.

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In their evidence, defendants offered in various forms to show that plaintiffs fraudulently substituted other and inferior coal for that agreed to be delivered; that the defendants did not know of this, but finding objections made by their customers, inquired of plaintiffs, and were assured by them that it was the coal stipulated for; that they accepted and paid for the coal, believing it to be what it was represented to be; and that this fraudulent substitution involved them in great loss, and prevented them from selling the balance of that contracted for; to be followed by proof that plaintiffs waived the notice on the 25th of each month, and accepted in lieu thereof other notices. Objected to, on the ground that there was no plea to raise the defence; objection sustained; exception (2d, 3d, 15th, and 19th assignments of error).

They also offered the same evidence as tending to prove the plaintiffs were not ready and willing to deliver the coal stipulated for; objection sussustained; exception (4th assignment of error).

The defendants then offered to plead a set-off specially; objected to on the ground that defendant cannot plead a set-off after plaintiff has closed his case; objection sustained; exception (5th assignment of error).

The defendants offered to prove that prior to the making of the contract sued on, the president of the company stated to defendants that the cost of producing the coal was $1.18; that this was false, as the cost was then only 90 cents, and was known by him to be false, and that the contract was made on the faith of this representation; that the cost of production at that time was a material element, as it would enable parties to decide whether they could compete successfully with other producers. Objection sustained; exception (6th and 7th assignments of error).

Defendants offered in evidence various letters from defendants to plaintiffs, to show the course of dealing between the parties, and that the stipulation as to notice was waived by plaintiffs. Objection sustained; exception (8th to 14th assignments of error).

The plaintiffs presented the following point: If the plaintiff was competent to deliver coal according to the contract, upon receiving notice of the quantity wanted, according to the contract, the plaintiff was entitled to recover the amount he would have received under the contract if the defendant had received the coal, less the cost to the plaintiff of delivering the article, including the royalty on the cost. *Answer*. The law is correctly stated in the point handed to me by the plaintiff (26th assignment of error).

The defendants presented *inter alia* the following points: (4) That if the jury find that the plaintiffs fraudulently and surreptitiously substituted other coal than that contracted for, of inferior quality, and that the defendants did not learn the fact till after the coal so delivered had been sold to their customers and consumers, and that the substitution was made to the extent of thousands of tons and with the intend to defraud the defendants, such substitution would entitle the defendants to repudiate the contract and decline to accept any further deliveries from plaintiffs themselves. *Answer*. That proposition I negative in this particular suit (30th assignment of error).

(5) That if the plaintiffs are entitled to recover at all, it must be because the defendants failed to take the coal at the times at which they should have taken it, and if so entitled, the measure of damages is the difference between the contract price and the market price at the times at which the defendants should have taken it under the contract. *Answer*. As I have already said, I do not think that that is the true measure of damages. I think the true measure is (as in answer to plaintiffs' point), (31st assignment of error).

Verdict for plaintiffs for $20,864.88, of which a remittitur of $3531.80 was subsequently filed, and judgment thereon. The defendants took this writ, assigning for error, *inter alia*, the rulings on the evidence as above given and the answers to the points.

Samuel Dickson and *J. C. Bullitt*, for plaintiffs in error.

We were entitled to the identical subject-matter we had contracted for; and the delivery of another article was such a violation of the contract as entitled us to rescind; the contract being entire, we could not be required to accept anything less than entire performance.

Fraud in the performance of a contract as well as in its inception, will justify its rescission; and the offers of fraudulent substitution were clearly admissible under non-assumpsit. In no case has the authority of Heck *v.* Shener (4 S. & R. 249) been questioned.

Libhart *v.* Wood, 1 W. & S. 265.
Singer *v.* McCormick, 4 Idem, 265.
Ridgway *v.* Hungerford M. Co., 3 A. & E. 171 (30 E. C. L. R., 59).
Mercer *v.* Whall, 5 Q. B. 447 (48 E. C. L. R.).
Telegraph Co. *v.* Rubber Works Co., L. R., 10 Ch. App. 515.
Clough *v.* R. W. Co., L. R., 7 Ex. 26.

The evidence of the false statement as to the cost of production, on the faith of which the contract was entered into, was admissible.

Khrumbaar *v.* Birch, 4 WEEKLY NOTES, 144.
Short *v.* Stevenson, 13 Sm. 95.

A. Sydney Biddle and *R. C. McMurtrie*, for defendants in error.

The coal actually supplied having been accepted and paid for, the suit concerned only the damages for not taking the residue. Moreover, the contract is divisible, and defendants

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for several months accepted the coal sent; they were thereby constantly affirming the contract, and cannot now rescind and refuse to accept the residue, even if the substitution was fraudulent. They have a complete remedy in a cross-action for damages for the injury they sustained by the delivery of coal they had not contracted for. After acceptance of a part under a divisible contract, a party cannot say that he will rescind the contract, because he did not receive precisely what he contracted for.

Boone *v.* Eyre, 1 H. Blackstone, 273, note *a.*
Duke of St. Albans *v.* Shore, Ibid. 279.
Campbell *v.* Jones, 6 T. R. 570.
Simpson *v.* Crippin, L. R., 8 Q. B. 16.
Withers *v.* Reynolds, 2 B. & A. 882.
Fillieul *v.* Armstrong, 7 A. & E. 557.
Franklin *v.* Miller, 4 A. & E. 599.

The evidence of substitution of other coal was not admissible under the pleas of non-assumpsit and payment, without notice of special matter.

Erwin *v.* Leibert, 5 W. & S. 105.
Heck *v.* Shener, 4 S. & R. 254.
Alexander *v.* Pusey, 13 S. & R. 454.
Dunlap *v.* Miles, 4 Y. 370.

Their claim arising from the inferiority of part of the coal is not a discharge from liability to accept other goods, but is rather a claim that can be sued for or deducted as set-off, when set-off is pleaded. If not used as a defence, the claim may be sued for in a separate action, which proves it to be a set-off; for, if not, the party would be concluded by the verdict, though the defence was never taken.

May 5, 1879. THE COURT. The Kittanning Coal Company agreed to deliver on board vessels at Greenwich wharves, fifty thousand tons of its best run of mine bituminous coal, denominated Excelsior Vein, from collieries in Clearfield County, commencing with March 1, 1874, and ending with February, 1875, at the rate of six thousand tons monthly, at the option of John C. Scott & Sons, they giving notice on or before the twenty-fifth day of each month of their requirements for the succeeding month. Scott & Sons agreed to furnish vessels for and receive the above stated quantity of coal, and make payment therefor, at thirty days from date of each bill of lading. That the contract was not entire, but severable, is obvious (Lucesco Oil Co. *v.* Brewer *et al.*, 16 P. F. S. 351; Morgan *et al. v.* McKee, 27 Ibid. 228). The Company delivered and Scott & Sons received under this contract eighteen thousand and thirty-eight and one-half tons of coal. This must be taken as an uncontroverted fact. The defendants affirm it. The plaintiffs proved it in the first breath of their testimony; repeated it, and added that this suit was brought to recover the damages sustained by the Company by the neglect of Scott & Sons to take (or rather call for when the amount would have been readily supplied) the balance of the fifty thousand tons at the price named in the contract (see their history of the case), and in their declaration aver that they "have done all things on their part required by the said agreement to be done, and were always ready and willing to deliver coal pursuant to their said contract to said defendants, and although said defendants did accept and pay for a small quantity of said coal, to wit, ten thousand tons, yet they, the said defendants, did not, nor would not, during the term of the said agreement, receive the residue of said coal."

During the whole time for delivery and receiving of the coal, the defendants gave no notice on or before the twenty-fifth of any month, of their requirements for the succeeding month. Deliveries were made, from time to time, as called for, beginning in March, and ending in October. This also both parties affirm.

It was the duty of the defendants to make the calls for the coal, not exceeding six thousand tons per month, and receive the same, so as to permit delivery of the fifty thousand tons within the time limited. Nothing in the offers of testimony for the purpose of showing a waiver of the requirements as to notice would warrant a jury in finding that the defendants were relieved from making calls so that the plaintiffs could deliver the coal within the terms of the contract. What matters it whether proof were received of a course of dealing, showing a waiver of notice on the 25th day of each month, when the fact was already patent and undeniable, that no coal was delivered or received without notice, and that such notice never was given on that date, but on such dates as suited defendants' convenience? The rulings upon those offers were not erroneous.

When notice was given to the plaintiffs, if they were bound to deliver at all in pursuance thereof, they were bound to deliver the very coal designated by the contract. They could not lawfully substitute any other without defendants' consent, and defendants could have refused any other coal, whether inferior or superior, for they were entitled to the specified article. If the plaintiffs stealthily substituted inferior coal, they perpetrated a fraud upon defendants for which they are answerable. If authority were wanting for the foregoing, it is in the cases cited by defendants, but it is not gainsaid. It is contended by defendants that if fraudulent substitution of coal was made in the delivery, they may now rescind the contract. The cases cited, we think, do not rule this. Where a servant or laborer claims wages, a physician or attorney fees, an agent or trustee commissions, fidelity lies at the bottom of the service the breach whereof forfeits right of com-

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pensation. If two have an executory contract, and one colludes with the other's agent respecting its performance, or if in an agreement for sale, the price to be paid by C., one party bribes C., the wrongdoer shall not profit by his turpitude, nor by the agreement itself. In a sale and delivery of goods there is not such relation of trust and confidence as where one does service for another, and in delivery of a similar but different article there may be no fraudulent intent, and if there be, it is not of so heinous a nature as bribing a referee or corrupting the other's agent. True, a fraudulent delivery of one article for another authorizes rescission of an entire contract—perhaps would of a severable one, but not after the goods had been accepted, paid for, and consumed. Rescission is one form of remedy for a defrauded party which generally he may exercise upon discovery of the fraud, though he cannot wholly restore, and if the fraud be not discovered in time for that remedy, another remains whereby he may recover damages. This contract was severable, and the coal delivered was paid for and used by defendants. They can restore nothing. They never notified plaintiffs that they would receive no more coal for their default in performance. We are not convinced that there was error in holding that the appropriate remedy for the alleged fraud, discovered at the trial, was by set-off or action for damages.

The pleas were "payment" and "*non-assumpserunt.*" During the trial defendants moved to amend by pleading *set-off* specially, which was denied. Had notice been given under the plea of payment, the set-off could have been proved with like effect as if specially pleaded, and consequently, the motion was really for leave to then give notice of special matter. Whether to allow it was in the discretion of the Court of Common Pleas. The case was not brought within the Act of 1806, which permits a defendant to "alter his plea or defence, on or before the trial of the cause." The rights of defendants under that Act are well settled by LEWIS, J., in Yost *v.* Eby (11 Harris, 327).

Error is assigned to the rejection of evidence of a false statement of the President of the Company as to the cost of placing coal on board vessels at Greenwich, made in negotiations for the contract. An action for deceit for fraudulent misrepresentation by the vendor of the price he had paid, or of the price he had been offered, for the subject of the contract cannot be sustained. (Hemmer *v.* Cooper, 8 Allen, 334; Davis *v.* Meeker, 5 Johnson, 354.) The defendants rely on Krumbhaar *v.* Birch (4 W. N. C. 144) and Short *v.* Stevenson (13 P. F. S. 95), as ruling the point in their favor. The former is where one sold his right, title, and interest in a patent right, for territory including Philadelphia, representing that he owned half the patent-right, whereas he had before sold his whole interest for Philadelphia; and the latter where one purchased land for himself and associates, and pretended to his associates that he had paid $12,000 for it, when he had only paid $6000.

These decisions do not touch the question, Is it a fraud for a vendor to misstate the cost or price of the article he is selling? The legal answer seems as well settled as the moral one, though they are dissimilar, and the seventh assignment is not well taken.

By the plea of non-assumpsit the defendant puts the plaintiff on proving his whole case, and entitles himself to give in evidence anything which shows that at the time the action was commenced the plaintiff had no right to recover. (Heck *v.* Shener, 4 S. & R. 248.) That action was for housekeeper's services and for goods sold, and it was held that under the plea evidence was admissible that the plaintiff had embezzled goods of defendant, not as a set-off but to defeat the action. "As to the objection of the plaintiff being taken by surprise, it is no greater surprise than when, under the same plea, the defendant gives in evidence a release, infancy, or coverture. Neither do I think there is much force in the other objection, that the matter of the evidence is not a liquidated debt or demand. If it is of sufficient magnitude to bar the plaintiff's action, there will be no need of going into calculations. But if not sufficient for that purpose it is as easy for the jury in this action to ascertain the amount to be deducted from the plaintiff's demand as it is for the jury in an action to be brought by the defendant against the plaintiff to ascertain the amount of his damages." Per TILGHMAN, C. J. Under this plea the defendant may show that the plaintiff is an insolvent debtor and the cause of action vested in his trustees; that the plaintiff accepted goods at another place than that mentioned in the contract; a former recovery; that the work for which the plaintiff claims was done in an unworkmanlike manner. (Kennedy *v.* Ferris, 5 S. & R. 393; Scott *v.* Province, 1 Pitts. 189; Gilchrist *v.* Bale, 8 Watts, 355; Gaw *v.* Wolcott, 10 Barr, 43.) In Falconer *v.* Smith (6 Har. 130), it was held that in an action on notes given for machinery it was competent for the defendant to prove that when the agreement was made the plaintiff warranted the machinery to be of a certain quality, and that the warranty had failed, though the notes were given several months after the date of the agreement. The plea of non-assumpsit "entitles the defendant without prior special notice, to give evidence of anything which shows *ex æquo et bono* the plaintiff ought not to recover. This is emphatically true of mat-

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ters of defence springing from or immediately connected with the transaction sued on, and impeaching the consideration of the contract averred by the plaintiff. . . . It is true that under our more recent decisions unliquidated damages for a breach of warranty may be averred as matter of set-off, and then a special plea or notice would be necessary, but as was justly observed in Sadler *v.* Slobaugh (3 S. & R. 388), a breach of warranty may, at the option of the defendant, be reserved as the foundation of a separate action, or set up as a defence going to the consideration of the assumpsit sued on." Per BELL, J. In various forms the defendant offered to prove that the plaintiffs fraudulently substituted inferior coal from other mines for that which they had contracted to deliver, and concealing this fact, delivered the inferior article in part performance of the contract; that the defendants did not know at the time of such deliveries that the coal was of this inferior character; that finding objections made by their customers they inquired of plaintiffs and were assured by them that the coal delivered was of the kind stipulated, and they accepted and paid for the same as part of the coal mentioned in the contract, believing it to be such; and that this fraudulent substitution involved the defendants in great loss, prevented them from making sales of the balance of the coal mentioned in the contract, and disabled them from receiving the same. At present it must be taken as if they had the testimony at hand to establish the facts in the offers. Had it been received it might have availed as a complete defence. The matter was immediately connected with the transaction which is the basis of this suit; it shows a wilful injury in the performance of part of a contract by the plaintiffs, upon which they claim damages because the defendants failed to perform.

By the settled law of this State the offered testimony was admissible under defendants' plea of *non assumpserunt*, not to prove a set-off, but to prove that the plaintiffs had no right to recover. Besides it was again specially offered as tending to prove that the plaintiffs were not ready and willing to deliver the coal stipulated in the contract. Why was it not admissible for this purpose? If the Company pretend they were always ready and willing to perform, is it not evidence in rebuttal that when called on for coal they gave it from other mines? Slight it may be in the opinion of the Court, but its weight was for the jury. We are of opinion there was error in rejecting the offers of testimony set forth in the second, third, fourth, fifteenth, and nineteenth assignments.

The only remaining assignments we shall notice, are the twenty-fifth, twenty-sixth, and thirty-first which relate to the question of damages. We think the instructions of the learned Judge correct, except in not considering the value of the coal in plaintiffs' hands, but it seems his intention was not directed to this, and we would pass it were the cause not to be tried again. Compensation should be the criterion in this as in other actions for breach of contract. Most frequently the simple rule, that the measure of damages is the difference between the contract price and the market price at the time the contract ought to have been completed, gives the injured party a fair recompense for his loss. In a case like this, that would be inadequate. Had the plaintiffs mined and stocked so large a quantity of coal the loss in increased handling, waste, and the like would not be covered by the difference between the market and contract price, to say nothing of the improbability of finding a market for the coal. The contract did not require them to mine and stock, it was enough if they were competent to deliver the coal according to contract, that is, had their mines in order, the miners, and all necessary means to mine and deliver the coal, and were prevented by default of defendants. In such case nothing short of the value of the contract would be a compensation. That would be determined by deducting from the contract price the cost of delivery, including the royalty and the value of the coal as it remained in place. Possibly the coal in the opened mines, in working order and with large capacity at the time the contract should have been performed, was of no value to the vendors. It may have been worth nothing above the royalty. Unless it was worthless as it remained in place, the property of the plaintiffs, they ought not to recover the difference between the contract price, and the sum of the cost of delivery and royalty.

Judgment reversed and a *venire facias de novo* awarded.

Opinion by TRUNKEY, J.

Common Pleas—Law.

C. P. No. 2. June, 1879.

Lanigan to use of Strickler v. Kille.

Landlord and tenant—Liability of the landlord under the covenant for quiet enjoyment.

It is a general rule in this State that in an action by a purchaser or lessee of real estate who has been evicted, without fraud on the part of the vendor or lessor, the measure of damages is the consideration paid.

A lessee cannot recover from his lessor the value of the improvements put by him upon the land, even though the latter has used them as a set-off in an action against him by a paramount owner for mesne profits.

Per MITCHELL J. The question, as to the measure of

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damages in this case, is difficult and is undetermined in this State certainly, and, so far as we are aware, in any other State.

Rule for new trial, and motion in arrest of judgment, *nunc pro tunc*.

Covenant, by the lessee to use of the assignee of the lease against the lessor, upon the implied covenant for quiet enjoyment.

The material facts of the case were as follows: On the 1st of August, 1871, John I. Kille, the defendant, demised and let to James Lanigan, the plaintiff, the sole and exclusive right and privilege of mining and taking out the iron ore from a certain tract of land in Dickinson Township, Cumberland Co. The lease contained a covenant that the lessee should forthwith procure and set up good and approved machinery to take out and work said ore, and, also, that at the expiration of the term the lessee should have the right to take down and remove all buildings so put up or erected.

The plaintiff having been evicted by virtue of a judgment obtained in an action of ejectment against his lessor, the defendant brought this action to recover for the loss sustained by the eviction.

The present defendant having, after the eviction of plaintiff, been sued by the evictor for mesne profits, had set off in that action the value of the improvements made by plaintiff. (See Ege *v.* Kille, 3 Nor. 333.) The plaintiff, therefore, in this action claimed to recover as damages the value of his improvements thus used by the defendant. The Judge, however, at the trial directed a verdict for nominal damages only.

A. Sydney Biddle and *George W. Biddle* showed cause.

The covenant for quiet enjoyment is a covenant in law, and differs from an express covenant in that the former binds the covenantor only during the existence of his own estate.

Williams *v.* Burrell, 1 Manning, Granger & Scott, 402, and cases cited in the argument.
Adams *v.* Gibney, 6 Bingham, 656.
McClowry *v.* Croghan, 1 Grant, 311.

Where in a contract for the sale of land if the vendor without fraud is found incapable of making a good title, the purchaser is not entitled to damages for loss of his bargain.

Bain *v.* Fothergill, Law Rep. 7 Eng. & Irish. Ap. 158.
Flureau *v.* Thornhill, 2 W. Blackstone, 1078.

The vendor is not liable to the vendee for either the increased value of the land or improvements put upon the property by the latter.

Rawle on Covenants, 235–6.
Bender *v.* Fromberger, 4 Dallas, 442.

It is the duty of the lessee in a case of a lease of this kind to look into the lessor's title.

2 Sugden on Vendors & Purchasers, 140, 10th ed.
Keech *v.* Hall, Douglass, 21.

F. E. Brewster, *S. E. Cavin*, and *F. C. Brewster*, for the rule.

Where there is an eviction by a paramount title, an action will lie against the landlord on the implied covenant for quiet enjoyment.

Hemphill *v.* Eckfeldt, 5 Wharton, 274.

This covenant is not a covenant at law, but merely a personal covenant.

Williams *v.* Burrell, 1 Manning, G. & S. 402.
Maule *v.* Ashmead, 8 Har. 482.

The measure of damages where improvements are put upon the property in accordance with the terms of the lease, and are lost by the breach of covenant, is the value of the improvements.

Rawle on Covenants, 252–259.
Taylor's Landlord and Tenant, 240.
Schuylkill & Dauphin Co. *v.* Schmoele, 7 Sm. 273.
Kille *v.* Ege, 1 Norris, 102.
Lock *v.* Furze, 115 E. C. L. R. 94.

Where in an action for mesne profits the lessee pays them, it is undoubted law that he can recover the amount so paid in an action against his landlord.

Kelly *v.* Dutch Church, 2 Hill (N. Y.) 116.
Mack *v.* Patchin, 42 New York, 175.

Here while we did not actually pay, yet our property was taken in payment, which amounts to the same thing.

July 5, 1879. THE COURT. This is an action of covenant by the lessee against the lessor, under a sealed lease of certain mining rights in a tract of land thereby demised for a term of fifteen years. The tenant having put valuable improvements on the land under a clause of the lease allowing him to do so, and entitling him to remove them at the end of the term, was subsequently evicted under a paramount title. The lease contained no express covenant for title, and the plaintiff, therefore, brought this action on the implied covenant for quiet enjoyment contained in the words "demise and let," which occurred in the lease.

The facts being undisputed, a verdict was directed for the plaintiff for nominal damages only. We have now before us a rule for a new trial on behalf of the plaintiff on the ground that he was entitled to recover the value of his improvements, and also a rule on behalf of the defendant why he should not be allowed to file a motion in arrest of judgment *nunc pro tunc*.

It is conceded that the general rule in this State is that in an action by a purchaser or lessee of real estate who has been evicted, without fraud on the part of the vendor or lessor, the measure of damages is the consideration paid. In the present case, the consideration being a royalty upon the iron mined, and rent for the time the plaintiff held possession, there are no damages, in fact, under the general rule above mentioned, and, therefore, a verdict was directed for nominal damages only.

It appeared, however, in the offers of evidence, that the defendant, the lessor, had been sued by the owner of the paramount title for mesne profits, and that he had in that action set off and

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been allowed the benefit of the value of the improvements made by the lessee, the present plaintiff (Ege *v.* Kille, 3 Norris, 333), and the plaintiff argues that his property having been thus used by defendant in payment of a valid claim against him, the latter should now make compensation to the plaintiff to the extent of the benefit thus received.

The argument is not without great force. It appears to come very near if not within the principles of actions for money had and received, and it receives considerable support from some expressions in the opinion of the learned Judge of the Supreme Court in delivering the opinion in Kille *v.* Ege (1 Norris, 112).

But we are, nevertheless, unable to assent to it. Under the general established rule it is conceded that the plaintiff could not recover from defendant the value of his improvements. By the eviction, therefore, they were lost to the plaintiff, with no obligation on the part of any one to pay for them. If the paramount owner had sued this plaintiff for mesne profits, the latter might have set off the value of his improvements, but he could not have had a certificate in his favor for any excess of such value. The most that his improvements could have availed him would have been to successfully defend such an action, and he is now none the worse off because the action has been successfully defended through the same means by his lessor, the present defendant.

The paramount owner was a common enemy who might have made his attack for mesne profits on either of the present parties. He did make it on the defendant, and in that action the defendant used the plaintiff's shield in the same manner that the latter might have done if the attack had been made on him. We are unable to see that the plaintiff is any worse off now than he was before, and it is admitted that before he had no cause of action for anything but nominal damages. The rule for a new trial must, therefore, be discharged.

The plaintiff's motion in arrest of judgment is based on the view that an implied covenant for quiet enjoyment extends no further than to protect the estate which the lessor could lawfully grant at the time of the lease, and that, as the eviction here was by title paramount existing at the time of the lease, there has been no breach in fact of the covenant which the law raises. This point, however, was not made within the four days allotted by rule of Court, and we have not thought it well, on consideration, to embarrass the case with it. There is a substantial controversy between these parties on the measure of damages. That question is difficult, and is undetermined in this State certainly, and, so far as we are aware, in any other. We, therefore, presume that it will go to the Supreme Court for final adjudication, and we should think it best that it should do so on the view taken by the Judge at the trial.

Rule discharged.

Opinion by MITCHELL J.

C. P. No. 2. March, 1879.

Dinsmore v. Davis.

Costs of audit—Proper practice where it is sought to put them on the party ordering the fund into court.

Rule to show cause why the costs of this case, including the costs of audit, should not be taxed, and execution therefor issue against the claimants who ordered the fund into court.

The fund was produced by sales under writs of *levari facias* upon plaintiff's mortgages. After the mortgages were recorded, liens for alterations and repairs were filed, and the fund was ordered into court by one of these creditors. The case was referred to an auditor, who reported in favor of the mortgagee. Exceptions were filed, and after argument dismissed by the Court, and the auditor's report confirmed. An appeal to the Supreme Court was dismissed at the costs of the appellants. The appellee now asked this Court to impose the costs of the audit on the creditor, who had ordered the fund into court.

Freedley and *Rawle*, for the rule.

Courts possess summary jurisdiction over costs.

Harger *v.* Commissioners, 2 Jones, 253.

Hence, proceeding by rule is proper.

Harris *v.* Fortune, 1 Binney, 125.

For form of rule, see Tatham *v.* Crawford (2 WEEKLY NOTES, 367). The losing party ought to pay costs, unless he can show clearly that there were special circumstances to create probable cause for disputing his adversary's claim.

Larimer's Appeal, 10 Harris, 42.
Eagle *v.* Hindenmyer, 1 Lancaster Bar, Mar. 5, 1870.
St. Joseph's Asylum Appeal, 2 Wright, 535.
Moore's Appeal, 14 Wright, 250.
Hammett's Appeal, 22 Sm. 337.

Upon the same principle, fiduciaries asserting unfounded demands, or needlessly causing protracted litigation, have always been personally charged with the expenses of audits. No special circumstances or probable cause existed here. The liens, being for alterations and repairs, had no force except from the date of filing, and, therefore, were postponed to the mortgage, which was recorded first. The record thus showed a *prima facie* legal right in the plaintiffs.

Purves and *White*, contra.

There was only one of the lien creditors in this case who ordered the fund into court, under the Act of April 20, 1846. The others merely gave notice to the sheriff, and to them the rule in Larimer's Appeal can have no application. The imposition of costs is intended to act partially as a penalty, and would be unjust in this

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case. The contestants had the advice of counsel in all that they did, which removes presumption of malice or an intention wantonly to embarrass the mortgagee in obtaining his money.

This Court has no further jurisdiction over the matter, as the record was removed to the Supreme Court and by them finally decided.

C. A. V.

THE COURT. It is undoubtedly competent for the Court to put the costs of an audit upon a claimant who has subjected the fund to the expense without proper justification. But costs in equity are discretionary, and the Court does not usually impose them without good ground. The proper practice in such a case as this would be to ask the auditor to report that the costs should be imposed on the delinquent party. The latter can then have his exception and his hearing on appeal. The present application, if granted, would subject the losing party to the additional costs without an appeal, or tie up the fund till a second hearing could be had in the Supreme Court. We do not think this would be equitable for any of the parties.

Rule discharged.

Oral opinion by MITCHELL, J.

C. P. No. 2. March 12, 1879.

Freeman v. Walsh.

Contracts of married women — Agreement by husband and wife to sell wife's real estate— Right of wife to sue for damages for breach of contract by vendee.

Rule to take off non-suit.

In December, 1877, Henrietta Freeman, a married woman, her husband joining, entered into an agreement in writing with James Walsh, Jr., for the exchange of properties in Philadelphia. Mrs. Freeman at once employed a conveyancer to prepare a deed for the properties to be conveyed to her and a mortgage to be given to her by Mr. Walsh, and to make the necessary searches, upon which she expended about $80. When she tendered to Mr. Walsh the deed to her property, properly executed, and at the same time tendered to him the deed and mortgage to be executed by him, he refused to receive her deed or to execute the deed and mortgage prepared for execution by him; hence this suit for damages in $1000 was brought. On the trial the execution of the writings referred to was offered in evidence by the plaintiff, who proposed to follow this with proof of ownership by Mrs. Freeman of the premises which she agreed to convey, and of the expense and loss incurred by her by reason of the defendant's breach of contract. This evidence was objected to by the defence upon the ground that the writing was wanting in mutuality, and could therefore not be enforced by a married woman; whereupon the Court refused to admit the testimony and entered a non-suit.

Sharp & Alleman, for the rule.

The agreement of Mrs. Freeman was voidable only, not void; if it was absolutely void it was not susceptible of ratification.

2 Kent's Commentaries, 266, 267.

Even a payment of part of the price and obtaining possession would not enable her to defend in an action of ejectment, if her agreement were void, not voidable; but this would not be consistent with the decisions in—

Vance *v.* Nogle, 20 Sm. 176, 179.
Walker *v.* Coover, 15 Sm. 430.
Mansley *v.* Smith, 6 Phila. 220.
Brown *v.* Bennett, 25 Sm. 422.
Lee *v.* Muggeridge, 5 Taunt. 36.
Vance *v.* Wells, 8 Ala. 399.
Franklin *v.* Beatty, 27 Miss. 347.

The declaration in the opinions of the Judges that the contract of a married woman is *void*, must be construed as applying to cases of a like kind—those where the wife has *elected* to treat it as void. The word *void* is often construed to mean *voidable*, at the election of one of the parties to the contract.

Columbia Ins. Co. *v.* Buckley, 2 Norris, 293.
Pearsol *v.* Chapin, 8 Wr. 13.
Atlantic Ins. Co. *v.* Goodall, 35 N. H. 328.

A wife may bind herself to pay for materials necessary for the repair of the property.

Allen *v.* Graham, 3 WEEKLY NOTES, 493.

If so, could she not recover damages for failure to deliver goods bought for such purpose? And yet she could not be held, we suppose, in damages for failure to take the material. Complete mutuality of remedy is not necessary in all cases.

Sutherland *v.* Briggs, 1 Hare, 34.

E. C. Shapley (*W. Gorman* with him), showed cause.

Contracts must be mutual to bind both parties; if one is not bound, the other is not.

1 Addison on Contracts, 3 Amer. ed. p. 34, sec. 18.
Grove *v.* Hodges, 5 Sm. 516.
Offerman *v.* Packer, 26 Leg. Int. 205.
Bodine *v.* Glading, 9 Har. 53.
Glidden *v.* Strupler, 2 Sm. 400.
Roseburgh *v.* Sterling, 3 Casey, 292.
Harbert *v.* Miller, 4 WEEKLY NOTES, 325.

A married woman may contract for the sale of her real estate by an executory agreement, in the statutory mode conferring the power, viz., by the joinder of her husband in the articles of agreement *and the separate acknowledgment by her*.

Husbands on Married Women, p. 68, sec. 71.

A married woman has no capacity to contract for the sale of her real estate or to convey it, except in the precise statutory mode conferring the power.

Dankel *v.* Hunter, 11 Sm. 384.
Miltenberger *v.* Croyle, 3 Casey, 170.
Kirk *v.* Clark, 9 Sm. 479.

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THE COURT. Rule absolute.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, SEPT. 4, 1879.* [No. 19.

Supreme Court.

April 1, 1879.

Knecht v. The Mutual Life Insurance Co. of New York.

Life insurance—Warranty, when not implied from declarations of assured—Declarations or promises not fulfilled distinguished from misrepresentations.

In an application for a policy of life insurance F. declared that he did not, *nor would he*, practise any pernicious habit obviously tending to the shortening of life. The policy issued in pursuance of this application contained, *inter alia*, the stipulation that if any of the statements or declarations made in the application should be found in any respect untrue, then the policy should be void. At the time of the insurance, F. had no pernicious habits, but some years afterwards drank to such excess that he died of delirium tremens. In an action on the policy:

Held (reversing the judgment below), that in the absence of any clause avoiding the policy in case the assured should practise any pernicious habit, and of any covenant or warranty on his part that he would not do so, the policy was not avoided.

Error to the Common Pleas of Northampton County.

This was an amicable action of assumpsit by Knecht, administrator of Fangboner, against the above corporation, upon a policy of insurance issued by the defendant corporation upon the life of the plaintiff's intestate for $1500. A case stated was agreed upon which was substantially as follows:—

In 1868 the plaintiff's intestate applied to the defendant for a policy of insurance upon his life, the application containing, *inter alia*, the following clause:—

"And the said Abram F. Fangboner further declares, That he is not now afflicted with any disease or disorder, and that he does not now, nor will he, practise any pernicious habit that obviously tends to the shortening of life."

The defendant upon the faith and in consideration of the statements, conditions, stipulations, and promises contained in the application, issued to the intestate their policy of insurance containing, *inter alia*, the following provision:—

"If any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then and in every such case, this policy shall be null and void."

At the time of making the said application for insurance the assured was of correct and temperate habits. Some years afterwards he became very intemperate, in consequence of which he died of delirium tremens. If the Court should be of opinion that the defendant was liable to pay the amount insured, then judgment to be entered for the plaintiff. Otherwise, judgment to be entered for the defendant.

After argument the Court entered judgment for the defendant, and the plaintiff took this writ, assigning the entry of judgment for error.

E. J. Fox, for the plaintiff in error.

There was here no warranty. A warranty is a stipulation for the absolute truth of some statement made, or for the strict compliance with a promise, but nowhere in the policy or in the application did the assured covenant, agree, or warrant that he would practise no pernicious habit tending to the shortening of life. He *declared*, or at most, promised that he would not, but a breach of promise is not a misrepresentation, and *a fortiori* not a breach of warranty.

H. Green, contra, presented no paper-book to the Court, but argued that the stipulation, if any of the statements or declarations "*shall* be found untrue," brought the subsequent formation of the habit within the terms of the contract; it would not be denied that the existence of the habit at the time of the application would have defeated the policy; the same effect should be given to the formation of future habits. Conditions on the contract of insurance subsequently unfulfilled put an end to the contract.

Ins. Co. *v.* Slockbower, 2 C. 199.
Trask *v.* Ins. Co., 5 C. 198
Ins. Co. *v.* Stauffer, 9 C. 398.

May 7, 1879. THE COURT. It was not alleged that in his application for insurance the insured made any false representation of an existing fact. What he did declare was "That he is not now afflicted with any disease or disorder, and that he does not now, *nor will he*, practise any pernicious habit which obviously tends to the shortening of life."

The case stated set forth, that at the time of making the aforesaid application for insurance the said Abram F. Fangboner was of correct and temperate habits. That some years after the issuing of said policy he became addicted to the use of intoxicating drinks, from the immoderate use of which he was attacked with delirium tremens from which he died. The policy issued in pursuance of said application contained this provision, "If any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then and in every such case this policy shall be null and void." It is

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unnecessary to discuss the question as to whether the declarations of the insured as to existing facts in his application, constitute a warranty. The authorities are by no means uniform on this point. Our own recent case of the Washington Life Ins. Co. *v.* Schaible (1 WEEKLY NOTES, 369), holds that they do not constitute such warranty. Where, however, the policy has been issued upon the faith of such representations, and they are false in point of fact, the better opinion seems to be that the policy is avoided.

And this is so even where the false statement is as to a matter not material to the risk (Jeffries *v.* The Life Ins. Co., 22 Wallace, 47). In such case the agreement is that if the statements are false there is no insurance: no policy is made by the company, and no policy is accepted by the insured. In the case in hand the policy attached. There was nothing to avoid it *ab initio*. Were the mere declarations by the insured in his application, as to his future intentions, and his failure to carry out his declarations or to comply with his intentions as to his future conduct sufficient to work a subsequent forfeiture of the policy? In no part of the application did the assured covenant that he would not practise any pernicious habit. Nor did he promise, agree, or warrant not to do so.

He *declared* that he would not. To declare is to state, to assert, to publish, to utter, to announce, to announce clearly some opinion or resolution; while to promise is to agree: "to pledge one's self, to engage, to assume or make sure, to pledge by contract."—*Worcester*. There is no clause in the policy which provides that if the assured shall practise any pernicious habit tending to shorten life, the policy shall *ipso facto* become void. There is only the stipulation that "if any of the statements or declarations made in the application . . . . shall be found in any respect untrue, this policy shall be null and void." This evidently referred to a state of things existing at the time the policy was issued. As to such matters as I have already said there was no untrue statement. But the assured declared as a matter of intention, that he *would not* practise any pernicious habit. Was this declaration of future intention false? There is no allegation much less proof that it was so. The assured might well have intended to adhere to his declaration in the most perfect good faith; yet in a moment of temptation have been overcome by this insidious enemy. In the absence of any clause in the policy avoiding it in case the assured should practise any such habit, and of any covenant or warranty on his part that he would not do so, we do not think his mere declaration to that effect in the application, sufficient to avoid the policy.

The judgment is reversed, and judgment is now entered in favor of the plaintiff, and against the defendant for the sum of fifteen hundred dollars with interest from June 26, 1876.

Opinion by PAXSON, J.

TRUNKEY, J., dissents.

GORDON, J., holding a policy of the corporation defendant, did not sit.

Jan. '79, 169. March 5, 1879.

The First National Bank of Allentown v. Hoch.

National banks—Powers of—Scope of authority of president—Fraud—Receipt construed—Deposit.

A national bank is not by its charter, nor by its statutory, nor its incidental powers, authorized to act as broker or agent in the purchase of bonds and stocks.

When a paper on its face shows that a transaction was not within the usual course of business of a bank, it is not binding on the bank, although signed by the president thereof as such officer.

The president is the executive agent of the board of directors as to the ordinary business of the bank, but cannot bind it by a contract outside thereof without special authority.

Error to the Common Pleas of Lehigh County.

Assumpsit, by William Hoch against the First National Bank of Allentown, to recover the balance of an alleged deposit. Plea: "Non-assumpsit," and special pleas that the president had exceeded his authority in giving the receipt or paper sued upon, and that the money given by the plaintiff had never been received by the bank.

Upon the trial, before ALBRECHT, P. J., the following facts appeared: On December 18, 1875, William Hoch called on William H. Blumer, the President of the First National Bank, for the purpose of purchasing bonds of the city of Allentown. The office of City Treasurer was in the same room where the bank did business, and the cashier of the bank was the City Treasurer. As the bonds, for some reason, were not ready for delivery, the sum of $1000 was left with William H. Blumer, and he gave a receipt as follows:—

$1000. Allentown, Dec. 18, 1875.

Received of Mr. William Hoch, one thousand dollars, to be invested in bonds of the city of Allentown, bearing seven per cent. interest. Interest on said deposit to be allowed from this date, and to be accounted for on demand.

W. H. BLUMER,
President 1st Nat. Bank.

On June 23, 1876, Mr. Hoch received from Jacob A. Blumer, who was the City Treasurer,

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one bond for $500, and the following was endorsed on the receipt:—

Received, June 23d, 1876, of J. A. Blumer, one bond of city of Allentown, No. 210, five hundred dollars, on account of within receipt. WILLIAM HOCH.

The endorsed receipt, and an indorsement of interest received, were both in the handwriting of Jacob A. Blumer. It further appeared that Hoch kept no account with the bank, and that the money paid in by him went, not to the bank, but into the individual account of Jacob A. Blumer. Demand on the bank for the bonds or the money was refused.

The Court construed the receipt to be a deposit, and instructed the jury to find a verdict for the plaintiff.

Verdict and judgment accordingly for plaintiff, whereupon the defendant took this writ, assigning for error the instruction of the Court.

Edward Harvey and *R. E. Wright, Jr.*, for the plaintiff in error.

The relation constituted by this transaction is that of principal and agent, not debtor and creditor. The object of the contract was to have the money invested in bonds. It was not to be the money of the bank, nor to be credited to the account of Hoch, and subject to his check. Only the interest is to be accounted for on demand.

It is essential to a *deposit* that the money paid into bank be passed to the credit of the owner, and be subject to his draft, check, or order.

Commercial Bank of Albany *v.* Hughes, 17 Wend. 94.
Marine Bank *v.* Fulton Bank, 2 Wallace, 252.
F. and M. Nat'l Bank *v.* King, 7 Sm. 202.
Foley *v.* Hill, 2 H. L. 28.
Grant on Banking, 1.

The paper being an agreement to invest the principal in bonds, and to account for the interest on demand, if there was a failure to get the bonds, the money could be demanded, not upon the paper sued upon, but upon the implied promise to refund it. But if the bank never received the money, there was no implied promise to refund it.

If Hoch was misled by the act or promise of Blumer, he could not recover from the bank without showing that the act or promise was within the scope of the general usages, practice, and course of business of the bank.

Lloyd *v.* West Branch Bank, 3 H. 172.

The contract was *ultra vires* the bank.

Shinkle *v.* First Nat. Bank of Ripley, 22 Ohio St. 516.
Fowler *v.* Scully, 22 Sm. 456.
First Nat. Bank *v.* Ocean Bank, 60 N. Y. 287.
Weckler *v.* First Nat. Bank of Hagerstown, 42 Md. 581.
First Nat. Bank of Charlotte *v.* Exchange Bank, 2 Otto, 122.
Venango Nat. Bank *v.* Taylor, 6 Sm. 14.
First Nat. Bank of Rochester *v.* Pierson, 16 Albany L. J. 319.
Wiley *v.* First Nat. Bank of Brattleboro, 47 Vt. 546.

The contract was *ultra vires* the president of the bank.

Dorsey *v.* Abrams *et al.*, 4 N. 299.
First Nat. Bank *v.* Ocean Bank, *supra.*
Bank of U. S. *v.* Dunn, 6 Pet. 51.
U. S. *v.* Bank of Columbia, 21 How. 356.
Shryock *v.* Basehore, 1 N. 159.
Lloyd *v.* West Branch Bank, 3 H. 174.

Wm. P. Snyder and *John Rupp*, for the defendant in error.

The paper is not merely a contract to buy bonds, but it is, further than that, a certificate that Hoch has deposited in bank one thousand dollars, which, with interest, is to be accounted for on demand. The possibility of purchasing bonds was uncertain; it would be folly to say that the paper meant to provide that the principal should never be accounted for, although no bonds should be received.

The bank could have discharged the contract at any time it saw fit by paying the money to Hoch, and Hoch could at any time have demanded the money. The money was paid to an officer of the bank; if the officers of the bank were dishonest, such fact cannot prejudice the rights of Mr. Hoch. The money having in contemplation of law gone into the bank, the bank is liable to repay it, according to the terms of the certificate of deposit.

May 5, 1879. THE COURT. The plaintiff in error is a national bank. This suit was against the bank on a receipt signed by the president thereof, in the following words, to wit:—

"$1000. Allentown, Dec. 18, 1875.

"Received of Mr. William Hoch one thousand dollars, to be invested in bonds of the city of Allentown, bearing seven per cent. interest. Interest on the said deposit to be allowed from this date, and to be accounted for on demand.

"W. H. BLUMER,
"Pres't 1st Nat. Bank."

The defendant in error failing to obtain all the required bonds, or a return of the residue of the money, brought this suit. The Court directed the jury to return a verdict in his favor.

It is well recognized law that a national bank is not, by its charter, authorized to act as a broker or agent in the purchase of bonds and stocks. Neither its specified powers given by statute, nor its incidental powers necessary to carry on the business of banking, extend to the transaction of such business. (First National Bank of Charlotte *v.* Exchange Bank, 2 Otto, 122; Fowler *v.* Scully, 22 P. F. Smith, 462.) When the paper on its face shows the transaction not to be within the usual course of business of the bank, it is not binding on the bank, although signed by the president thereof as such officer.

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He is the executive agent of the board of directors, within the ordinary business of the bank, but cannot bind it by a contract outside thereof without special authority. I do not understand these general rules to be denied. Some of them are expressly admitted, and the others impliedly conceded by the Court below, and by the counsel for the defendant in error. The Court ruled the case on the construction it gave to the receipt. The learned Judge said to the jury: "The question as to whether the plaintiff is or is not entitled to recover in this action, depends upon the construction that is put upon the receipt of December 18, 1875, which has been offered in evidence. It is the duty of the Court to construe this paper. If this were an obligation on the part of the bank to purchase and furnish the plaintiff with the kind of security mentioned in the paper, it would be beyond the power of the bank or its president to enter into that obligation, and the plaintiff would not be entitled to recover. But I construe this paper to mean that it is an acknowledgment that the plaintiff did pay to the president of the defendant $1000, which was treated according to the terms of the paper as a deposit, and might be discharged by the bank, either by furnishing the bonds of the city of Allentown, or by repaying the money with interest." It was undoubtedly the duty of the Court to construe the paper; but we cannot concur in the construction given. The principal object of the contract, clearly shown by the receipt, was the purchase of bonds. That was the specific purpose for which the money was left, and received. The language of the receipt assumes that the desired bonds could not then be procured, and to prevent a loss of interest in the mean time, to the defendant in error, the latter clause was added. The primary thought and main intent of the contract was a purchase of bonds. The secondary one was to procure interest until the investment could be made. While the word "deposit" does appear in the receipt, yet it is evidently used as a synonym for money or fund. The receipt does not state that the money is left as in the case of an ordinary deposit, nor that it shall be deposited in bank to his credit, nor was it ever so deposited. It was put in the hands of the city treasurer on the very day of its receipt; presumably for the purpose of getting the city bonds. The bank never received the money. It was never subject to check drawn by defendant in error on the bank. Although the transaction was with Blumer, as president of the bank, yet in all legal aspects it was with him as an individual. Upon the uncontradicted testimony the defendant in error was not entitled to recover.

Judgment reversed.

Opinion by MERCUR, J. PAXSON, J., absent.

Jan. '79, 3. Jan. 20, 1879.

Peterson's Estate.

Will—Construction of—Gift of income and principal—Postponement of possession of principal—Vested and contingent interests—Real estate—Equitable Conversion of by will—Discretionary or contingent powers of sale.

A devise to trustees to pay and divide income amongst testator's children in equal shares, and upon the death of each child to pay the principal represented by his share of income to his children, if of full age, and if minors to pay the income during minority and the principal upon their attaining twenty-one, creates a vested interest in the grandchildren.

Unless a will contains an imperative direction to sell, irrespective of contingencies and independent of discretion, conversion of real estate devised to trustees with power of sale, will not take place until the sale is actually made.

A. devised and bequeathed all of his estate to trustees *inter alia* to pay the income in equal shares amongst his eight children, and from time to time as any one of them should "die leaving lawful issue, such issue, if under lawful age, shall be entitled to receive the interest and income of their parents' share equally among them, if one, solely, and if more than one, in equal parts: and as they severally attain such lawful age, they are to receive and be paid their share and portion of the principal or capital fund of which their parent had received the interest, income, . . . and those of any said children leaving lawful issue of lawful age, such issue shall receive and be paid the said principal or capital fund. . . . But in case any of my said children should die without leaving such lawful issue, then and in that case the share and part of such child so dying, as well the real as the personal estate, shall lapse and fall back into my estate. . . . And in order to enable my said trustees to pay off and settle any of the shares and portions of my estate which may from time to time become due and payable on the decease of any of my said children, it shall and may be lawful for them, my said trustees, to take any of the unappropriated funds of my said estate, or to sell any of my real estate for such purposes, and in order to arrive at the value of any such share at the time of the decease of any such child or children, it shall be lawful for the said trustees, or the survivors or survivor of them, with the child or children if of full age, and the next friend or guardian of such as may be under age, mutually to choose a judicious and disinterested citizen, and these citizens, if an even number, to choose another, . . . who upon being duly qualified shall ascertain the value of such share or portion, . . . and a due record thereof made or being confirmed by said Court, any of my said children shall be at liberty to take the same at such valuation, . . . and if none of them will accept thereof, . . . then and in such case the same shall be sold by my said trustees, . . . and with such funds to pay and satisfy the person entitled to such share, his or her portion thereof." One of the testator's sons died intestate, leaving a daughter who subsequently died a minor:

Held, that her interest was vested.

Held also, that there was here no equitable conversion of the real estate, and that her portion descended to her heir.

Appeal from the Orphans' Court of Philadelphia County, upon the adjudication of the account

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of Thomas K. Peterson and Israel Peterson, surviving trustees under the will of John Peterson.

John Peterson, the testator, died December 27, 1855, leaving a will by which he devised all of his estate, real, personal, and mixed, unto Thomas K. Peterson, Israel Peterson, and Edwin Mitchel, and to the survivors and survivor of them, and the heirs and assigns of such survivor, in trust, first, to pay debts; second, to pay certain annuities to his wife and one of his daughters; and, third, to pay to each of his other eight children one-eighth part of the income of his residuary estate during their respective lives, with the privilege of obtaining certain loans from the estate, for which interest was to be charged by the trustees: the will further provided as follows:—

"*Eleventh*—And as my son John Howard Peterson is a minor, under the age of twenty-one years, I order and direct my said trustees to secure for him the remaining equal eighth or ninth part of my said estate, as the case may be, and the interest and income thereof, to appropriate so much thereof as may be necessary to defray the expenses of his education and maintenance, and upon his arrival at the age of twenty-one years, I give him the balance of such interest and income of such estate, if any, and from the time of his attaining such age, I give and bequeath unto him, my said son, the interest and income of such estate during his lifetime. . . .

"And from time to time as any of my said children, . . . shall die leaving lawful issue, such issue, if under lawful age, shall be entitled to receive the interest and income of their parents' share equally among them—if one, solely, and if more than one, in equal parts; and as they severally attain such lawful age, they are to receive and be paid their share and portion of the principal or capital fund of which their parent had received the interest and income, the loan if any to such parent to be taken as part thereof; and those of my said children leaving lawful issue of lawful age such issue shall receive and be paid the said principal or capital fund of which their parent had received the interest and income, such loan to be taken as a part, if one, solely, and if more than one, equally among them. But in case any of my said children should die without leaving such lawful issue, then and in that case the share and part of such child so dying, as well the real as the personal estate, shall lapse and fall back into my estate and be divided among such of my children as may be then living, and the issue of such as may be dead, in the way and manner as I have directed in relation to their particular share of my estate.

"And in order to enable my said trustees to pay off and settle any of the shares and portions of my estate which may from time to time become due and payable on the decease of any of my said children, it shall and may be lawful for them, my said trustees, to take any of the unappropriated funds of my said estate, or to sell any of my real estate for such purposes, and in order to arrive at the value of any such share at the time of the decease of any such child or children, it shall be lawful for the said trustees, or the survivors or survivor of them, with the child or children, if of full age, and the next friend or guardian of such as may be under age, mutually to choose a judicious and disinterested citizen, and these citizens, if an even number, to choose another; or in case they cannot agree upon such persons, then to apply to the Judges of the Orphans' Court to appoint such discreet and judicious persons, who upon being duly qualified, shall ascertain the value of such share or portion, and in order to do so they shall make a just and fair valuation of all the real and personal estate; that part which is subject to a life estate shall be valued but not divided and paid until after the falling in of such life estate; and upon such share being so ascertained, and a due record thereof made or being confirmed by said Court, any of my said children shall be at liberty to take the same at such valuation, the eldest male having the first choice, and so on the youngest, and if none of the males will take, then to be offered to the eldest female, and so on to the youngest, and if none of them will accept thereof (my meaning is that the part which my said children may elect to take as above mentioned, is that part which may be found necessary to be sold to raise a fund to pay off the share of the child arriving at full age as above set forth), then and in such case the same shall be sold by my said trustees, or the survivors or survivor of them, who I also appoint executors hereof, at public sale to the highest and best bidder, any of my said children having the right to become purchasers thereof, such sale to be made in the same manner and on the like terms and conditions as I have hereinafter ordered and directed as to my estate generally, and with such funds to pay and satisfy the person entitled to such share, his or her portion thereof. And the like proceedings shall be had as often as it may be required to ascertain and pay off such share or shares."

The testator then nominated the trustees above named to be executors of his will, and gave them full powers whenever they might deem it advantageous to his estate, or "for the purpose of more easily making partition and division thereof among the parties interested," to sell the whole or any part of his estate, and to invest the proceeds, or so much thereof as might not be required for the uses of his will, in other real estate or in securities yielding income. He also gave them full powers to lease, repair, and improve his real estate.

John Howard Peterson died intestate May 29, 1875, leaving a widow, Caroline E., and one child, Carrie May Peterson, who died a minor November 21, 1877. Edwin Mitchel, one of the trustees, died also, and on January 29, 1878, the surviving trustees filed their first account, as trustees.

Before the Auditing Judge the widow (who had subsequently intermarried with Speakman) claimed, as next of kin of Carrie May Peterson, to receive the income of John Howard Peterson's share of the estate accruing since the last payment to Carrie May Peterson, and also the principal of said share. The Auditing Judge decided that letters of administration must be taken out on the estate of Carrie May Peterson, and awarded the accrued interest upon John Howard Peterson's share to such administrator when appointed. He also decreed that the principal of said share "be valued and paid unto the said administrator, according to the will of the testator."

The trustees filed exceptions to the adjudication, alleging error, (1) In deciding "That Carrie May Peterson died seized of a fee in the share of testator's real and personal estate bequeathed and devised in trust for her father, J. Howard Peterson, for life." (2) In deciding "That at the death of John Howard Peterson, his daughter,

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Carrie May Peterson, acquired an absolute vested interest in the share of the testator's estate given to her, and that this interest was not divested by reason of her death under the age of twenty-one years; but that it passed under the intestate law to her mother as her next of kin." (3) In not deciding "That upon the death of Carrie May Peterson, a minor, her father's share lapsed into the residuary estate of John Peterson." (4) In deciding "That the will of John Peterson worked such a converson of John Howard Peterson's share that the real estate unconverted at Carrie May Peterson's death passed as personalty to her mother." And (5), "In awarding the share of John Howard Peterson in the real estate of testator, to the administrator of Carrie May Peterson."

These exceptions were dismissed, and the adjudication was confirmed (no opinion filed). From this decree the trustees took this appeal, assigning as error the dismissing their exceptions and confirming the adjudication.

Frank P. Prichard and *N. H. Sharpless*, for appellants.

(1) Carrie May Peterson did not take a vested interest in the estate of John Peterson. Where the gift consists merely in a direction to pay or divide at a certain age, it is not vested until the time for payment arrives.

Seibert's Appeal, 1 H. 501.
Moore *v.* Smith, 9 W. 403.
Leake *v.* Robinson, 2 Mer. 363.

Where the gift of income precedes, and is distinct from that of the principal, the devise is not vested but contingent, and especially where the gift is to a class and the principal is not to be taken out or separated from the estate until the time of payment arrives.

1 Roper on Legacies, *p. 581.
Batsford *v.* Kebbell, 3 Ves. 363.
In re Ashmore's Trusts, L. R. 9 Eq. 99.
Spencer *v.* Wilson, L. R. 16 Eq. 501.

The question has only been referred to in Pennsylvania.

Provenchere's Appeal, 17 Sm. 463.

(2) The will did not work an equitable conversion of the real estate. "To establish a conversion the will must direct it out and out, irrespective of all contingencies."

Anewalt's Appeal, 6 Wr. 414–16.

A discretionary power of sale does not operate until the sale takes place.

Page's Estate, 25 Sm. 87.

So too if the exercise of the power depends on any contingency.

Miller and Bowman's Appeal, 10 Sm. 404.

The selection of appraisers by the devisees, and the refusal of any of the devisees to take at the appraisement, are such contingencies as will prevent an immediate conversion.

Boshart *v.* Evans, 5 Wh. 551.
Anewalt's Appeal, *supra.*
Neely *v.* Grantham, 8 Sm. 433.

This decree could not be enforced. If the parties cannot agree upon the appraisers the valuation cannot be made. The Orphans' Court has no jurisdiction over the appraisement except to set it aside for fraud.

Boger's Appeal, 10 B. 440.

Thos. H. Speakman and *E. Spencer Miller*, contra.

(1) It is only in the event of a child dying without leaving lawful issue that his share is to lapse. John Howard Peterson did leave such issue, so that under no circumstances could his share fall back into the estate; if not, then it could only go to his daughter under the intestate law. Postponement of the payment of *principal* is not a postponement of the vesting of the estate; even postponement of the possession or enjoyment does not prevent its vesting, where the suspensive expressions refer to the time of possession and not to the gift itself.

Reed *v.* Buckley, 5 W. & S. 517.
1 Jarman on Wills, *727.
Fearne on Remainders, *552, n. g.

Where the property is put in trust and the income given for maintenance, it will be held to be vested.

Branstrom *v.* Wilkinson, 7 Ves. 420.
Provenchere's Appeal, 17 Sm. 463.

(2) Conversion is a question of intention, to be gathered from the whole will.

Chew *v.* Nicklin, 9 Wr. 84.

All the terms used by the testator indicate that the share to be given each of the children is to be transferred by a *payment* of money. There is no estate given in any particular part of the real estate. Their only means to obtain their rights under the will is by enforcing the execution of the trust.

Morrow *v.* Brenzier, 2 R. 189.

None of the children have such an interest in the real estate as could be bound by a judgment; if they take by election under the will it would be as purchasers.

Allison *v.* Wilson, 13 S. & R. 330.
Silverthorne *v.* KcKinster, 2 Jones, 72.
Dundas's Appeal, 14 Sm. 325.

February 10, 1879. THE COURT. Did the testator intend to attach to the devises and bequests to the issue of his children a condition precedent that they should arrive at lawful age? The answer is in the terms of the will. Interest and income of both real and personal estate of the share of each child are payable during his or her life, and at death, without leaving lawful issue, such share shall lapse and fall back into his estate, and be divided among such of his children as may then be living, and the issue of such as may be dead, in the way directed in reference to their particular shares. In case any of his children "shall die, leaving lawful issue, such issue, if under lawful age, shall be entitled to receive

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the interest and income of their parents' share equally among them, if one, solely, if more than one, in equal parts. And as they severally attain such lawful age, they are to receive and be paid their share and portion of the principal or capital fund of which their parents had received the interest and income. . . . And those of my said children leaving lawful issue of lawful age, such issue shall receive and be paid the said principal or capital fund of which their parent had received the interest and income." Full directions are given for ascertainment and settlement of the portions of his estate which may from time to time become due and payable on the decease of any of his children. In every part of the will, bearing on the subject, the corpus of each child's share is treated as given to the lawful issue, and not a phrase indicates that any such issue, under age, is not on an equality with those of full age. The difference is simply this, that the one of majority receives his portion immediately, while payment to the one in his minority is postponed, he receiving his interest and income in the mean time. In respect to the issue of his children, the gift of the interest and income is not distinct from the principal. Hence it need not now be said whether the doctrine in Spencer *v.* Wilson (16 Law Reports, Eq. C. 501), where the income was the subject of one gift and the capital of another, will be adopted in Pennsylvania. Under John Peterson's will, that the lawful issue of his children take a vested estate, though in their minority when the parent dies, we consider not doubtful, but, if it were, the doubt should be resolved against a contingent estate, for it is a rule of interpretation that in doubtful cases, estates are to be held vested rather than contingent.

Does the will work an equitable conversion of the real estate? This is the only remaining inquiry, for it is not alleged that there has been conversion by a sale. In order to arrive at the value of a share at the time of the decease of any child, the testator directs that appraisers be appointed to "make a just and fair valuation of all the real and personal estate," and upon such shares being so ascertained any of his said children shall be at liberty to take the part necessary to be sold to raise a fund to pay off the share of a child arriving at full age, the first choice given to the males in order of seniority and next to the females in like order, and if none of them will accept, then the same shall be sold by the trustees, "and with such funds to pay and satisfy the person entitled to such share, his or her portion thereof." In another part of the will a discretionary power is given to the trustees, subject to the consent of William Spooner, to sell the whole or any part of the estate, and to invest the proceeds in other real estate, or personal securities, as they may deem best. The appellees admit that this discretionary power is no conversion. They also concede that conversion is a question of intention, to be determined by the terms of the will; and contend that the terms of this will "decisively fix upon the land the quality of money." But, if this be so, what mean the various directions to be observed before the trustees can sell any part to raise money to pay off a share? Appraisers shall be chosen by the trustees and surviving children, if they can agree, but if they cannot agree, the appraisers shall be appointed by the Court, to make a just and fair valuation of all the real estate, as well as personal, and ascertain the value of the share or portion of the deceased child. Upon due record of the valuation, or confirmation thereof by the Court, the children may take the land, and should they so elect the trustees can make no sale. Their power to sell depends upon the refusal of all the children to accept the share of the land at the valuation. "And the like proceedings shall be had as often as it may be required to ascertain and pay off such share or shares." Here are contingencies which may prevent a sale of any part of the real estate during the life estates given to the children. The will works no conversion of land into money. Unless there be an imperative direction to sell, irrespective of contingencies and independent of discretion, conversion will not take place until the sale is actually made. (Anewalt's Appeal, 6 Wright, 414; Henry *v.* McCloskey, 9 Watts, 145.)

Moreover the will, in whole and in its parts, shows that the testator contemplated that his real estate should remain in the trustees until those in remainder became entitled to possession. He gave them power to lease and collect rents. He gave them discretionary power, conditioned that William Spooner first assent to repair, improve, and build upon any of his lands and defray the expenses out of his estate, and also to sell and reinvest in other real estate to be held for the same uses. He repeatedly directs payment of the "interest and income." He wills that if any child die without lawful issue his share in the real and personal estate shall lapse. He made provision for adjustment of the share of a child who should die leaving issue. We discover no intention to convert. Many provisions of this will are vain if the real estate is fixed with the quality of money.

We are impelled to the conclusion that so much of the decree as rests upon the basis that Carrie May Peterson's interest in the real estate was converted, is erroneous.

Decree reversed, and record ordered to be remitted for further proceedings.

Opinion by TRUNKEY, J. WOODWARD, J., absent.

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Jan. '79, 54. Feb. 6, 1879.

Braman's Appeal.
Ryan's Estate.

Orphans' Court, jurisdiction of—Decedents' estates—Fraud—Tort—Trustees—Who may claim at distribution of decedents' estates.

In a proceeding for distribution in the Orphans' Court, no one can claim but through the decedent as creditor, legatee, or next of kin.

A claimant at distribution in the Orphans' Court who is neither creditor, legatee, nor next of kin of the decedent, cannot waive the tort of a trustee who fraudulently received money for the estate, and sue the estate for money had and received, however he might do so against the trustee accountant.

Appeal from the Orphans' Court of Philadelphia County.

Upon the audit of the first account of Samuel White, executor and trustee of the will of Letitia G. Ryan, deceased, HANNA, P. J. found substantially the following facts: The decedent died in March, 1872, devising to her brother, the accountant, certain property in trust for her husband for life, and after his death, to her children by her first marriage, with remainder to their heirs. The accountant charged himself, *inter alia*, with the rents received from a store property, and with the proceeds of the sale of the same, after deducting the amount of a mortgage existing on the property. This sum was claimed by George G. Braman.

William Ryan, the husband of the decedent, was engaged in business with one Walter, under the firm name of William Ryan & Co. In 1860, while largely indebted, and, as it subsequently appeared, insolvent, he conveyed the store in question to Samuel White, who in turn conveyed it to his sister, the decedent. The conveyances were subject to a mortgage, and were in fraud of the creditors of the said Ryan. Subsequently judgments to a larger amount were obtained against Wm. Ryan & Co., and among them one confessed to the said White, the accountant, as trustee for the decedent. Execution was issued on this judgment, and a large part of it realized by a sale of the personal property of the firm. In January, 1861, George G. Braman obtained a judgment against Ryan for $4300, which judgment was revived by *sci. fa.* in 1867, and the said store levied upon, sold at sheriff's sale, and purchased by Braman. In 1871, ejectment was brought by Braman against Ryan and his wife, the decedent. Mrs. Ryan died in 1872, and Mr. Ryan in 1873. The suit was tried May 29, 1874, and resulted in a verdict for the defendant. Judgment was entered on the verdict June 8, 1874.

The mortgage in question had been in existence before Mr. Ryan had acquired the property, and had been allowed to remain thereon. In 1874 the counsel for the accountant represented to the counsel for the then holder of the mortgage that default would be made in the payment of interest, and that he wanted to have the mortgage sued out to make title. A writ was accordingly issued April 4, 1874, and service accepted by a member of the bar, although not then practising. The defendant in the writ had, in fact, been dead for several years. Judgment was entered for want of an appearance, and execution issued April 22, 1874. The debt, interest, and costs were paid to the plaintiff by one Powell, and the judgment was thereupon marked to his use; but the sale proceeded, the property was purchased by the accountant, and, thirteen days before the verdict in the ejectment suit, the sheriff's deed was made to him. The amount realized by the sale was, after payment of the debt, interest, and costs, paid into court, and the report of the auditor awarding the balance to the accountant as executor of Mrs. Ryan was duly confirmed. The claimant did not in any way appear at that audit.

The auditing Judge held that, while there appeared to have been an irregularity in obtaining the judgment upon the mortgage, yet there was no actual fraud upon the claimant; that his right to appear at the distribution of the proceeds of the sheriff's sale had been waived; and that the Orphans' Court could not take jurisdiction of his claim.

The claimant filed exceptions to the finding of the auditing Judge, which exceptions were dismissed by the Court in banc, and the adjudication confirmed, PENROSE, J., delivering the following opinion:—

"It was incumbent upon the exceptant, George G. Braman, after he had become the purchaser at the sheriff's sale in 1870, to see that the interest on the mortgage, subject to which he had bought, was regularly paid thereafter. He knew, and was bound to guard against the consequences of default, and, so far as he was concerned, there was no duty in this respect on the part of Mrs. Ryan, whose title, under the deed to her of March, 1860, he asserted to be fraudulent and void.

"That she did in point of fact pay during her lifetime, and that the accountant, her executor and trustee, continued to do so for some two years longer, can give the exceptant no right to complain that payment afterwards ceased, or that notice was given by the accountant to the mortgagee that it would no longer be made, or even that he requested that suit should be brought, and aided in having the judgment obtained. Irrespective of the bankrupt law, it has never been questioned in Pennsylvania that judgment might

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be confessed for an honest debt, even for the very purpose of preferring one creditor to the exclusion of all others.

"The exceptant was, at best, simply a terre tenant. The mortgagee was not bound to make him a party, or give him notice of the suit on the mortgage; and, had he done so, his only defence could have been that the debt was paid, or that it was not fully due. But this is not even now pretended. Nor is it pretended that from the day of his purchase to the present time the exceptant has ever paid, or offered to pay, one cent, principal or interest, on the mortgage. How then has he been hurt by the acceptance of service in the name of the mortgagor? If this were unauthorized, the mortgagor or his heirs alone could complain.

"Let it be conceded, however, that the exceptant might have availed himself of this objection. The fraud, if such it be against him, would not extend beyond the judgment, which was voidable merely on this ground—not absolutely void. (Pearsoll *v.* Chapin, 8 Wright, 9.) The exceptant might either have applied to the Court to open the judgment and let him into a defence, or he might have appeared in the proceedings for distribution, and claimed the fund as owner of the property sold. But he did neither. It is not alleged that he had not actual notice, both of the sale and of the subsequent proceedings. He certainly had legal notice. The relations between himself and Mrs. Ryan's estate were entirely hostile, both claiming to be the owner of the property sold; and the verdict in the ejectment was in her favor. It was certainly his duty, under these circumstances, to have made his claim at the proper time and place, and to have established it by due proof. Having suffered a decree to be made in favor of his adversary, he is bound by it. This principle was applied in the case of Commonwealth *v.* Trout (26 Smith, 384), where the Supreme Court (WILLIAMS, J.), says: 'If, then, the plaintiff's evidence would have shown that the defendant was guilty of fraud in making the sale, it would not have avoided the conclusiveness of the decree confirming the sale and distributing the proceeds . . . And what right have the plaintiffs to complain that the decrees are held to be conclusive upon them? They had due legal notice of the proceedings, and if they had any objection to the confirmation of the sale, on the ground of the alleged fraud, it was their duty to appear and make it known, and they would have been heard. They do not allege that they had no notice of the sale, or of the proceedings for the distribution, or that they had discovered the alleged fraud since the confirmation of the sale and the distribution of the proceeds. . . . Why should not the decree of the Court be conclusive upon them?'

"But a fatal objection to the claim, so far as this Court is concerned, is one which, in McBride's Appeal (22 Smith, 484), is thus stated by Judge WILLIAMS: 'The fund for distribution, from whatever source derived, constitutes part of the decedent's estate, and no one is entitled to claim any portion of it in this proceeding for its distribution who does not claim it through the decedent, and as part of her estate, either as creditor, legatee, or next of kin. But the appellant does not claim it either as creditor, legatee, or next of kin, nor does he claim it as part of her estate; but he claims it as his own. . . . It is clear he cannot raise any such issue in this proceeding for distribution. . . . If he denies that the money belongs to the estate . . . and claims it as his own . . . *he must resort to some other form of proceeding for his remedy.*'

"In the case before us the claim denies the title of the decedent's estate, and is founded on an alleged tort of the accountant, and that, too, in his individual capacity.

"All the proceedings with relation to the mortgage were long subsequent to Mrs. Ryan's death, and the purchase by the accountant at the sheriff's sale was in his own name. True, when he afterwards resold at an advance of price, he gave the estate the benefit of this, and charged himself with it in his account; but this was because he chose to recognize a fiduciary relation in which the exceptant has no part, and which cannot affect his rights one way or the other. His claim is against the accountant individually, as trustee *ex maleficio*. An estate is not liable for the torts of an executor, nor can the tort be waived and the claim made for money *had and received by the executor* for the use of the exceptant. In such the only judgment possible is *de bonis propriis*. (Rose *v.* Bowler, 1 H. Black, 108; Jennings *v.* Newman, 4 Term Rep. 347; Powell *v.* Graham, 7 Taunt. 586.)

"As to the exceptions filed by the accountant and by the *cestui que trust*, so far as they relate to matters of fact, we need only say, that what is stated by the auditing Judge is rather for the purpose of argument than as distinct findings upon the evidence.

"In the view taken, it was immaterial whether the deed to Mrs. Ryan was or was not in fraud of creditors, or was or was not based upon a valuable consideration. For the same reason we need not now consider these exceptions, or determine how far it was shown that the facts were not in accordance with the verdict and judgment in the action of the ejectment.

"The fifth exception on the part of the *cestui que trust* is answered by Bacon's Appeal, Earp's Appeal, Ingersoll's Appeal, etc.

"Exceptions dismissed, and adjudication confirmed."

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The claimant took this appeal, assigning for error the dismissal of his exceptions.

David C. Harrington and *David W. Sellers*, for the appellant.

A judgment cannot be entered without due process of law, unless the defendant appear by attorney or in person. A judgment entered without authority should be stricken off.

Banning *v.* Taylor, 12 H. 289.
Godfrey's Case, 11 Coke, 448.
Warter *v.* Perry, Cro. Eliz. 199.
Randal's Case, 2 Mod. 308.
Caldwell *v.* Walters, 6 H. 79.
Hecker *v.* Haath, 1 Leg. News, 61.
Martin *v.* Gernandt, 7 H. 124.
Cochran *v.* Eldridge, 13 Wr. 370.
Gilbert *v.* Hoffman, 2 W 66.
Foulk *v* McFarlane, 1 W. & S. 297.
Jackson *v.* Summerville, 1 H. 359.

The judgment was procured to hinder, delay, and defraud creditors; it was, therefore, fraudulent and void as to them.

Bum *v.* Ahl, 5 C. 387.
Streeper *v.* Eckart, 2 Wh. 302.
Bredin *v.* Bredin, 3 B. 81.
Zerbe *v.* Miller, 4 H. 488.
Taylor's Appeal, 9 Wr. 71.
Clark *v.* Douglas, 12 Sm. 408.
Kisterbock's Appeal, 1 Id. 485.

The auditor's report was not conclusive.

Woolston's Appeal, 1 Sm. 452.

A sheriff's sale and receipt of purchase-money does not prevent a party from contesting the title acquired at the sale.

Foulk *v.* McFarlane, 1 W. & S. 297.
Pendleton *v.* Richey, 8 C. 63.
Martin *v.* Gernandt, *supra.*

The payment of full consideration for property, if the purchase be made to hinder and defeat a creditor, is void even in the hands of a purchaser, for it is assisting a party to cheat another.

Cadogan *v.* Kennett, Cowper, 434.
Johnston *v.* Harvey, 2 P. & W. 82.
Dean *v.* Connelly, 6 B. 239.
Ashmead *v.* Hean, 1 H. 584.
Fenner's Case, 3 Rept.
Tarbox *v.* Hays, 6 W. 398.

The Orphans' Court had jurisdiction under the Act of 1836 (Purd. Dig. 1104, § 8).

Vandyke's Appeal, 10 Sm. 487.
Loomis's Appeal, 10 B. 387.
Rowland's Estate, 7 P. L. J. 312.
Dundas's Appeal, 14 Sm. 332.
Kirkpatrick *v.* McDonald, 1 Jones, 393.

Braman can waive the tort, and proceed for money had and received by the executor of Mrs. Ryan.

Atkins *v.* Hemphray, E. C. L. R. 653.
United States *v.* Daniel, 6 Howard, 13.
Cravath *v.* Plympton, 13 Mass. 454.
Wilbur *v.* Gilmore, 21 Pick. 250.
Halane *v.* Duche's Executors, 2 Dall. 174.

An action for mesne profits against the representatives of the decedent will be sustained.

Arundal *v.* Springer, 21 Sm. 398.

The judgment on the mortgage was void as against a dead man.

George Junkin, for the appellee.

From the date of the sheriff's deed, the attitude of the appellant towards Mr. and Mrs. Ryan was changed. So far as the real estate was concerned, he no longer was Mr. Ryan's creditor. He owned the real estate subject to the mortgage. No law required that he should have been notified of the judgment or sale.

Instead of going through the fiction of two *nihils*, service was accepted of the writ. The appellant was not injured by this. He had legal notice of the sale and of the audit. His equity of redemption was there, and he neglected to claim it.

The trustee had a right to a legal sale. If his conduct was fraudulent the estate of the cestuis que trustent is not liable therefor.

The Orphans' Court had not jurisdiction of the claim. No one can claim on a decedent's estate, unless as creditor, legatee, or next of kin.

McBride's Appeal, 22 Sm. 484.

March 10, 1879. THE COURT. In a proceeding for distribution in the Orphans' Court no one can claim but through the decedent as creditor, legatee, or next of kin (McBride's Appeal, 22 P. F. Smith, 480). Legatee or next of kin the appellant did not pretend to be. Creditor he was not. The wrong of which he complains—conceding that it was a wrong—was the act of the accountant, for which the estate was not liable. The accountant having received the money for the estate was bound to account for it, and could claim no indemnity for his fraud in procuring it, if any such fraud was resorted to. It follows that the appellant could not waive the tort and sue the estate for money had and received, however he might have done so as against the accountant. Of course he could not claim damages as mesne profits accruing to him since the death of the decedent.

Decree affirmed, and appeal dismissed at the costs of the appellant.

PER CURIAM.

Quarter Sessions.

Q. S. of Dauphin County. Aug. 25, 1879.

In re Riot Bill Bribery Investigation.

Bribery—Corrupt solicitation—Attempt to bribe members of Legislature—Powers of Grand Jury.

At the opening of the August Term PEARSON,

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P. J., charged the Grand Jury, *inter alia*, as follows:—

GENTLEMEN OF THE GRAND JURY . . . . I will now call your attention to an offense probably of rather different character from most of those that will come before you, and one which has not often come before the public here. It is one of those offences which is, if committed, highly injurious to society, dangerous to public morals, and to the general administration of the government—that is, bribes; soliciting, as is alleged, members of the Legislature, to receive bribes; offers to them of a kind forbidden by the law—and I will call your attention to the law on the subject. I speak of it, gentlemen, as a crime which strikes almost at the foundations of society, because if, instead of having fair, honest, proper legislation according to the best discretion and judgment of the legislators, we are to have them bought over to vote for measures, which the public requires, or vote against those which are injurious to the public, either the one or the other, this I say is dangerous to society at large, and we should most carefully guard against anything of the kind. I will, in the first place, call your attention to the Constitution of the country on that subject. It is not merely a person soliciting, but the person agreeing to receive, or actually receiving, that ought to be held up to public scorn and contempt by being indicted in the criminal court.

I will call your attention for a moment to the words of the Constitution, which is the highest law of the land:—

ARTICLE III. SECTION 29. A member of the General Assembly who shall solicit, demand, or receive, or consent to receive, directly or indirectly, for himself or for another, from any company, corporation, or person, any money, office, appointment, employment, testimonial, reward, or thing of value or enjoyment, or of personal advantage, or promise thereof, for his vote, or official influence, or for withholding the same, or with an understanding, expressed or implied, that his vote or official action shall be, in any way influenced thereby, or who shall solicit, or demand any such money, or other advantage, matter or thing aforesaid for another, as the consideration of his vote or official influence, or for withholding the same, or shall give, or withhold his vote or influence, in consideration of the payment or promise of such money, advantage, matter, or thing to another, shall be held guilty of bribery within the meaning of this Constitution, and shall incur the disabilities provided thereby for said offence, and such additional punishment as is or shall be provided by law.

That is, where a member of the Legislature receives, under solicitation of another, any money or thing of value or promise of an office, or acts through any other than fair, proper influences, it makes him, the member, amenable to the laws. Then, as I understand, that is against those who offer. The next provision of the Constitution is:—

SECTION 30. Any person who shall, directly or indirectly, offer, give, or promise, any money, or thing of value, testimonial, privilege, or personal advantage, to any executive or judicial officer, or member of the General Assembly, to influence him in the performance of any of his public or official duties, shall be guilty of bribery, and be punished in such manner as shall be provided by law.

And here is another provision of importance:

SECTION 32. Any person may be compelled to testify in any lawful investigation or judicial proceeding against any person who may be charged with having committed the offences of bribery or corrupt solicitation, or practise of solicitation, and shall not be permitted to withhold his testimony upon the ground that it may criminate himself, or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceeding, except for perjury in giving such testimony; and any person convicted of either of the offences aforesaid shall, as part of the punishment therefor, be disqualified from holding any office or position of honor, trust, or profit in this Commonwealth.

You will observe, gentlemen, that the Constitution, therefore, makes the provision both against members of the Legislature who shall receive or ask for, or be willing to receive, or agree to receive, any offer in the form of money, office, or in any other way—a person going to a member of the Legislature and saying: "You vote for such a bill," or "Vote against such a bill, and I will procure you such an office"—it would be bribery within this Act of Assembly. Any person soliciting this to be done is guilty of a high crime, guilty of the attempt to bribe. The *offer* of money or anything of value is of itself made the crime in this case. Therefore, persons have no business to be tampering with the Legislature, tampering with the members, or saying, "If you will consent to vote for such a bill you can receive so much money"—it is altogether illegal, and forbidden by the Constitution itself. The Act of Assembly is perhaps equally explicit on this subject, though defining what the punishment shall be more particularly. The Constitution declares what the crime is as well as the Act of Assembly.

The Act of 29 April, 1874, provides as follows:—

SECTION 1. Any person or persons who shall, directly or indirectly, by offer or promise of money, office, appointment, employment, testimonial, or other thing of value, or who shall, by threats or intimidation, endeavor to influence any member of the General Assembly, State, county, election, municipal, or other public officer in the discharge, performance, or non-performance of any act, duty, or obligation pertaining to such office, shall be guilty of the offence of corrupt solicitation, and liable to indictment for a misdemeanor; and on conviction thereof shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo imprisonment not exceeding two years, at the discretion of the Court.

SECTION 2. Any occupation or practise of solicitation of members of either house of the General Assembly, or of public officers of the State, or of any municipal division thereof, to influence their official action shall be deemed a misdemeanor, and any person convicted thereof shall be punished as provided by the preceding section; *provided*,

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that any open address upon or explanation of any measure or question before either house of the General Assembly, or any committee or member thereof, or before any municipal council, or board or committee thereof, or before any public officer, shall not be held to be solicitation, within the meaning of this section.

Any open address, any persuasion, any coaxing, or the like of that, would not come within the Act, but the moment any office is offered, the moment any money is offered, the moment any article of value is offered, the moment any promise of advantage is offered, it brings it within the statute.

In order, then, to make out the offence charged here, you have only to inquire: Was there an offer or endeavor to influence any member or members of the Legislature by offering or promising them money, anything of value, any office, or advantage of any kind? Was that done? If so, it would be an attempt to solicit them to do what is illegal, and is an attempt to bribe, an unlawful solicitation. They need not accept it. They may say they would not accept it; that they would scorn to take it, yet it does not make it any less offense on the part of the persons offering—they are guilty, and all that is necessary to be proved is the simple fact that they solicited a member of the Legislature to vote in a particular way under a promise of procuring money for them, or offering to give them money, telling them where they could get money, or that they could have money by doing so and so, that they could receive such and such articles—that is all there is necessary to be established, to be proved to your satisfaction, in order to make out this offense. . . . Therefore it is a high offense against society, and one that should be most carefully guarded against by courts and juries, punished inflexibly and without any hesitation, if persons are guilty of it, and the only simple fact for you to have established before you is that any person solicits any member or members of the Legislature to accept a bribe, or tells them how they could make money, or offers to give them money, or anything of that kind, for voting in a particular way, voting for or against a particular bill. This constitutes the offense.

It may be possible, in the course of your examination of this charge against persons for soliciting members of the Legislature to accept money, that it may come out that it doesn't stop at solicitation alone, but that a member accepted or agreed to accept the money. If so, although no indictment may be sent before you, yet if in the examination of witnesses before you in the question of this bribery it comes out that any member of the Legislature did accept or agree to accept any gift of money or valuable thing, office, or anything of the kind, if it comes out that they did agree to do so, you make a presentment of it, you present them to the Court, and say such and such witnesses testified before us that such members of the Legislature, naming them, were guilty of accepting or agreeing to accept these bribes which were offered to them, and if such is the case, direct the District Attorney to send indictments before you, or if he does not do that at once, to at least have the person charged arrested and brought up before a magistrate for a preliminary examination, and then an indictment would be sent before the next Grand Jury, so that neither the persons who are charged in these indictments, nor the members of the Legislature themselves, if they agreed to accept money, can get clear if you perform your duties. But if any member did not agree to take it, you are not to make a presentment of him; but it is only when the one offers or the other agrees to take—either the one or the other—they are both guilty of the crime—that you will find a true bill, or make a presentment. As I understand from the form of this statement, there is no one charged with receiving the money, that is, no member of the Legislature charged with receiving money. You cannot act upon newspaper reports; you have no right to act upon resolutions of the Legislature; you act upon the evidence produced before you, and that alone, and if that makes out a case of either giving or receiving a bribe against the person who is charged, find a true bill. If it is against others who are not charged, make a presentment of them to the District Attorney, so that the whole matter be properly and fully investigated in Court, so that we may get at the bottom of these things. Sometimes committees of the Legislature examine such subjects. They have not the same power that the courts have in compelling the attendance and testimony of witnesses; sometimes they are not very anxious to find out what has been done; sometimes they are not very willing to expose whether they have been guilty of receiving bribes, they do not want to tell anything that takes place; but we want to find out everything about it, we want to get to the truth of the matter, and get to the bottom of it, and see who is guilty and who is not guilty, or whether any person is guilty, or whether it is a mere general slander. As I said before, you act upon the evidence and upon that alone, and not upon anything that you ever have read in the newspapers about what took place in the Legislature last winter. Do not be influenced in the least by that. Do not be influenced in the least by any public opinion. Do not be influenced in the least by politics or by anything else than the evidence which is produced before you. If the Commonwealth cannot now produce witnesses before you to establish the facts, you ignore the bills. If the Commonwealth does produce witnesses to establish the

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facts, find them without the least regard to whom it will strike, without the least regard to the character of the persons who have been guilty of planning anything of that kind, or of soliciting others to commit what was wrong.

Common Pleas—Equity.

C. P. No. 1. August 9, 1879.

Horstmann et al. v. Young.

Equity—Injunction—Frame buildings—City of Philadelphia—Ordinance of April 11, 1863—Exception in said Ordinance of "sheds for the temporary storage of merchandise," construed—What buildings are not within the exception—Special damage to individual complainant—What sufficient to maintain bill for injunction.

Application for the continuance of preliminary injunction against the erection of an extension to a frame building. Hearing on bill and affidavits.

The bill set forth: That the respondent, in the fall of 1878, erected upon a vacant lot on the east side of Fifth Street, twenty feet from Cherry Street, a frame building, covering the entire front of the lot on Fifth Street, being 50 feet wide, and nearly one-half of its whole depth of 100 feet; that this building has been continuously used since its erection as a store-house and sales-place for large quantities of lumber and cut timber; that the respondent is about extending the said frame building by running it over the entire lot. That the present structure, with its proposed addition, is in direct violation of the City Ordinance of the 11th of April, 1863, prohibiting the erection of wooden buildings, and the complainants will be specially injured by it, inasmuch as their warehouses and buildings, filled with valuable merchandise, immediately adjoin it and almost entirely surround it, so that in case of fire they will be in imminent and special peril.

The truth of these matters so charged was not denied by the respondent, but he contended that his structure was a lawful one, not erected in violation of the Ordinance of 11th of April, 1863, but authorized by its proviso, which excepts from its provisions "sheds for the temporary storage of merchandise." And that if it did violate the provisions of that Ordinance the complainants had not sustained, and were not likely to sustain, such special damage as to entitle them to maintain their bill.

J. de F. Junkin and *R. H. Hinckley, Jr.*, for complainants.

(1) The building is in violation of City Ordinance of April 11, 1863; if not, it must come within the exception "sheds for the temporary storage of merchandise;" but the affidavits show it is not a shed, and has been used for the storage of timber for nearly a year. (2) It is a nuisance *per se*, putting the neighborhood in danger from fire, and if it is in violation of law, as claimed by complainants, it is a nuisance at law, and comes within the jurisdiction of equity to restrain, provided the proper party apply for such restraint. Now the proofs disclose the fact that the insurance rate on one of our buildings has been doubled by reason of this erection. As for the case of Rhodes *v.* Dunbar (7 Sm. 274), although the syllabus would indicate that such an increased rate of insurance was no ground for private relief, yet a careful examination of the case will show that the Supreme Court did not so decide. The insurance rate in that case had not been increased, and there was only an apprehension it might be, and the Court held that fear of injury did not constitute good grounds for the intervention of equitable power. And in that case also, the building itself was not in violation of law, and there was no legal nuisance.

B. F. Fisher and *B. F. Wagner*, contra.

This building comes fairly under the exception to the Ordinance. It is essentially a roof for the temporary protection of merchandise. If brick walls were added, no question as to the dangerous character of the building would arise, and yet it would be more so than at present, when its open method of construction allows free access to water in case of fire. Besides, rates of insurance on lumber yards are not high.

This structure was built under the sanction of the Building Inspectors, who should be the best judges of its safe and lawful character, and it does not differ from hundreds throughout the city. But we insist, more especially, that there is not sufficient proof of the complainants having suffered special damage, mere apprehension of damage not being enough, and we rely on Rhodes *v.* Dunbar (7 Sm. 274).

C. A. V.

August 16, 1879. THE COURT. (After stating the facts *ut supra*.) The first question to be determined is, whether this is "a shed for the temporary storage of merchandise."

A shed is generally understood to be a slight covering, near to the ground, affording a temporary shelter against the inclemency of the weather, and it may well be doubted whether a substantial building, thirty feet high, divided into

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two stories, and containing bins for the assortment and storage of lumber, and a permanent roof, can properly be called a shed because it lacks some of the characteristics of a warehouse.

So also we may well doubt whether the framers of this Ordinance had in their minds the more extended meaning of the word merchandise, or ever contemplated that the proviso could be applied to the contents of a lumber yard. It would seem to refer more properly to that class of merchandise which would be injured by exposure to the weather, and therefore required immediate protection. Lumber not belonging to that class of articles, they may have well thought that not being injured by temporary exposure it would not be necessary to provide for its temporary protection.

But assuming that this building is a shed, and that this merchandise comes within the meaning of the proviso, how then does the matter stand?

The Ordinance, after forbidding the erection of wooden buildings, has this proviso: "That nothing herein contained shall be considered as applying to bath houses or privies attached to dwellings, the lower story of which shall be composed of brick or other incombustible materials, or brick-sheds or coal-sheds, or sheds for the temporary storage of merchandise."

It will be observed that the sheds for storing brick and coal may be erected for the purpose of storing them, not "temporarily," but without restriction as to point of time. Brick and coal not being dangerous in themselves, the owner might doubtless use the sheds which covered them as his warehouse, and dispose of their contents at his leisure. But as to other species of merchandise a shed can only be erected for its "temporary storage." This naturally implies a structure constructed for an emergency, a sudden demand, a place of deposit for a time, with the intention of subsequent removal to a safer place. The place where merchandise is finally stored for the purpose of sale and delivery, with no intention to remove it until sold, cannot, with any propriety, be called a place of "temporary" storage. Yet this is admitted to be the use for which the present building is intended.

The respondent claims that the storage is "temporary," because his lease will, in the course of time, expire; but, with as much truth, it might be urged that he is mortal, and that therefore his occupancy cannot be otherwise than temporary. If three years can be called "temporary," as regards storage, it would be difficult to name any period of time when it would cease to be so.

It would seem, therefore, very clear that this is in no proper sense erected for "temporary storage," and it is, therefore, illegally erected, and exists contrary to law.

The second question to be considered is, whether the injury is greater to the complainants than to the public at large, because if they are in no worse position than the citizens generally, the wrong is so entirely public, that public authority alone can claim redress from the courts.

As these structures are forbidden to be erected from the fear of fire, certainly the citizens whose houses adjoin them are in more danger than those whose dwellings are far off. And in the present case the President of the Insurance Patrol, a person of great experience in the insurance business, testifies that he considers risks "in the vicinity of these premises" extra hazardous. In this opinion he is supported by other experts, who "consider it highly dangerous to the neighborhood," and the complainants themselves also testify that they have been notified by their insurers that their rate will be very much increased. Indeed it requires no expert to tell us, that a structure covering an area of 50 by 100 feet, filled to the height of 20 to 30 feet with thoroughly dried lumber, so arranged that the air can circulate through every part of it, is a wooden furnace, which, if lighted, would necessarily prove destructive to the adjoining properties. It was, it is true, decided in Rhodes *v.* Dunbar (7 P. F. Sm. 274), that it was not a ground for equitable relief, that the erection of a lawful building would increase the rates of insurance to neighboring buildings, but in this case the ground of equitable relief is the erection of a building contrary to law, and the special injury is being required to pay a higher rate of insurance in consequence of that illegal erection. We think, therefore, for the purpose of showing special damage to authorize private intervention, this is sufficient.

Experience seems to have shown that this Ordinance is a very wise one. It originally applied only to certain wards, but was followed by supplements in 1867, 1868, 1869, 1870, and 1874, including Germantown and other parts of the city within its provisions, until almost all the densely settled portions of the city are protected. The location of the present structure at Fifth and Cherry Streets, less than three squares from the State-house, is in the most thickly built portion of the city, where a conflagration would be most disastrous. To select a place of that character to store lumber, for even a limited period, would seem to be a great risk, and to hold that it can be stored there for years, would violate the law and endanger the safety of the citizens.

There is evidently great danger that under a loose construction of the provisions of this Ordinance, its utility may be very much impaired. Under the guise of bath-houses, sheds, privies, and bow-windows, there are numerous wooden structures springing up all over our city, the

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danger from which will probably never be appreciated until some great conflagration has shown us how much they add to the difficulty of controlling it. It is a question worthy of grave consideration, whether the time has not arrived when the cheapness of incombustible building materials will justify the prohibition of all wooden structures in the thickly populated parts of the city. However that may be, it is very clearly the duty of the courts to enforce strictly the safeguards against conflagrations which already exist.

The injunction, so far as respects the erection of the proposed building, is, therefore, continued.

So far as it affects the building already erected, the action of the Court will be suspended until final hearing on bill and answer.

Opinion by BIDDLE, J.

Common Pleas—Law.

C. P. No. 2. March 10, 1879.

Anwalter, Administrator, v. De Haven.

Contracts of infants—When infants cannot disaffirm executed contracts—Relations between a minor and a stock broker employed by him to buy and to sell stocks—Suit by administrator of minor to avoid contracts.

Case stated, showing the following facts:—

From January, 1875, to August, 1876, Joseph Ruchizky, then a minor, had been dealing in stocks through defendants, who were stock brokers. During this time defendants purchased for him stocks to the value of $472,419.55, and received from him as collateral security for these purchases money and stocks to the value of $7924.96. The minor was a clerk, with a salary of $500 per annum, and had no property except certain stocks of the value of $1545.12 which were a part of those left with his brokers as collateral. At various times the minor received from his brokers payments on account of stock sold to the amount of $2695.92 but he never received any of the stocks which were bought by them for him except five shares which were transferred at his order and cost to one J. A. Landis.

On August 4, 1876, the minor was found upon a settlement of his accounts to be indebted to his brokers in the sum of $655.29, and he signed an acknowledgment of his liability for this sum.

On August 12, 1877, Joseph Ruchizky, the minor, attained his majority, and afterwards died, whereupon letters of administration were issued to Conrad Anwalter, who brought this suit to recover back the difference between the amount deposited by the minor with defendants for margins, etc., and the amount received by him, on the ground that the minor's contracts with defendants were voidable by his administrator.

"If the Court be of opinion that, on the above facts, their judgment should be for the plaintiff, then judgment is to be entered for plaintiff for $5229.04, and interest from August 1, 1876; but on the delivery to said plaintiff of twenty shares Keystone National Bank (formerly Keystone Bank), together with all dividends that have or may have been declared on the same between May 14, 1875, and the time when said stock shall be returned, the said judgment is to be reduced to $4329.04 with interest from above date; but if not, then judgment to be entered for the defendants, the costs to follow the judgment, and either party reserving the right to sue out a writ of error thereon."

R. M. Schick and *B. H. Brewster*, for the plaintiff.

This was the contract of an infant and clearly voidable by his administrator. Nor is the infant bound to restore the consideration in order to avoid the contract. To require this would be often to deprive the infant of the protection which the law has given him.

Shaw *v.* Boyd, 5 S. & R. 309.

The true rule is that if the infant has the consideration he must restore it, but if he has wasted it or lost it he need not.

Platt and *Dickson*, contra.

These brokers against whom this suit is brought are only the agents to whom the infant gave the money to be paid to others for stocks. These are the people, if any, against whom the infant can recover.

Ex parte Pyke, 8 Chancery (L. R.), 754.

[HARE, P. J. Suppose the infant had given $5000 to a man to buy a race horse for him, and after the purchase the horse dies, could the infant sue his agent in the purchase for the $5000?]

C. A. V.

April 19, 1879. THE COURT. The essential facts of this case stated may be briefly summed up to be that the original plaintiff, being an infant, employed defendants, who are stock brokers, to buy and sell stocks for his account: that defendants received from the plaintiff considerable sums of money and shares of stock which they applied to the purchases directed, and made sales as directed, the proceeds of which they paid over to plaintiff; that after a large number of transactions, plaintiff ceased giving orders, and the account was closed or liquidated, showing an in-

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debtedness by plaintiff to the defendants. It also showed, however, that during the dealings plaintiff had paid to the defendants some $4300 more than he had received from them, thus making a loss to him of that amount besides his debt to defendants. This sum he now seeks to recover back from the defendants, on the ground of his infancy and his right to avoid all the transactions referred to.

The case does not expressly say when the plaintiff elected to disaffirm, but it must be presumed that it was after the liquidation of the account in August, 1876, as the suit is not brought until March Term, 1877.

Upon this state of facts the defendants must be regarded as the agents of the plaintiff, dealing for him with the other parties to whom they sold, or from whom they bought stocks in the course of the transaction, but as to whom they assumed liabilities as if they were principals; and the question arises, can defendants now after having assumed obligations towards others which they have discharged by the payment over of the money or the delivery of the stocks, be held answerable to rescind all these completed transactions as between themselves and plaintiff, and thus bear the loss of his speculations?

It is commonly said that an infant cannot appoint an attorney or agent of any kind; indeed that is the one act which it is said is so absolutely void as to be incapable of affirmance. But that is said with reference to the acts of the agent set up as acts of the infant with regard to third persons. It is nowhere said that if an infant use the hand of another to do an act which he might do himself, the act shall not, as between the two, be deemed valid after it has been completely executed. And that is the present case. The defendants, as brokers, were ordered to buy stocks; they did so. Then they were ordered to sell, and they did so, and accounted to plaintiff for the proceeds. That was their whole duty, and, having performed it, their connection with the transactions ceased; they were mere conduits to pass money from the hands of plaintiff to those of the other principals in his contracts; and to hold them liable to make good his losses now, after the money has by his direction passed out of their hands, would be to establish a principle that would include every one who, however innocently or ministerially, passed the money of an infant towards its destination. Such a principle would be a shocking violation of natural justice, and be a dangerous conversion of the privilege of infancy from a shield to a sword. No case has been found, nor do we believe any exists, which sustains any such view of the law. Perhaps the most terse and pointed statement of the true rule on the privilege of infancy is to be found in the judgment of Lord Justice TURNER, in *Ex parte* Taylor (8 De G. M. & G. 258), "If an infant buys an article which is not a necessary, he cannot be compelled to pay for it; but if he does pay for it during his minority, he cannot on attaining his majority, recover the money back."

It appears, however, from the case stated that the defendants have in their hands certain shares of stock of the Keystone National Bank, whose value as between these parties has been liquidated at $900. This, it appears is stock of plaintiff, put by him in the hands of defendants for certain purposes, but which has not yet left defendants' possession and control. As to this stock, therefore, we think the transaction is not entirely executed, and the plaintiff's privilege of rescission still exists.

The case stated makes mention of one P. K. Landis, as having certain connection, in name at least, with some of the transactions, but we are unable to see that he has any rights of his own that are involved in this suit, or that the use of his name under the circumstances recited in the case stated in any way varies the rights of the parties thereto. We have therefore treated this case throughout as between Ruchizky and De Haven.

Judgment is entered for the plaintiff on the case stated for $900, with interest from August 1, 1876, with the right on the part of the defendants to pay it by the delivery of twenty shares of the stock of the Keystone National Bank, together with any dividends that may have been received therefrom between May 14, 1875, and the time of delivery.

Opinion by MITCHELL, J.

C. P. No. 2. March 15, 1879.

Waln v. Massey.

Mortgages—Clause for attorney's commission for collection—Power of the Court to reduce the stipulated percentage—What is a reasonable attorney's fee on mortgage for $90,000.

Rule for judgment for want of a sufficient affidavit of defence.

Sci. fa. sur mortgage for $90,000, on which the sum of $13,674 was overdue for interest and taxes, in addition to the principal. The mortgage contained a stipulation for the payment of three per cent. attorney's fee for collection in case of default. The affidavit of defence averred that the rate of commission was excessive and unreasonable.

Edward Waln and *Geo. Junkin*, for the rule.

A. D. Campbell, contra.

THE COURT, under the authority of Daily *v.* Maitland (*ante*, 103), fixed the compensation at 1½ per cent., and made the—

Rule absolute.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, SEPT. 11, 1879.* [No. 20.

Supreme Court.

Jan. '77, 147. Feb. 17, 1879.

Sowers's Appeal.

Husband and wife—Divorce à mensâ et thoro—Turning out of doors—Indignities to the person—Act of Feb. 26, 1817.

To entitle a wife to a decree of divorce à mensâ et thoro upon the ground that she was turned out of doors, there must be proof that she was ejected by force, or was compelled to leave because of a threat to employ force and a reasonable apprehension that it would be used against her; or there must be proof of a refusal to receive her upon demand that she should be taken into her husband's home as wife, or of an emphatic refusal to allow her to remain after her return; or, lastly, there must be proof of facts amounting to a justification on the part of the wife in withdrawing from the home of her husband.

Abusive or profane language, occasional refusal to speak, or neglect in writing are not such indignities to the person or such cruel and barbarous treatment as are contemplated by the Act of Feb. 26, 1817.

Appeal from the Common Pleas No. 1, of Philadelphia County.

Libel in divorce à mensâ et thoro, filed by Josephine Gordon Sowers, by her next friend, William A. Gordon, against William H. Sowers.

The libel set forth: that the respondent had (1) turned the libellant out of doors and (2) had offered such indignities to her person as rendered her condition intolerable and her life burdensome, thereby forcing her to withdraw from his house and family. Under the second head the following specifications were filed: (1) Insults to the libellant by false, slanderous, and opprobrious epithets. (2) Refusal to speak to the libellant. (3) Neglect in writing. (4) Neglect to receive the libellant, rendering it necessary for her to go to the house of a third party. (5) Insulting letters to the libellant, and (6) neglect to support the libellant and her child.

The answer contained a general denial of the allegations of the libel and averred that the libellant had voluntarily left the respondent's house, contrary to his wishes.

The evidence disclosed the following facts: The libellant was married to the respondent on the 19th of May, 1870, in Georgetown, D. C., and immediately afterwards went to Germantown, Phila., where she lived with her husband at his mother's house until Dec. 23, 1873. The house was a comfortable one; she had servants, horses and carriages at her command, was under no restraint, was released from the cares of housekeeping, dressed well, and had a moderate allowance of pocket money, and in short had every luxury that her husband could afford, whose business was that of a hardware commission merchant, from which he received an annual income varying from $5000 to $7500. In public the respondent was kind and affectionate to his wife, and courteous and deferential in his manner. And in private, although they had occasional quarrels, there was no evidence of his having maltreated her, or of his having been in the habit of using abusive or profane language to her, or of having for any considerable length of time refused to speak to her. The respondent was subject to attacks of depression of spirits, which were of short duration, and his temper though quick was under control. After her marriage the libellant made frequent visits to her family at Georgetown, to which the respondent at first made no objection, but as these visits were made regularly three times a year and were sometimes of more than six weeks' duration, the respondent remonstrated with her, charging her with preferring her family and friends to him and with giving him a second place in her affections. Remarks made by the respondent, which were intended to call his wife's attention to gossip caused by her long absences, which hurt his pride, were misconstrued by her as imputations upon her fidelity as a wife. In December, 1872, the libellant went to Georgetown to spend the Christmas holidays with her family, and on Feb. 20, 1873, after an unusually long absence, she wrote the respondent to meet her at Germantown Junction, on the Pennsylvania Railroad, which he, on account of an engagement could not do, but sent his servant and the carriage twice to the station. The libellant, not meeting her husband at the station upon her arrival, instead of going to her husband's home, went into Philadelphia, where she staid three days at the house of a friend. Although she wrote her husband of her whereabouts he did not call for her, because he was offended by her long absence, and did not approve of her conduct in not going directly home. She subsequently returned to his house. On Dec. 23, 1873, the libellant announced her intention of visiting her family at Georgetown, to which the respondent objected, although he afterwards bought her ticket and made preparations for her departure, which took place on Dec. 24, 1873. They corresponded with each other, at first amicably, during her absence; and on Feb. 1, 1874, she wrote that he might expect her on the 5th. To this letter he sent the following reply:—

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PHILADELPHIA, Feb. 3, 1874. 2 P. M.

MADAM: Your letter dated 1st inst., post-marked 2d inst., just received. You left my house without my permission on the 24th December last. I have known little of your movements since. Before leaving you informed me your mother desired a separation. For three and one-half years I have allowed and permitted every possible insult and outrageous conduct of yourself and of your family. Your mother grossly insulted me in her own house the only time I was ever unfortunate enough to sleep under the roof of such people. I shall not receive you. You have left your bed and board without my authority or permission. You have daily and hourly insulted me and treated me with the utmost contempt. By the laws of my State I cannot refuse you admittance, but, madam, if you suppose I can any longer play the dog to you that I have since our marriage, you and your high-toned family are greatly in error. You left my house without my permission and you wrote a lying letter three weeks afterwards and since. I know nothing of your whereabouts except through third parties, who say you are flourishing on my name. I do not propose this thing shall continue. If I owed nothing to myself I do to others. Your family have played an infamous part in this business, and I suppose they are satisfied when they are able to keep you six weeks from your lawful husband and in the hands of your old lovers.

WILLIAM H. SOWERS.

This letter the libellant construed as evincing a determination on the respondent's part not to receive her into his home, and therefore, her brother wrote at once for her personal effects, saying that he had offered her a home with him. To this the respondent did not reply, but sent the effects as requested. By "not receiving her" the respondent meant that he would not receive her at the station, not that he would not receive her into his home, where preparation for her arrival had been made. On July 18, 1874, the libellant gave birth to a child, of which the respondent was notified by the attending physician, but apparently did not know before that his wife was *enceinte*. The respondent contributed nothing to the support of his wife and child from Dec. 24, 1874, up to the time of the filing of the libel. There was no further correspondence between them, nor any evidence of any request on the part of the wife to be admitted into her husband's home.

The Court dismissed the libel, ALLISON, P. J. delivering the following opinion:—

This is a proceeding for divorce à mensâ et thoro; it is instituted by the wife, Josephine G. Sowers, by her next friend, against her husband, William H. Sowers, to whom she was married at Georgetown, in the District of Columbia, on the 19th of May, 1870, and who immediately after her marriage removed to Germantown, the residence of her husband, where, as man and wife, Mr. and Mrs. Sowers continued to reside until the 24th day of December, 1873. Mrs. Sowers testifies that on that day she went from Germantown to Georgetown to make a visit to her friends, and that she has never returned to her home in Germantown.

The reasons for remaining separate from her husband are, that the respondent turned her out of doors, and that he offered such indignities to her person as to render her condition intolerable, and life burdensome; thereby forcing her to withdraw from his house and family.

The answer of the respondent expressly denies both allegations. A large amount of testimony has been taken in support on one hand, and in denial on the other, upon the vital questions which are presented by the libel and the answer.

Under the second head, of legal justification in separating herself from her husband, the libellant charges against him, that he insulted her by false, slanderous, and opprobrious epithets. That he at various times, and for long periods of time, refused to speak to her; that when absent from him he neglected to write to her. That he neglected to meet her at the depot on one occasion on her return from a visit to Georgetown. That he addressed insulting letters to her; and that he has neglected her since she has become a mother, in refusing to receive her into his house, and in not contributing means for the support of herself and her child. The child was born at Georgetown, after the libellant last left the home of her husband, on the 24th of December, 1874, and has never been seen by the respondent.

The first two of these allegations cannot be regarded as established by the proofs. They are supported mainly by the testimony of the libellant, and are contradicted by the testimony of the respondent. The credibility of these parties standing in the relation of witnesses to their own cause has not been impeached. They are both esteemed by their friends and acquaintances as worthy of confidence and regard, and each of them holds now, as they have always held, a respectable position in society. They have each testified, as we are bound to presume, according to an honest belief; but they have seen and heard, as well as acted their several parts, from different standpoints; real or supposed causes of complaint have given tone and color to the transactions of which they have testified, and this, we doubt not, is substantially a correct explanation of that which would otherwise seem to be wilfully false in statement. The occurrences which followed, when remarks which had been made to the husband were repeated to the wife, touching the frequent and protracted absence of Mrs. Sowers at Georgetown, are an illustration of how differently they are stated and explained by the parties. Mrs. Sowers regarded them as an imputation upon her honor as a wife, causing her at the time to withdraw from the society of her husband, and to pass the night alone in great distress of mind, in a room adjoining that in which he slept. Mr. Sowers' account of what passed is, that his statement to his wife was intended to

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inform her that her visits to Georgetown were made the occasion of unpleasant suggestion and remark by his acquaintances; that he had no intention of conveying to her any other impression than that this was the case, and that it was done to protect himself from future annoyance, and because he felt it to be a duty which he owed to his wife to state to her the remarks to which her absence gave rise; he asserts the full confidence which he has now, and ever has had, in the purity and integrity of his wife, and that he so assured her.

That Mr. Sowers' treatment of his wife in the presence of strangers was always kind and respectful, and even affectionate, according to the testimony of several of the witnesses, is established by the proofs. This, indeed, is admitted by the libellant, and whatever of truth there may be in the charge that respondent was in the habit of applying profane and opprobrious epithets to his wife when they were alone or when none but the family were present, must be regarded as supported almost wholly by the testimony of the libellant. The single exception, as we are able to recall the testimony, is the occasion at dinner, testified to by the servant, Winnie Price, upon whose evidence considerable doubt is cast, contradicted as it is by the statements of the mother of the respondent and by the respondent himself; considered also, as it should be, in connection with the motive of the witness, and that it was not heard by the servant who waited on the table, and the testimony of a number of witnesses that it was not the habit of the respondent to use profane language. Aside, therefore, from the single occasion sworn to by the witness Price, the allegation of the use by the husband of profane and opprobrious language addressed to his wife must be regarded as resting upon her testimony alone, and in view of the fact that it is met by the positive denial of the respondent, it cannot be regarded as a fact proved in the cause.

It cannot be questioned, that there was at times contention, ill feeling, and the expression of mutual dissatisfaction with the situation and conduct of both husband and wife, each toward the other, and that the respondent, on various occasions, for a longer or shorter period of time, when these feelings were in the ascendant, refused to speak to the libellant; the testimony is, however, contradictory as to the period of time for which this treatment on his part would continue; that it was a grievance which weighed heavily on the libellant cannot be doubted. But unfortunate and improper as this conduct on the part of the husband may have been, it is not entitled to much consideration in making up a judgment upon the question whether or not the respondent offered such indignities to the person of the wife as to render her condition intolerable and her life burdensome. This conduct of the husband was, according to the testimony of the libellant, but occasional; she says, after the cloud came forth the sun, and if the home of the husband and the wife was at times disturbed by disagreement and anger, it resulted from the fact that each had cause for real or supposed complaint against the other. The husband, soon after his marriage, came to the conclusion that he held but a secondary place in the affections of his wife. That her father's home and family, and the enjoyment of the society of her friends in Georgetown, were set above all proper consideration for him and his relatives and friends, and that this was evinced by the several protracted visits which she made to Georgetown in each year, and as he says in his testimony, by her declarations of contempt for him, as well as for the members of his family; to this latter allegation, it should be here stated, Mrs. Sowers has given an emphatic contradiction, so far at least as her husband is concerned, and in turn asserts, that she found her situation in the home of the mother of the respondent one of discomfort to her. To this she adds the unkind treatment of her husband, to which we have referred; that he refused to supp y her with a sufficient amount of spending money for her personal use; that he used intoxicating liquors immoderately; that he neglected many personal attentions, which had been accorded to her, and which she thought were due to her. These things, she says, rendered her condition intolerable, and were injurious to her health.

The fact, however, is clearly established by the testimony, and by the admissions of the libellant, that her home was one in which every necessary want was supplied, and many luxuries furnished to her. She was always treated with respect by the subordinates of the household; horses and carriages were at her command; her time was her own; nor was task or restraint imposed upon her. She was frequently accompanied by her husband in her visits and in her drives, and also in her attendance at church. To the world, at least, her home was a happy one. The disagreement between herself and her husband was carefully concealed from public view; nor does it appear that any one thing requisite to her comfort was denied her, if we except her limited supply of spending or pocket money, and the refusal of the respondent to gratify, on one occasion, her desire for an expensive winter wrap, and withholding his consent to her having a pony phaëton, furnished or proposed to be given to her by her brother. These are luxuries with which the law does not require a husband, situate as was the respondent, to supply his wife. It does not appear from the testimony that Mr. Sowers is possessed of great wealth; and though he is engaged in varied and active business, from

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which he receives a considerable income, it is not such as to require him to respond to every demand which may be made upon him. To his wife's request for spending money, and for a fixed allowance, he testifies that his reply to her was, that he gave to her all that he could afford to bestow upon her for private expenditures.

We put out of the libellant's statement of grievances her allegation that her husband neglected to meet her at the Germantown Junction, several miles from her home, on her return from a visit to Georgetown. Mrs. Sowers might well have omitted this from her complaint. Smarting under the irritation of the seeming neglect, instead of going to her home, after so long an absence from it, and seeking an explanation from her husband, if one was required, for this omission of an accustomed attention on his part, she turned away from her home, when almost at its door, and sought the protection of acquaintances in the city, sending no word until the next morning where she was, though she knew her return was expected that evening, the testimony showing that preparation had been made for her reception. This is aside from the explanation given by Mr. Sowers, which, if correctly stated, accounts satisfactorily for his failure to meet Mrs. Sowers in accordance with his usual habit on such occasions.

The most serious and important of all the charges under this head, which are made by the wife against her husband, grew out of his letter to her of February 3, 1874, and his refusal to contribute means of support to his wife and child. Mrs. Sowers had been absent from her home from the 24th of December, 1873, on a visit to Georgetown. On February 1, 1874, she informed her husband by letter of her intention to return to him on the 5th of that month. The material portion of respondent's letter begins with the third paragraph, in which he writes: "I shall not receive you. You left my bed and board without my permission. You have daily and hourly insulted me, and treated me with the utmost contempt. By the laws of my State I cannot refuse you admittance. . . . . Your family have played an infamous part in this business, and I suppose they are satisfied, when they are able to keep you six weeks in the hands of your old lovers."

To this letter Mrs. Sowers did not reply, but her brother wrote to the respondent immediately on the receipt of it, saying, "She will now remain with those who know how to appreciate her," and asking that her individual property, clothing, etc., should be sent to her. The decision of Mrs. Sowers to remain in Georgetown is placed by her brother on the ground of a refusal of Mr. Sowers to receive his wife into his house. From that time all direct communication between the libellant and the respondent ceased. She did not write to him informing him of the birth of their child, though her physician did; and the respondent asserts, and makes it one of his causes of complaint, that when she left him, on the 24th of December, he did not know that she expected to become a mother, asserting that she had kept from him all knowledge of her situation. This assertion of the respondent is denied by the libellant, and in connection with this denial she charges against her husband, as an act of cruelty, that he has made no inquiries about her or her child. In her testimony she says: "He has never contributed one penny towards the support of either of us; he has never visited either of us."

This letter, and the subsequent conduct of the respondent, in so far at least as his neglect of his child is concerned, is indefensible. No one, and more especially one occupying the position which the respondent occupies, can justify the writing of such a letter to his wife, however great his real or his fancied provocation. It indicates a violence of spirit, and contains a harshness of expression that must have deeply grieved and wounded the sensibilities of Mrs. Sowers; and, however the respondent may have felt himself justified in withholding support from his wife while absent from him, as he asserts, without his permission, the innocent ought not to have been made to suffer with the guilty. His child has a just claim upon him for the manifestation of a father's love for his offspring, as well as for protection and the supply of its material wants. The law of nature and the law of the land alike demand the fulfilment of these obligations. That they were withheld gives to libellant a just cause of complaint, aside from the question, whether this grievance alone, or considered in connection with her other grounds of objection to the conduct of her husband, gives her a legal right to the divorce from bed and board which she prays may be awarded to her.

But conceding the full force of this fact, it yet remains to be considered in its legal aspect, whether it can, in any proper sense, be regarded as such cruel and barbarous treatment as constitutes an indignity to her person, which rendered her condition intolerable and her life burdensome, so that she was forced to withdraw herself or to remain away from the house and family of her husband. That it cannot be regarded in this light must, we think, be admitted if the letter of February 13th, 1874, can properly be interpreted in the sense in which the respondent claims it ought to be interpreted, and which, he asserts, it was intended to express. The proper answer to this question will furnish an answer as well to the other material point on which the libellant rests her case, namely, whether she was, in a

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true legal sense, turned out of doors by the respondent—for if this is established, then the husband has, in law, constructively deserted his wife, and, having persisted in such desertion for two years, a divorce must be decreed. McDermott's Appeal (8 W. & S. 251) is the leading case in Pennsylvania, establishing the doctrine that the refusal of a husband to receive his wife into his home is a virtual turning her out of doors. GIBSON, C. J., places the decision of the Supreme Court on the ground that our statute is a municipal regulation for the protection of the community as well as the wife. That it was sufficient to show that a wife who had followed her husband from Ireland was refused maintenance and admission to his house. The decree of the Court below was affirmed on this ground alone. McDermott's Appeal has ever since been regarded as a correct interpretation of the statute on which these proceedings are based.

The authority of this case is recognized in Grove's Appeal (1 Wright, 443). The original libel in that case set up an actual turning out of doors, which was subsequently allowed to be amended, by asserting that the wife, while living separate and apart from her husband, being desirous of returning to him, repeatedly offered and was willing to return and live with him as a true and dutiful wife, but that her husband refused to permit her so to do. The testimony of one witness showed that on a cold and snowy night in January, with her two small children, she went to her husband's house; she had difficulty in obtaining admittance, and was allowed to remain ten minutes to warm herself, when her husband told her to go. She begged to be allowed to stay, when he took her by the arm and pushed her out. Several witnesses proved that on different occasions she expressed a desire to go back and live with her husband, but that he steadily refused to receive her. This was held to be an *actual* turning out of doors according to the testimony of two of the witnesses, or at all events, constructively and substantially as proved by other witnesses.

So, also, in Gordon *v.* Gordon (12 Wright, 226) the Court instructed the jury that the refusal of the husband to permit his wife to remain in his house was a sufficient turning out of doors to entitle her to a verdict. This instruction was affirmed by the Supreme Court, as they say, with reluctance; the evidence showing conduct on the part of the wife the most reprehensible, insults and gross personal indignities to her husband, yet it was not sufficient to justify him in turning her out of doors, because it fell short of proving conduct on her part which amounted to cruel and barbarous treatment, which rendered his condition intolerable and life burdensome. Under the authority of these cases does the letter upon which the libellant rests this issue in the cause constitute a turning out of doors? It falls very far short of the facts upon which McDermott's Appeal was decided. Grove's Appeal is a still greater remove from it. In Gordon *v.* Gordon the questions of actual and constructive turning out of doors were left to the jury, the testimony sustaining the entire charge, if believed by the jury. Under the latter allegation it was proved that the wife returned to her husband's house and requested permission to remain and live with him, which was refused, accompanied by an order that she should leave the house, and a threat to call an officer to eject her.

In May *v.* May (12 P. F. S. 206), in support of the demand of the libellant in this case, the question of actual turning out of doors was not raised. The husband's proposition was to allow his wife to return to his house and occupy a small sleeping-room, have the care of her children, and eat at his table, but on the condition that she was denied all control of the house; she was required to take a position in the family subordinate to a servant who had treated her unkindly. This, in connection with the proof that he whipped her with a cowhide, treated her with cruelty and neglect in her confinement, inflicted personal violence, which was evidenced by her screams and the marks upon her person, was all submitted to the jury upon the question of infliction of indignities to the person which justified the wife in withdrawing from the family of her husband. These facts make out a case widely different from that of the libellant, who has never manifested a desire to return to her husband, nor has she asked an explanation of the letter upon which libellant and respondent have placed such opposing interpretations. If the conduct of the respondent is to be judged by the letter of the fifth day of February it falls very far below the facts proved in the case of May *v.* May. We have the oath of the respondent in support of the allegation, that no more was meant by the expression than that he would not meet her at the junction, as he had done on all prior occasions, except the one to which we have referred, and that all her accustomed privileges in the home of his mother, which was his home also, were reserved for his wife; that her room was prepared for her reception, and has been kept awaiting her return ever since. Whether this is a correct explanation of the declaration that he would not receive his wife, we have no means of determining, except the oath of the respondent, and the qualifying statement in the letter, that "by the laws of my State I cannot refuse you admittance." The libellant, placing her own construction on this letter, has thought proper to rest upon that construction, and remain in Georgetown separate and apart from the respondent.

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We have no case in Pennsylvania in which the suit of the wife was maintained on the ground that she was turned out of doors, where it was not shown that the wife was ejected by force, or was compelled to leave because of a threat to employ it, and a reasonable apprehension that it would be used against her; or a refusal to receive her upon demand that she should be taken into her husband's home as wife; or an emphatic refusal to allow her to remain after she had returned, accompanied by the declaration of a wish to remain and "behave herself as a good wife ought to do." Or lastly, where the facts did not show a justification on the part of the wife in withdrawing from the home of her husband; facts which would entitle her to a divorce in her suit against an offending husband.

This case does not, in our judgment, come up to the requirements of the law on either ground on which the libellant rests her suit; we therefore refuse to grant the divorce from bed and board for which she prays.

The libellant took this appeal, assigning for error the decree of the Court dismissing the libel.

George Tucker Bispham and *Wayne McVeagh*, for the appellant.

Refusal of a husband to receive his wife into his house is a turning out of doors within the meaning of the Act of Feb. 26, 1817.

Grove's Appeal, 1 Wr. 443.
McDermott's Appeal, 8 W. & S. 251.

The facts of the case show a literal refusal by the respondent to receive the libellant. But the presumption of a turning out of doors, raised by the literal language of the letter, may be rebutted by proof that it was not the intention of the respondent that the words should be taken in their literal sense. The context of the letter, which is full of reproaches, insulting phrases, and insinuations, and the subsequent action of the respondent, are consistent with the literal interpretation contended for. This view is strengthened by the fact that in answer to her brother's letter he did nothing to convey a different impression; on the contrary, he confirmed his wife's construction by sending her her personal effects. Afterwards he made no inquiry for his wife and child, and contributed nothing to their support.

The construction of the Court below that refusal to receive must be supplemented by either an actual turning out of doors, or by some formal demand of admittance on the part of the wife, or by some cruel and barbarous treatment, is not sustained in McDermott's Appeal, *supra*. On the contrary, that case decides that a mere refusal, standing alone, is equivalent in law to a turning out of doors.

A course of humiliating insults and annoyances calculated to destroy the life or health of the wife, although unaccompanied by actual violence, is sufficient cause for a divorce.

Butler *v.* Butler, 1 Pars. 329.

Each case stands on its own merits, the acts and course of conduct amounting to such indignities being nowhere defined.

May *v.* May, 12 Sm. 206.

An analysis of the testimony in this case shows such a course of treatment as entitles the wife to a divorce.

W. Wynne Wister, Jr., for the appellee.

To constitute a turning out of doors there must be intentional denial of admittance. In Grove's Appeal and McDermott's Appeal, cited on the other side, there was in one a positive, and in the other a constructive refusal by the husband to admit his wife. The facts of this case show that the respondent, so far from refusing to receive the libellant, had ordered preparations to be made for her return. Again he writes, "by the laws of my State I cannot refuse you admittance." The libellant has never expressed a desire to return to her husband's house, and that distinguishes this case from that of Gordon *v.* Gordon (12 Wr. 226). The specifications of indignities to the person of the libellant are not such as are contemplated by the Act as rendering life burdensome.

Butler *v.* Butler, 1 Pars. 329.
May *v.* May, 12 Sm. 210.
Cheatham *v.* Cheatham, 10 Mo. 296.

There are two tests for the determination of the character of the indignities aimed at by the Act.

(1) There must be a *persistent* course of such treatment as renders the wife's condition intolerable.

Elmes *v.* Elmes, 9 Barr, 166.
Richards *v.* Richards, 1 Wr. 225.

The testimony shows no such continued course of treatment; on the contrary, the quarrels were only occasional.

(2) There must be a design to injure and annoy.

May *v.* May, 12 Sm. 210.
McElroy's Appeal, 16 Sm. 366.

In this case there was no manifest intention to annoy; on the contrary, the wife had every luxury and every wish gratified that the means of the respondent could afford. Indignities provoked by the complaining party are no grounds of divorce.

Richards *v.* Richards, 1 Wr. 225.
Mayhugh *v.* Mayhugh, 7 B. Mon. 424.
Johnson *v.* Johnson, 14 Cal. 459.

The respondent never refused to contribute to the support of his wife and child, and it is questionable if it is the husband's duty, who furnishes his wife with a comfortable home, to offer her pecuniary assistance when she voluntarily absents herself from his home.

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March 17, 1879. THE COURT. After a very careful examination of the evidence in this case, we are of opinion that the facts and principles of law upon which it ought to be decided are so well, accurately, and impartially stated in the opinion of the learned President of the Court below, that nothing need be added to enforce and confirm the conclusion at which he arrived.

Decree affirmed and appeal dismissed at the costs of the appellant.

PER CURIAM.

Jan. '78, 216. March 11, 1879.

Wheelock v. Wood.
Wood v. Wheelock.

Usury—Usurious judgment—Under what circumstances may be attacked by subsequent judgment creditors.

Subsequent judgment creditors have no standing to attack a judgment on the ground of usury without proof of an intent to defraud them thereby.

The mere fact that the debtor has agreed to pay more than six per cent. interest is not enough to establish such fraudulent intent, nor is the refusal of the debtor to contest the claim; the contract must be shown to have been entered into collusively, and as a scheme to hinder and delay creditors.

Appeal of Second National Bank of Titusville, 4 Norris, 529; S. C., 6 WEEKLY NOTES, 153, followed.

Two writs of error to the Common Pleas of Bradford County.

Feigned issue, wherein J. Wood *et al.* were plaintiffs, and M. W. Wheelock was defendant, to test the validity of a certain revived judgment for $3700, entered in favor of M. W. Wheelock against G. P. Cash and H. L. Scott, assignee of G. P. Cash.

This case arose as follows: Before an auditor appointed to distribute the proceeds of the sale of certain real estate of G. P. Cash, the above-mentioned revived judgment was presented for payment; it was objected to by J. Wood *et al.*, subsequent judgment creditors, on the ground of usury, but was ordered by the auditor to be paid. J. Wood *et al.* then filed in court an affidavit, setting forth that on Aug. 6, 1870, G. P. Cash had borrowed $3000 of M. W. Wheelock, and given his judgment note therefor; that this note had been entered up, and that Cash had paid interest on it at the rate of 10 per cent. per annum up to some time in 1873; that on May 10, 1873, the judgment was revived by amicable *scire facias* for $3700, being $818.85 more than was legally due upon it; that at the time of revival both Cash and Wheelock knew that Cash was insolvent, and that the judgment, as revived, would hinder, delay, and absolutely prevent the petitioners from the collection of their judgment against Cash; and prayed for an issue to try the disputed facts, etc.

The issue was granted. On the trial the evidence was undisputed that at the time the note was given there was no doubt of Cash's solvency; but that he had subsequently, somewhere about the year 1874, gotten into financial difficulties; the deposition of Wheelock was read in evidence, wherein he testified that, at the time the judgment was revived he had believed Cash to be solvent.

The plaintiff presented *inter alia* the following point: (1) A judgment tainted with fraud in *whole* or in *part* is absolutely void—and cannot be used for any purpose when it would come into conflict with the rights of other creditors.—*Answer.* The plaintiff's first point as a general proposition is correct; but as to this case we are unwilling to say that, because Wheelock's judgment contains usurious interest, the whole judgment is void, or postponed, even if it comes in conflict with the rights of these plaintiffs.

The defendant presented *inter alia* the following point: (2) To enable the plaintiff to recover in this case the jury must believe that there was collusion between G. P. Cash and the defendant, in the revival of the Wheelock judgment to defraud subsequent lien creditors, or that he (Wheelock) had such a knowledge of Cash's indebtedness, and the value of his property, that he knew that subsequent lien creditors would be injured thereby.—*Answer.* The defendant's second point is also affirmed, provided the jury find in addition to what is here stated, that Wheelock had not such knowledge of Cash's circumstances as that he could reasonably presume that his act in taking the agreement to revive his judgment would defraud Cash's creditors. (7th assignment of error.)

In the general charge, the Court (MORROW, P. J.) said, *inter alia*, as follows: [If you believe that the usurious contract to revive Wheelock's judgment was intended to defraud Cash's creditors, or if you find that Cash's circumstances where known to Wheelock to be such that it could be reasonably presumed that this would be the natural effect of it, then these plaintiffs can postpone Wheelock's judgment as to the excess of interest, and your verdict should be for the plaintiff for the amount of such excess.] (4th assignment of error.) . . . . The defendant claims that if you find for plaintiffs, your verdict should only be for excess of interest paid, after plaintiffs were creditors of Cash. We refuse so to charge, for [at the time the judgment was revived Cash had the right to retain or deduct the amount of usury already paid from the debt. In refusing to do that, it was as much a fraud on his

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creditors as to include usury accruing after their rights attached.] (5th assignment of error.)

Verdict and judgment for plaintiff for $818.85. Both parties took writs of error, defendant assigning the answer to his point and the portions of the charge above given in brackets; plaintiff assigning the answer to his point.

Patrick and *Foyle*, for Wheelock.

The affidavit contained no positive averment of fraud between Cash and Wheelock, and was insufficient to sustain the granting of the issue.

Robinson, Minis, and Miller's Appeal, 12 Casey, 81.
Knight's Appeal, 7 Harris, 493.

Moreover, the issue was applied for too late, after they had taken one chance before the auditor.

Bradford's Appeal, 5 Casey, 518.
Seip's Appeal, 2 Ibid. 176.

There was no evidence of any fraudulent intent on Wheelock's part to injure other creditors; and third parties cannot attack a judgment merely because the *debtor* has been defrauded.

Thompson's Appeal, 7 Sm. 175.

J. Wood for J. Wood *et al.*

The charge of the Court was in accordance with the law as laid down in—

Green *v.* Tyler & Co., 3 Wr. 361.
Bank *v.* Roseberry, 3 WEEKLY NOTES, 13.

May 7, 1879. THE COURT. This case is ruled by the Appeal of the Second National Bank of Titusville (4 Norris, 529). It was there held that the mere fact that a debtor has paid or agreed to pay in good faith, and in the usual course of business, more than six per cent. interest, is not enough to establish a fraud upon creditors, and that the mere refusal of the debtor to contest the claim against him does not of itself amount to such fraud: and that it is only where an usurious contract is entered into collusively as a scheme to hinder and delay creditors that the latter have any standing to contest a judgment entered upon such usurious contract.

The case referred to had not been decided when the case in hand was tried in the Court below. Had it been, the rulings of the learned Judge would have been different, as the application of the principles announced in 4 Norris makes an end of this case. There is nothing in it to show fraud and collusion in fact. No such fraud is even averred in the affidavit upon which the feigned issue was granted. It is not denied that when Cash gave the judgment note of $3000 to Wheelock in 1870, and agreed to pay thereon interest at the rate of ten per centum he was perfectly solvent. His insolvency occurred about the time of the revival of the judgment in 1875. And even then there is no evidence that Wheelock knew of his insolvency. On the contrary, he swears that he believed he had abundant means to pay his debts at the time. The including of the $700 of extra interest was in pursuance of the contract of the parties made in good faith years before. It contained no element of a collusive fraud, a fraud in fact to hinder and delay the creditors of Cash.

There was error in awarding the feigned issue. The affidavit did not set out such facts as to justify it. There was also error in the portions of the charge contained in the fourth and fifth specifications. The defendant's second point (7th specification) should have been affirmed without qualification.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by PAXSON, J.

Wood v. Wheelock.

May 7, 1879. THE COURT. What has been said in Wheelock *v.* Wood just decided is, for the most part, applicable to this case. This writ of error, however, was taken out by the plaintiffs below, who obtained a verdict in their favor to the extent of the usurious interest included in the revival of the judgment in Wheelock *v.* Cash.

The effect of the verdict is to postpone said judgment in favor of the plaintiffs for the excess of interest only. The plaintiffs contended and asked the Court to instruct the jury that if the Wheelock judgment was tainted with fraud at all, it affected the entire judgment, and that the whole of it must be postponed. As the charge of the Court was more favorable to the plaintiffs than they were entitled to, the judgment upon this writ of error must be affirmed.

Opinion by PAXSON, J.

[See Lennig *v.* Meyer, *post*, p. 325.]

Jan. '79, 171. March 5, 1879.

Macungie Savings Bank v. Hottenstein.

Promissory notes—Usurious interest—How far usurious interest taints through transmutations—Novation—Accommodation endorser becoming principal debtor by novation cannot set up usurious interest paid on old note.

The rule that the vicious element in a usurious contract survives in all its transmutations is confined to cases in which the obligor or promissor remains the same.

Notes drawn by G., whereon H. was accommodation endorser, were discounted at a usurious rate of interest by M. After a series of renewals, G.'s notes were given up to H., and H.'s own note was taken by M., repeatedly renewed, and finally sued upon. Although the evidence pointed most convincingly to a case of novation, the jury were instructed to give credit to H., the defendant, for the usurious interest paid by G.:

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Held, reversing the Court below, that M.'s claim against G. was extinguished when his notes were surrendered to H., and that the usurious interest paid by G. could not be set up as a defence by H.

Error to the Common Pleas of Lehigh County.

Assumpsit, by the Macungie Savings Bank against Levi S. Hottenstein on his note for $2100. Plea, "non assumpsit, set off, payment with leave, etc."

The facts as they appeared upon the trial before ALBRIGHT, P. J. are stated in the opinion of the Supreme Court as follows:—

"Four notes drawn by William Grim, one on the 16th of June, 1870, and the others on different dates in the year 1872, were discounted by the Macungie Savings Bank. They were renewed from time to time until January, 1875. Levi S. Hottenstein, the defendant, was the accommodation endorser of the four notes throughout the period during which they were renewed. At the close of the year 1874, or in the beginning of 1875, negotiations were entered into by the parties which resulted in the discounting by the bank of a note for $2100, drawn by Hottenstein and endorsed by Henry Brobst.

"The four notes of Grim were given up to Hottenstein, and are in his hands. The new note was renewed at intervals until the 30th of April, 1877, when the last of the series on which this suit was brought was given. As part of the transaction, a mortgage by Grim to Hottenstein for $2100 was put in evidence. Hottenstein testified, however, that he had no knowledge of its existence until the following summer. He then took it, and holds it now. Usurious interest had been demanded and received by the bank, not only on the series of notes drawn by Hottenstein and endorsed by Brobst, but on the series of Grim's notes which Hottenstein had endorsed. The jury were instructed on the trial to give credit to the defendant for the excess of interest paid both by Grim and Hottenstein."

Verdict for plaintiff for $1624.45, and judgment accordingly.

The plaintiff took this writ, assigning for error the instruction of the Court,

Edward Harvey and *C. I. Erdman*, for the plaintiff in error.

The surrender of the Grim notes and acceptance of the Hottenstein note constituted a novation.

2 Powers on N. & B. 203.
Byles on Bills, *307.
Dennis *v.* Williams, 40 Ala. 633.
Arnold *v.* Camp, 12 Johns. 409.
Manuel *v.* Mississippi R. C., 2 B. 198.
Slaymaker *v.* Gundacker's Ex's 10 S. & R. 75.
Hart *v.* Boller, 15 S. & R. 162.

As the contract with Grim was satisfied, Hottenstein stood in no position to avail himself of usury as a defence.

Bly *v.* Second Nat'l Bank of Titusville, 29 Sm. 453.

John Rupp (with whom was *John D. Stiles*), for the defendant in error.

Hottenstein's note was only taken as collateral security.

Shaw et al. *v.* First Ref'd Church, 3 Wr. 226.
Weakly *v.* Bell et al. 9 W. 273.
Bank of Penna. *v.* Potius, 10 W. 150.
Seltzer *v.* Coleman, 8 C. 493.
Dougherty *v.* Hunter, 4 Sm. 380.
Stone *v.* Miller, 4 H. 450.
Byles on Bills, *381.
Hoar *v.* Clute, 15 Johns. 224.
Bayard *v.* Shunk, 1 W. & S. 92.
McIntyre *v.* Kennedy, 5 C. 448.

As long as the original indebtedness which is tainted with usury exists, so long the taint of usury follows it. The original taint of usury attaches to all consecutive obligations, or securities, growing out of the original vicious transaction, and none of the descendent obligations, however remote, can be free from it if the descent can be traced. Neither the renewal of an old, nor the substitution of a new security between the same parties, can efface the usury, nor a further security, nor a guaranty given subsequently by a stranger. The statute of usury could be very easily evaded, if a security of a third person, taken a few days, or a few months after the loan in lieu of the borrower's would be valid.

Campbell *v.* Sloan, 12 Sm. 481.
Miller *v.* Irwin, 4 N. 376.
Power *v.* Nat'l Bank of Fairhaven, 35 Leg. Int. No. 194.
Overholt *v.* Nat'l Bank of Mt. Pleasant, 1 N. 490.
Kendig *v.* Linn, Am. Law Reg. Jan. 1879, p. 64.
Gardner *v.* Matteson, Id. Oct. 1878, p. 680.

May 5, 1879. THE COURT (after stating the facts, as above). Was the defendant entitled to allowance for the usurious interest Grim had paid? If the question had been submitted to the jury, they could scarcely have failed to find that the evidence made out a case of novation—the substitution of a new debt for an old one. The bank's claim against Grim was extinguished when his notes were surrendered to Hottenstein. The new note could not have been received as a collateral security, for there was no surviving debt to secure. The question of merger could not arise, for that takes place only where the debt is one, and the parties to the securities are identical (Jones *v.* Johnson, 3 W. & S. 276). Throughout the opinion in Campbell *v.* Sloan (12 P. F. S. 481) care was taken to confine the rule that the vicious element in a usurious contract survives in all its transmutations to cases in which the obligor or promissor remains the same. It was said that no payment by a changed form of security can be *bona fide* "by the same borrower to the same lender, even though it may be strengthened by the engagement of a new surety or guarantor." As to all essential points involved in this contro-

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versy, the defendant stands in precisely the position in which Andrews stood in Bly *v.* The Second National Bank of Titusville (29 P. F. S. 453). Andrews had been the accommodation endorser of a series of notes drawn by the Climax Mower and Reaper Company, in the discount and renewal of which the company had paid usurious interest to the bank. In the note in suit, drawn by Andrews and endorsed by Bly, a balance due by the company had been included. Judge TRUNKEY, then the President of the Common Pleas of Venango, said in entering the judgment: "On all the loans and discounts Andrews was an accommodation endorser, borrowed no money, paid no interest, and has no right of action on account of illegal interest paid by the company." The judgment was affirmed upon Judge TRUNKEY'S opinion. Miller *v.* Irwin (4 Norris, 376) was sent back for a trial because the defendant's affidavits alleged that she had given the note sued upon in renewal of a note drawn by her deceased father, of whose estate she was executrix, that she had not assumed or intended to assume any personal liability, and that she was induced to sign the note by the distinct and positive assurance of the officers of the United Savings Bank, that she would be bound only as executrix. That case rested on its own facts. Nothing contained in it had relevancy to any principle decided in Bly *v.* The Bank of Titusville, and nothing in it has relevancy to any principle requiring determination here.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by WOODWARD, J. PAXSON, J. absent.

Jan. '76, 138. Wm. M. M. March 28, 1879.

Tinicum Fishing Co. v. Carter.

Easement—Fishing right—Eminent domain—Right of State to bank and wall navigable rivers to prevent overflow—Consequential damages arising therefrom—Measure of damages.

Damages cannot be recovered for injury to a fishery by the erection of a bank and wall, under the authority of the State, to keep out the overflow of water.

Such damages are merely consequential, and the constitutional provision as to compensation does not apply.

In a suit for damages for injury to a fishery, it is sufficient to prevent recovery to show that the fishery was worthless; it is not necessary to show its complete obliteration.

Error to the Common Pleas of Delaware County.

Case, begun July 26, 1867, by P. B. Carter against the Tinicum Fishing Co. to recover damages for injury to a fishing right of which plaintiff claimed to own twelve-fourteenths.

This case had already been before the Supreme Court on three successive writs of error, the judgment having been each time reversed; see 11 Sm. 23 and 32, and 27 Sm. 310.

On the fourth trial of the case, before CLAYTON, P. J., the following facts appeared: The plaintiff claimed a right to draw nets in the Delaware River from Hart's Ferry to Darby Creek, about a mile in length, and to draw his nets out upon the shore: he rested his title upon user, and claimed that Jos. Carter had in 1830, when his will was proved, acquired such a title that he could devise it; under him the plaintiff claims. The claim for damages was by reason of the erection of a pier and of a wall and bank which interfered with the plaintiff's ability to draw his nets.

The defendant offered to show that the wall and bank complained of are part of the system of walls and banks erected by the Darby Meadow Company incorporated by the Acts of April 3, 1851, and March 2, 1854.*

Also that for more than six years prior to the beginning of this suit, the said company had had entire supervision and control of the wall and bank. Objected to. Objection sustained; exception (1st to 7th assignments of error).

The defendant further offered to show that in 1868 the fishery was utterly worthless. Objected to. Objection sustained; exception (8th assignment of error).

The defendant requested the Court to charge: (3) The defendant has a right to erect and maintain the wall mentioned in this case, and is not responsible for the damages alleged to have been done thereby to the fishing rights claimed by plaintiff. *Answer.* This point is negatived unless the jury shall find that the erection of the wall at this precise place was absolutely necessary for the protection of the fast land from encroachments from the river, and that the old bank when in proper repair was not sufficient for the purpose. (9th assignment of error.) (6 and 7) If the jury believe that the erection of the pier and the necessary effect thereof, or that natural causes, destroyed the fishery, their verdict must

* The Act of April 3, 1851 (P. L. p. 340), incorporating the Kingsessing and Tinicum Co. provides in its 11th section: "It shall and may be lawful for the said managers, their officers and agents, from time to time as they shall judge necessary to enter upon all and every part of the lands within the boundaries of the said Kingsessing and Tinicum Meadow District, and to inspect, build, make, alter, enlarge, repair, rebuild, support, and maintain all dams, banks, cross banks, walls, sluices, floodgates, footings, and other works and things necessary for the drainage, embankment, and protection of the said tract." . . . .

The Act of March 2, 1854 (P. L. p. 139), incorporating the Darby Meadow Co. extends to it almost all the provisions of the above Act.

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be for the defendant. *Answer*. This is affirmed, but the fact of the erection of the pier having rendered the fishery less profitable is not enough. It must be an absolute obliteration of all privileges owned by the plaintiff. Under all the evidence I do not think the plaintiff's right has been absolutely obliterated by the pier. If you shall find that at any time this fishery could be used with profit, then this point is not sustained. (11th and 12th assignments of error.)

In the general charge the Court said, *inter alia*, as follows: If you find from the testimony that this wall and bank interfere with Mr. Carter's right, as it had been previously enjoyed, then you may find for the plaintiff, provided you shall find the other question submitted to you in his favor; but if you shall find from the testimony that this fishery has been so completely obliterated by natural causes that it is for all time destroyed, then of course there can be no recovery—not destroyed for a season, not rendered less valuable, but completely obliterated, and swept out of existence. . . . You must recollect that the shore is liable to changes. The same causes which wash mud in, may wash it out again, and thus the fishery become valuable again. (16th assignment of error.)

Verdict for plaintiff for $420 and judgment thereon; the defendant took this writ assigning for error, *inter alia*, the ruling on evidence above given, the answers to defendant's points, and the portion of the charge above given.

Wayne MacVeagh (with him *Wm. Ward*), for the plaintiff in error.

It is now the settled law that every fishery in the navigable waters of this State exists subservient to the sovereign will of the State.

Tinicum Fishing Co. v. Carter, 11 Sm. 29.

It cannot be that the right of one man to a fishery is to ruin a great public work—is to prevent the erection and maintenance of this wall and allow the overflowing of a great area of land. It was certainly error to exclude evidence of the worthlessness of the fishery; future possibilities cannot constitute the measure of damages in this action.

A. Thompson (with him *P. B. Carter*), for defendant in error.

This case is now in the Supreme Court for the fourth time, and the small verdict rendered should not be disturbed.

May 7, 1879. THE COURT. This case has been so thoroughly discussed (11 P. F. S. 21, and 27 Id. 310), that little more remains to be said. While the main point now raised was not expressly decided by either of the former cases, the principles by which it must be disposed of were clearly pointed out. It was held in Tinicum Company *v.* Carter (11 P. F. S. 21), that the plaintiff below was not entitled to recover damages for the injury to his fishery resulting from the construction of a pier out into the river under a license from the Port Wardens of the city. "As the State," says Justice SHARSWOOD, "might have erected or caused to be erected the wharf and pier built by the defendants below, without any responsibility to the plaintiff for any consequential damages to his easement or right of drawing his seine on the shore, so neither is the grantee or licensee of the State liable for such damage. As to him it is *damnum absque injuria*." This ruling is equally applicable to the erection and maintenance of the stone wall which is the chief ground of the plaintiff's complaint. The Darby Meadow Company has the right under its charter to protect the meadows by the erection of walls to keep back the water, and if in doing so the plaintiff's rights of fishery are interfered with or even destroyed he is without remedy. His damages, if any, are merely consequential, and the constitutional provision that compensation shall be made to the owner of property taken for public use does not apply to such damages. (Monongahela Navigation Company *v.* Coons, 6 W. & S. 101). The Meadow Company having the right under its charter to construct the walls, it follows that if said wall had been constructed under the authority of, or license from the Company, as a part of its system, the defendants would have a right to avail themselves of such authority or license as a defense to this action. Further if the Meadow Company neither built nor authorized its construction, yet if after the wall had been erected, they adopted and maintained it and had continued to maintain it for more than six years prior to the commencement of this suit, it would be a complete answer to any claim for damages growing out of its construction.

It was certainly error to exclude from the jury evidence to show that in 1868 the fishery was utterly worthless. This error was cured to some extent subsequently by the admission of testimony of a similar character, and it is referred to now to avoid misapprehension in the future.

The Court below was called upon by the defendant's sixth and seventh points to say that if either by the erection of the pier or from natural causes the plaintiff's fishery had been destroyed the verdict must be for the defendant. The learned Judge affirmed these points with the qualification, that the plaintiff's right must be absolutely obliterated: and that the destruction of the fishery must "be full and complete, not partial." Herein we think the learned Judge fell into error. There was no question of the obliteration of plaintiff's right. That might continue long after its exercise had become impracticable or unprofitable. Nor was it a question of

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the absolute destruction of the fishery. It was certainly sufficient for the defendant to show that it was worthless. The plaintiff was suing for damages, and the destruction of a worthless thing could have done him no injury. If the fishery could no longer be fished to profit or advantage it was worthless. The fact that a few stray shad could be caught there occasionally amounts to nothing.

The 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 11th, 12th, and 16th assignments of error are sustained.

The judgment is reversed and a *venire facias de novo* awarded.

Opinion by PAXSON, J.

Quarter Sessions.

Q. S. of Mercer Co. August, 1879.

Commonwealth v. Eagles et al.

Criminal law—Plea of autrefois acquit—When not a sufficient bar—Want of jurisdiction of former tribunal—Constitutional law—Act of May 1, 1861, unconstitutional—Larceny.

To support the plea of *autrefois acquit*, in an indictment for larceny, the defendant must show affirmatively that in the former trial his liberty was in legal jeopardy. If it appear that the Court had no jurisdiction; or that there was clear error, which would necessarily have required a reversal of the sentence on a writ of error; or that an Act of Assembly under which the defendant was tried was clearly and palpably unconstitutional, the plea of former trial and acquittal is not maintainable in bar of a second indictment in the Quarter Sessions for the same offence.

The Act of May 1, 1861 (Purd. Dig. 396, pl. 85, and Id. note *e*), authorizing certain trials before a justice and a *jury of six* is clearly, palpably, and plainly unconstitutional, and an acquittal upon a trial for larceny before a justice and a jury of six, under that Act, is not pleadable in bar of a second indictment.

Alexander Eagles, R. C. Whann, and M. L. Whann were indicted for the larceny of a buffalo robe. Plea: not guilty, and also that defendants had formerly been tried and acquitted for the same offence.

A jury being sworn to pass on this last issue, the evidence showed that the defendants had formerly been tried for the same offence before a justice of the peace and a jury of six persons, and duly acquitted, said trial being had under the local Act of May 1, 1861, extended by subsequent Acts to various counties, which provides, *inter alia*, as follows:—

Sect. 1. The several justices of the peace of the counties of . . . . are hereby authorized to hold monthly courts with jurisdiction to hear and determine, in the manner hereinafter provided, the several offences and misdemeanors, etc. . . . .

Sect. 3. If the defendant shall plead not guilty to the offence charged, *and shall at the same time signify his determination to be tried by a jury of six*, before the said justice, the justice shall make an entry to that effect upon his docket, and . . . . the justice shall proceed to the trial of the cause, etc. . . . . but if the defendant shall not signify his or her determination to be tried before said justice, the justice shall proceed with the said defendant as if this Act had not been passed. (Purd. Dig. 396–97.)

After the evidence was closed, and the legal questions involved were argued by counsel, the Court (MCDERMITT, P. J.) charged the jury as follows:—

Gentlemen of the jury: The issue you are trying is: Were the defendants formerly and legally tried and acquitted of the crime for which they are now indicted? The evidence, if believed, and there is none contradicting it, is that they were tried and acquitted of the same offence before Thomas J. Wright, a justice of the peace, and a jury of six.

This trial was had under what is commonly known as the Erie and Union County Act, of May 1, 1861, which was extended to this county by the Act of the 30th of March, 1864.

Under the plea of a former trial and acquittal of the charge of larceny, the defendant must affirmatively show that in such trial his liberty was in legal jeopardy. By this is meant, that if the pleadings were all right, and he had been convicted and sentenced to pay a fine, or to undergo an imprisonment, he could not have had a reversal of the proceedings by certiorari, or writ of error, for want of jurisdiction in the Court trying him. No man's liberty can be legally said to have once been in jeopardy, where the sentence, must, on a writ of error, have been reversed for want of jurisdiction in the Court imposing it.

If the Court trying the accused has no jurisdiction over the offence with which he is charged, his consent cannot confer it. A case was tried in this Court before me, where one of the jurors during the trial fell sick, and the defendant, in open court, consented that he might be tried by the other eleven. But when they found him guilty he moved for a new trial on the sole ground that he was not bound by his consent to be tried by eleven jurors. On the authority of the case of the Commonwealth *v.* Shaw (Pittsburgh Reports, 492), and its cited cases, the Court, much against its will, granted the new trial. In this case the Court, *inter alia*, says: "No consent can alter or modify the known,

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certain, uniform, prescribed rules of trial in criminal cases. To try with eleven or thirteen jurors is to create a new tribunal unknown to the Constitution or law. This no counsel, or citizen, or court, or all three can do."

That larceny was a crime only triable at common law by a jury of twelve, and this before the adoption of any of our State constitutions, no lawyer controverts. The Constitution of 1776 declared that "trials by jury shall be as heretofore." The Constitution of 1790, and the amended ones of 1838 and 1874, adopted substantially the same provision in relation to trial by jury. It was ably argued, that the Act under which this trial was had was in force when the present Constitution was adopted, that the crime of larceny, where the stolen property is of less value than ten dollars, may now be constitutionally tried by a justice of the peace and a jury of six. We cannot agree to this position. Whatever crime could, under the Constitution of 1776, only be constitutionally tried by a jury of twelve, can only be constitutionally tried, under the Constitution of 1874, by a jury of twelve. And if so, the Legislature cannot create a tribunal of a less number of jurors to try any person accused of such crime. No trial should, or does, conclude one party unless it does the other. Had this former trial resulted in a verdict of guilty, and a sentence of imprisonment, the defendants could, on a writ of error, have reversed the judgment on the ground of want of jurisdiction in the Court trying them, unless their consent to be so tried conferred it. That consent confers jurisdiction, is not claimed in argument by the defendants' counsel. If the trial, whether the defendants were convicted or acquitted, did not conclude them, as well as the Commonwealth, they have never been once in jeopardy.

I have no hesitation in pronouncing the Act under which this trial was held, in so far as it constitutes a justice and a jury of six a court for the trial of the crime of larceny, "clearly, palpably, plainly" unconstitutional. And if so, this trial was a nullity.

Concede that a trial might be had under this Act before a justice of the peace and a jury of six, which would conclude both parties, was this such a trial? Every man is presumed to know the law. Under the Act only the owner of the robe alleged to have been stolen, or some one acting for him, could make the oath or information, which would give such justice and jury jurisdiction of the case. This the defendants were bound to know. Says the Act: "The complaint or information shall be fully read aloud in the hearing of the defendant, or party accused." This was done by the justice in this case. If the information was not made by the owner of the robe, or by A. A. Williams, acting for him, the proceedings were *coram non judice*, and therefore a nullity, having no more legal vitality than if they had been had before any seven citizens of the county. There is no evidence whatever to show that Williams, the informer, in instituting the prosecution, had any authority to act as the agent of the "aggrieved party," the owner of the robe, Mr. Huey, but the evidence is just the reverse.

In the opinion of the Court, said trial was unconstitutional and void; and even if said Act were constitutional, the prosecutor not being "the party aggrieved nor acting for him," the justice and the jury had no jurisdiction of this offence. The defendants were, therefore, never once in jeopardy and must plead over to the indictment.

The jury found that the defendants were not formerly and legally tried and acquitted of the offence for which they were indicted, and judgment of *respondeant ouster* was entered on the verdict.

Common Pleas—Law.

C. P. No. 1. June 10, 1879.

Lennig v. Meyer.

Mortgage—Usury—Sheriff's sale—Distribution of proceeds—In the distribution of the proceeds of a sale of mortgaged premises under a first mortgage, a second mortgagee is entitled to dispute the lien of the first, and the amount due, on the ground of usury—Greene v. *Tyler, 3 Wright, 361, and Bachdell's Appeal, 6 Sm. 386, commented on.*

Exceptions to auditor's report.

The defendant had executed two mortgages on his premises, the first to plaintiff in the sum of $7000, and the second to the Twentieth Ward Building and Loan Association, in the sum of $1600. After the death of the mortgagor proceedings were commenced to foreclose the first mortgage. Judgment was obtained for want of an appearance, on two returns of *nihil habet*, and damages assessed at $7536.35. Under this judgment the premises were sold at sheriff's sale, and purchased by plaintiff for $8400.

The second mortgagee having notified the sheriff to pay the money into court, the sheriff, at the instance of plaintiff, made a special return, setting forth that the purchasers appearing by the

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searches to be first lien creditors for $7624.25, he had exchanged receipts with them for that amount, and that the balance of purchase money, $775.75, was no more than sufficient to pay costs and taxes. The second mortgagee filed exceptions to the sheriff's return, and the questions arising thereunder were referred to an auditor (E. Greenough Platt).

At the audit, it was admitted that but $6720 had been paid by the first mortgagee, the remaining $280 being usury; in other words, that the mortgage was a "bonus" mortgage at four per cent. discount; and the plaintiff's right to recover this $280 became the sole question in dispute. The auditor, after stating the facts, reported as follows:—

"The sole question, therefore, is whether a second mortgagee can, without any allegation of fraud (and of this there is no pretence here) avail himself of a defence on the ground of usury, which would have been open to the defendant before judgment.

"There can be no doubt that the case of Greene *v.* Tyler (3 Wr. 361) expressly rules this question, unless it is overruled by subsequent decisions. In that case it was decided that a subsequent mortgagee could contest the amount due on a prior mortgage, on the ground of usury; and in Bachdell's Appeal (6 P. F. Smith, 386), where the question had been raised in the Court below, as between judgment creditors, this case seems to have been considered as decided correctly. No appeal, however, was taken by the first judgment creditor in Bachdell's Appeal to the decision of the Court below, as is remarked by PAXSON, J., in the appeal of the Titusville Bank (6 WEEKLY NOTES, 153). The decision in Bachdell's Appeal was contained within five lines, and the case was decided by the Court below upon a totally different point, viz., that interest cannot be claimed by a judgment creditor after the date of a sheriff's sale. Greene *v.* Tyler was decided in 1861, upon a sale made in 1856, but the reasoning of his honor, Justice WOODWARD, would seem to have been applicable to a case subsequent to the Act of May 28, 1858, as well as to one prior thereto.

"In Verner *v.* Carson (16 P. F. Smith, 440) it was, however, substantially decided that a purchaser taking the property subject to an usurious lien, could *not* contest the amount of the judgment. He had no equity against it, because it was immaterial whether he paid his purchase-money to the vendor, or in satisfaction of the judgment. The principle settled in this case is recognized by SHARSWOOD, J., in Hopkins *v.* West (2 Norris, 109). He states there further a well-recognized rule, that as to the validity of the judgment there is no difference in legal effect between a judgment confessed or for want of an appearance or plea, and a judgment on the verdict of a jury.

"In Good *v.* Grant (26 P. F. Smith, 52) it was held that the payment of interest which was in excess of the legal rate, was not necessarily fraudulent, and creditors could not recover such excess, the debtor himself not being entitled to recover it.

"In Miners' Bank *v.* Roseberry (31 P. F. Smith, 309), the doctrine was extended still further. Money had been borrowed on usurious interest, a bond given and judgment entered thereon; the judgment debtor was subsequently adjudicated a bankrupt, the land sold by the assignee, and the purchaser contested the amount of the judgment on the ground of usury; it was held that he could not do it. The opinion of Mr. Justice MERCUR, in considering the question, really settles the present case. He says that the Act of May 28, 1858, applies only to the parties to the transaction, it being at the election of the borrower whether he will withhold the excess or recover it within the time limited; that a subsequent judgment creditor cannot set aside a judgment merely because it is erroneous; that payment of usury is not necessarily fraudulent as to creditors, and that whenever the usurious contract is intended to defraud creditors, or when the circumstances of the debtor are known to be such that it can be reasonably presumed that this will be the natural effect, creditors then have the right to postpone the excess of interest; which practically means that when there has been any act, or contracts, or agreements, which would hinder, delay, or defraud creditors, they would be fraudulent. The fact that the Act of 1858 made a radical change in the law is not only adverted to, but it is declared that 'The statute prefers to deal only with the parties to the proceedings. The debtor may elect whether he will withhold the excess or recover it back within the time limited, *failing to act in time he has no remedy*.' Greene *v.* Tyler (*supra*) was cited, but evidently considered not a controlling authority, because it was before the Act of 1858.

"In Price's Appeal (3 Norris, 141) judgment was entered upon a bond for $8000, conditioned for the payment of 'all moneys borrowed from said creditor, or which may from time to time be borrowed from the same, lawful money as aforesaid, at or upon the time when the same shall become due.' Before the auditor certain promissory notes were produced as evidence of the amount due under the condition. It was held that as the judgment did not show on its face the amount due, and there was no lien for a special sum, but resort must be had to proof outside of the judgment, a subsequent lien cre-

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ditor had the right to object that the amount attempted to be proved included usurious interest. The authority of Verner *v.* Carson, Good *v.* Grant, and Miners' Bank *v.* Roseberry was expressly recognized in this case.

"In Titusville Bank Appeal (6 WEEKLY NOTES, 153) the cases which established formerly the doctrine that a judgment regular on its face cannot be attacked collaterally except for fraud or collusion, are carefully reviewed, and the doctrine applied to the case of usury, and it is well shown that, in any event, since the Act of May 28, 1858, it is perfectly lawful for a man to make an usurious contract, and that in doing so he commits no moral wrong. The Act, however, gives him the privilege of recovering it back in six months if it has been paid; the decision says he can deduct it from the amount to be recovered. This decision seems to be conclusive. In the opinion by PAXSON, J. the cases of Greene *v.* Tyler and Bachdell's Appeal are reviewed, and it is stated that in the former there was a distinction in the fact that the objecting creditor had a specific lien. Bachdell's Appeal is dismissed with the remark that it was decided, if decided on that point at all, on the authority of Greene *v.* Tyler. It is, however, shown, in the concluding part of the same opinion, that whether or not Greene *v.* Tyler was well decided, it does not apply to cases which have arisen since the Act of 1858, and that the only ground for attacking a recorded lien is fraud or collusion, or perhaps usury, which would amount to fraud or collusion. The latter is not pretended in this case.

"It was contended, however, that a second mortgagee stood in a different position from a judgment creditor. Two grounds were suggested for this: (1) that he was a purchaser, and (2) that he was mortgagee of the equity of redemption, and therefore had the same right to redress that the debtor had. The answer to the first objection is the decision of Verner *v.* Carson and Miners' Bank *v.* Roseberry (*supra*), where it was substantially held that a purchaser could not object to the lien of a judgment, because it made no difference to him whether in purchasing the property he paid the money to the lien creditors or to the debtor as part of the purchase-money for the property. As to the second objection, your auditor is of the opinion that whatever might be the rule if the second mortgagee should seek to redeem *before* judgment, under the cases he is concluded by the judgment, unless he can show such fraud or collusion as would bring it within the Stat. 13 Eliz. c. 5. (Dougherty's Estate, 9 W. S. 189; Thompson's Appeal, 7 P. F. Smith, 175.)

"The auditor can, therefore, see no reason why a second mortgagee can attack a prior lien if a judgment creditor could not."

The auditor therefore awarded to the plaintiff the full amount of his judgment; and to this ruling the second mortgagee filed exceptions.

W. Gorman, for exceptant.

The Act of June 16, 1836, gives "any person interested" the right to contest any fact controlling the distribution.

Act of June 16, 1836, Purd. Dig. 656, § 108.

This has been frequently held to include ordinary judgment creditors.

Smith *v.* Reiff, 8 Har. 364.
Reigart's Appeal, 7 W. & S. 267.
Shulze's Appeal, 1 Barr, 251.
Johns *v.* Erb, 5 Id. 232.

And, if a judgment creditor has this right, *à fortiori*, should a second mortgagee who has a specific lien on the thing sold. And his right extends to showing that the first mortgagee is not entitled to recover the full amount of his judgment by reason of the usurious nature of the mortgage contract.

Greene *v.* Tyler, 3 Wr. 361.
Bachdell's Appeal, 6 Sm. 386.

Especially should this be so where, as in the present case, his lien attaches before judgment is obtained and damages are assessed on the first mortgage.

The cases relied on by the auditor are not strictly in point.

H. Wharton, contra.

C. A. V.

July 7, 1879. THE COURT. The question raised by these exceptions is whether it is competent for a second mortgagee to question the validity of the first mortgage on the ground of usury. The facts in this case are not in dispute. It was admitted before the auditor that the first mortgage, which is for $7000, was taken from the mortgagor at a discount of four per cent., or $280 less than the face of the mortgage. It was also shown that the second mortgage was recorded and became a lien on the property before judgment was obtained on the first mortgage. The auditor says in his report: "There can be no doubt that the case of Greene *v.* Tyler (3 Wright, 361), expressly rules this question, unless it is overruled by subsequent decisions." In this we agree with him; but differ from him in thinking that it is overruled by any of the subsequent cases. That it has not been expressly overruled is clear from the fact that none of the subsequent cases proceeded on the same state of facts, and our duty to the Supreme Court and the value of the doctrine *stare decisis*, alike require that we shall adhere to what has been authoritatively decided.

The principles of Greene *v.* Tyler were adopted in Bachdell's Appeal (6 P. F. Smith, 386), which was a contest between judgment creditors.

In Verner *v.* Carson (16 P. F. Smith, 440), it was held that a purchaser of real estate bound by

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a judgment which was usurious, had no such equity as entitled him to go behind it in order to contest the amount of the plaintiff's claim, as it was immaterial to him whether the purchase-money was paid to the vendor or went in satisfaction of a judgment against him.

Bank *v.* Roseberry (31 P. S. Smith, 309), which was principally relied on by the auditor, was the case of a purchaser questioning an usurious judgment. MERCUR, Justice, expressly distinguishes that case from Greene *v.* Tyler, by saying that the lien of the second mortgage in Greene *v.* Tyler attached before judgment was confessed on the first mortgage. In that respect Greene *v.* Tyler and this case are alike, with this difference, that in Greene *v.* Tyler judgment was confessed, and in this case the judgment was upon two *nihils* for want of an appearance. Whatever rights the second mortgage creditor had, had attached before the judgment on the first mortgage. Besides an action on a mortgage is a proceeding *in rem;* and any one interested in the mortgaged premises has a right to intervene *pro interesse suo*, with the same effect, and, in some instances, with greater effect than the mortgagor, because he might be estopped by previous acts or declarations. We rest our decision of this case, however, on the authority of Greene *v.* Tyler (3 Wright, 361), which we do not recognize as having been overruled by any of the subsequent cases. It has simply been distinguished as having been decided on transactions prior to 1858, the date of our present usury law, although it is manifest from reading the opinion of WOODWARD, Justice, in that case, that he decided it in view of the Act of 1858. In the appeal of the Second National Bank of Titusville (6 WEEKLY NOTES, 153) PAXSON, Justice, said, it is not essential to question the soundness of Greene *v.* Tyler, and conceded that it was rightly decided to the extent of its own facts.

Exceptions sustained.

Opinion by PEIRCE, J.

[NOTE.—The question of the power of an auditor appointed to distribute a fund to inquire into the validity of a usurious judgment, regular upon its face, does not appear to have been raised or decided in Bachdell's Appeal (6 Sm. 386). It is true that the reporter states in the syllabus (2) that "An auditor reported that judgment creditors could question the validity of a prior judgment on the ground of usury, and reduced a usurious judgment accordingly. The Court below, *on exceptions*, confirmed the report in this particular." It will be observed, however, that this ruling of the auditor was favorable to the *parties appellant*, from which it would naturally be inferred that the question as to the auditor's power was not presented for the review of the Supreme Court. An examination of the paper-book of the appellant confirms this, as the following copy of the "Assignments of error" will show, viz.:—

"The Court erred (1) in decreeing to Crawford & Byers the sum of $4404.18. (2) In decreeing to Crawford & Byers interest on the amount loaned from July 14, 1866, the date of the execution of the bond to them by Bachdell, to July 14, 1869. (3) In decreeing to Crawford & Byers the amount of the book account of said Crawford accruing after the entry of their judgment against said Bachdell."

The paper-book further discloses the fact that, strictly speaking, the Court below also should not be taken to have approved this ruling of the auditor. In that Court the appellants excepted to "so much of the auditor's report as allows 5 per cent. commission to the attorney in the case of Byers & Crawford *v.* Bachdell for the following reasons, etc.," while the only exception filed in the Court below in behalf of Byers & Crawford (the appellees in the Supreme Court) was as follows: "And now, to wit, July 23, 1867, Samuel Plumer, attorney for Byers & Crawford, excepts to so much of auditor's report reducing the claims of said Byers & Crawford, for the following reasons, viz.: This was not a loan by Byers & Crawford to defendant upon which more than legal rate interest was charged, but was the purchase of a security, which was so understood and agreed to by defendant." It will be seen that this exception brought the matter of the reduction of the Byers & Crawford judgment to the notice of the Court below *on the merits solely*, as a question under the Usury Act of 1858, and does not raise the question of want of authority in the auditor to inquire into the validity of the judgment.

Judge PAXSON, in reviewing Bachdell's Appeal in Appeal of Second Nat. Bank of Titusville (4 Nor. 528; S. C., 6 WEEKLY NOTES, 153), impliedly indicates an opinion that the syllabus is not warranted by the decision; he seems to refer to the case as having arisen prior to the Act of 1858, whereas it was decided at the Oct. and Nov. Term, 1867. In Miners' Trust Co. Bank *v.* Roseberry (31 Sm. 312; S. C., 3 WEEKLY NOTES, 13), the Court below, and Justice MERCUR, who delivered the opinion of the Supreme Court, fail to notice the error in the report of Bachdell's Appeal.

In Greene *v.* Tyler the question came up on a feigned issue, and the power of an auditor was not involved. Price's Appeal (3 Nor. 141) is distinguished, for the reason that the judgment there objected to before the auditor was not liquidated in amount.

In the Appeal of Second Nat. Bank of Titusville (*supra*) it was held that usury, under the Act of 1858, is not *per se* a fraud upon creditors; and that it is only where a judgment has been fraudulently given by collusion between the debtor and the plaintiff in such judgment, for the purpose of hindering and delaying creditors, that the defrauded creditors may impeach a judgment before an auditor. Thompson's Appeal (7 Sm. 175) is to the same effect.

In the very recent case of Wheelock *v.* Wood (*ante* 319), the auditor refused to reduce a prior judgment on the ground of usury, and the question was subsequently tested by a *feigned issue*. The Supreme Court, affirming the ruling in Appeal of Second Nat. Bank of Titusville, held that no sufficient facts were shown to warrant the awarding of an issue to try the validity of the judgment.

In the Common Pleas case of Lennig *v.* Meyer, above reported, it is expressly stated by the auditor that there was no pretence or allegation of fraud; and it would therefore seem that, entirely apart from the legal merits, the *auditor* had no power to inquire into the validity of the alleged usurious judgment. This point however, does not appear to have been raised or considered; it is not alluded to either in the auditor's report or in the opinion of PEIRCE, J.]

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, SEPT. 18, 1879.* [No. 21.

Supreme Court.

Jan. '78, 189. Feb. 3, 1879.

Philadelphia and Reading R. R. Co. v. Adams.

Ships and shipping—Collision—Duty of a steamer to a row-boat in her course—Applicability of the "Steering and Sailing Rules" to row-boats—Presumption as to the condition of a row-boat in the channel—Practice—Jury—Negligence—Rule of "inevitable accident" as laid down in Beach v. *Parmeter, 11 Harris, 196—Measure of damages.*

A row-boat is not within the protection of the "Steering and Sailing Rules" embodied in the navigation laws of the United States.

The "Leopard," one of the Philadelphia and Reading Railroad Co.'s steamers, in her course down the river Delaware, collided with a row-boat in the channel, capsizing the boat, in which there were five men, two of whom were drowned. The steamer, although she saw the row-boat several hundred feet before the point of collision, did not change her course or stop, and there was a conflict of evidence as to whether any signal was given by her. The men in the boat made no effort to avoid the steamer until she was within sixty yards, when they tried to pull for the shore, but abandoned the effort when within three yards of the steamer and jumped overboard:

Held (reversing the judgment of the Court below), that the captain of the steamer passing down the channel had the right to assume that the boat was equipped in the usual way, that the ordinary precautions would be taken, and the ordinary movements made, and that up to the moment when the captain had reasonable ground to apprehend a collision, he was not bound to change his course or to take other precautions to protect the boat from a danger entirely practicable for the crew of the row-boat to avert.

Held further, that the adoption of the rule as laid down in Beach *v.* Parmeter (11 Harris, 196), "that the accident which will excuse the party who committed the injury must be such inevitable accident as human foresight under the circumstances could not have prevented," although proper under the circumstances of that case, would, as a formula for the instruction of the jury, prove to be unsafe.

Held further, that it was error to leave to the discretion of the jury the assessment of damages without the application of any rule of law.

Error to the Common Pleas No. 3, of Philadelphia County.

Case, by Lena Adams against the Philadelphia and Reading Railroad Company, to recover damages for the drowning of her son, Frank Adams, caused by the alleged negligence of the defendant. Plea, not guilty.

Upon the trial, before FINLETTER, J., the following facts appeared: About 4 o'clock in the afternoon of July 3, 1876, John Krause, John Trapp, August Keenly, Casper Werner, and Frank Adams took a boat at Mifflin Street wharf to go to the "Poplars," on the Jersey side, to take a swim. The boat was a skiff with two oars and a paddle, and hard to manage. While they were crossing the river two of the men went in to swim. Meanwhile the "Leopard," one of the defendant's colliers, which had left her berth after 4 o'clock, was going down the river with the tide in her favor. When the men in the boat first saw the steamer they were in the middle of the river near the salt works, about 200 yards from her, and she was coming straight towards them. They then went for Trapp, whom they took into the boat, but did nothing to avoid the steamer until she was within 60 yards, when they tried to pull for the Philadelphia side. When the steamer came within two or three yards all of the men jumped overboard except Krause, who was knocked overboard by the collision, the steamer striking the boat with her starboard bow and capsizing her. Trapp and Keenly recovered the boat, but before they could go to their assistance Werner and Adams were drowned. After the collision the steamer threw a rope to Krause and hauled him aboard, but did not immediately stop. There was a conflict of evidence as to the behavior of the steamer before the collision. The testimony on the part of the plaintiff was that there was no man at the wheel in the pilot-house, that no whistle or any other signal of approach was given by the steamer, nor was any effort made to avoid colliding with the boat. On the part of the defendant the officers of the steamer testified that the captain and first mate were at the wheel, that when the steamer was within 500 feet from the boat the whistle was blown and the engines reversed, but that owing to a strong ebb tide, the steamer's momentum was so great that it was impossible to stop before reaching the boat, which was improperly managed.

The plaintiff submitted, *inter alia*, the following points:—

(6) The accident which will excuse the party who committed the injury must be such inevitable accident as human foresight under the circumstances could not have prevented. *Answer.* Affirmed. Exception. (Fourth assignment of error.)

If the steam vessel had a proper lookout and had a man at the wheel, they were bound to have seen the row-boat in their path, and if they did not see it, and continued on their course without changing it or stopping the vessel, it is evidence of negligence on her part. *Answer.*

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I affirm that, if the jury find the facts mentioned contributed to the accident. Exception. (Sixth assignment of error.)

If the steamer did see or ought to have seen the row-boat in time to avoid the collision, and did not avoid it, she was guilty of negligence, and the verdict should be for the plaintiff. *Answer.* I affirm that. Exception. (Eighth assignment of error.)

If the steam vessel did see, or could, by a proper lookout, have seen the row-boat a square off, and if that was distance sufficient to allow her to change her course, or stop so as to avoid the collision, she was bound to do so, and, failing to do so, she was guilty of negligence. *Answer.* Affirmed. Exception. (Ninth assignment of error.)

The effort to stop the steamer, if not made soon enough to be successful, if she saw or ought to have seen the row-boat, will not excuse such negligence. *Answer.* Affirmed. Exception. (Tenth assignment of error.)

The defendant asked the Court to charge, *inter alia:* If the jury believe that when the boat, in which the deceased was, was first seen to be in the steamer's way, the captain of the steamer whistled and changed his helm, and successively stopped and reversed its engine, this was all he was bound to or could do to avoid collision, and although the steamer, whether from her momentum or from the tide, may not have been able to have stopped still before it reached the boat, the defendant's servants were not for that reason negligent, and your verdict should be for the defendant. *Answer.* I refuse so to charge you. Exception. (Thirteenth assignment of error.)

That it was the duty of those in charge of the row-boat to keep out of the steamer's way, and as the evidence shows that those in charge of the boat in which Adams was did not do so, the plaintiff cannot recover. *Answer.* Gentlemen, I refuse to charge as requested. (Sixteenth assignment of error.)

In the general charge the Court said, *inter alia:* "Therefore, after all, this question of compensation is more a matter, as far as the jury is concerned, of common sense, of common observation of men and things, as they exist around us, than it is of law. It would be impossible to fix any rule or standard by which damages of this kind could be estimated; they depend upon conditions of life, they depend upon your understanding of life, which the jury will know about, and as perfectly, and are as capable of understanding, no doubt, as any lawgiver or any one whose duty it is to instruct the jury on the purposes of law. Whatever it may be, it should be governed by a disposition to do right, to arrive, if possible, at a fair compensation, and to do right between these parties, just as each of us would expect under like circumstances, if our cause should be viewed and judged by a jury."

Verdict and judgment for the plaintiff for $2700. The defendant took this writ, assigning for error the answers to the plaintiff's and defendant's points and the charge of the Court.

Thomas Hart, Jr., for the plaintiff in error.

The affirmance of the plaintiff's sixth point misled the jury, and is the enunciation of a rule from which no defendant could escape, and which it is submitted is not law. It is admitted that, in cases of collision upon highways, either upon land or water, the defendant is liable for the negligence of servants. But it is not law that the defendant is excusable only when the occurrence is an inevitable accident which human foresight under the circumstances could not prevent. The definition of "inevitable accident," in Beach *v.* Parmeter (11 Harris, 196) is too narrow.

In collision "inevitable accident" is that which a party charged with the damage could not possibly prevent by the exercise of ordinary care, caution, and maritime skill.

The Virgil, 2 W. Rob. 205.
The Marpesia, L. R. 4 P. C. 213.

"If only such acts of God as neither human effort could avert, nor human foresight anticipate, can excuse carriers, then at the present day, a carrier cannot be said to be excused in any case that is not a miracle. And the same objection exists to the use of the term 'inevitable accident.'"

Wharton's Law of Negligence, § 557.

The proposition that a steamer holding her course upon the river is bound under all circumstances to keep out of the way of a rowing-boat is inapplicable, because it is an attempt to apply to row-boats the admiralty rules governing steam and sailing vessels.

There is no statutory obligation upon a steamer to keep out of the way of a row-boat. Rules 20 and 21 of the U. S. Revised Statutes, in regard to collision apply to steam and sailing vessels. The reason of the rules rests upon the inequality of the vessels. But a row-boat has as good if not greater means of locomotion than a steamer. It is not dependent upon the wind and not within the rules as to sailing vessels.

Trinity House Rules of 1840.
1 Parsons's Shipping and Admty. 584.
The City of London, 4 Notes of Cases, 40.

It is now well settled that a steamer is not bound under Rule 21, requiring steamers, when approaching another vessel so as to involve the risk of collision, to slacken their speed, to stop or reverse, until some danger of collision is apparent.

The Free State, 1 Otto, 200.
The Scotia, 14 Wall. 170.

The governing principle is that a smaller and more readily managed boat is bound to turn out

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and avoid a larger and more unwieldy vessel. There is an analogy in the rules governing the passage of vehicles upon a highway upon land.

Beach *v.* Parmeter, 11 Harris, 196.
Ince *v.* East Boston Ferry Co. 106 Mass. 149.
Grier *v.* Sampson, 3 Casey, 183.

The steamer was entitled to keep her course, because she was in the exercise of the superior right of navigation.

Cobb *v.* Bennett, 25 Sm. 326.

An apposite illustration is that of a train approaching a crossing. The engineer is entitled to the presumption that the traveler will cross the track and be out of the way when the train passes.

Pierce Archer, Jr., and *James D. Lee*, for the defendant in error.

The plaintiffs were not trespassers. They were upon the highway, where they had a right to be, and upon the approach of the steamer they made every exertion men could make to avoid the steamer. The steamer is answerable because she did not change her course, slacken her speed, or stop, or do anything to avoid the collision. The law exacts from steamboats, which have means to avoid injury which other boats do not possess, exertions proportionate to their powers.

Holmes *v.* Watson, 5 Casey, 457.

Steamers are held to the strictest care possible when in neighborhood of sailing or smaller vessels.

Steam tug Sampson, 3 Am. Law Reg. 337.

The accident was not "such as the use of human foresight could not have prevented."

Beach *v.* Parmeter, 11 Harris, 196.

Meeting a sailing vessel in such a direction as to involve risk, it is the steamer's duty to keep out of the way, and nothing but inevitable accident, or the conduct and movement of the ship can repel the presumption that the steamer was negligent, arising from the fact of collision.

The Scotia, 14 Wall. 181.

There is no analogy between this case and that of a railway car on its own track. The railway train has the right of way. The steamer has not.

Penna. R. R. Co. *v.* Morgan, 1 Norris, 137.

May 5, 1879. THE COURT. A collision occurred in the afternoon of the 3d of July, 1876, between the steam-collier "Leopard," belonging to the defendants below, and a row-boat, in which there were four young men, of whom Frank Adams, the son of the plaintiff below, was one. The steamer was going down the Delaware river on an ebb tide, at a rate of speed variously stated as from eight to twelve miles an hour. The boat was near the middle of the river, between the city of Philadelphia and the New Jersey shore, when the steamer approached it. Two of the men in it, one after the other, went into the water to swim. John Trapp was swimming when the steamer was first seen. From this point the testimony was conflicting. That of the plaintiff was to the effect that when the steamer was within fifty or sixty yards of the boat the men in it tried to get away, but could not do so on account of the tide. That of the defendants tended to show that no effort at all was made to move from the channel in which the steamer was coming down. It would seem that the boat was managed with difficulty, and that there was a deficiency of oars. As the steamer reached or was about to reach them, the men jumped into the water, and Adams and Casper Werner were drowned. There was testimony that the boat was abandoned at the instant of the collision, and there was testimony that it was abandoned when the steamer was ten or fifteen feet distant. This suit was brought by the plaintiff to recover damages for the injury caused her by the death of her son. The exigencies of this judgment do not require that the facts developed should be analyzed or even detailed. The discussion will be confined to what appear to be the vital legal points raised on the trial and argued here.

In the second point of the counsel for the defendants, the Court were asked to charge: "If the jury believe that when the boat in which the men were was first seen to be in the steamer's way, the captain of the steamer whistled and changed his helm, and successively stopped and reversed his engine, this was all he was bound to do, or could do, to avoid collision, and although the steamer, whether from her momentum or from the tide, may not have been able to stop still before reaching the boat, the defendants' servants were not for that reason negligent, and the verdict should be for the defendants." The point was peremptorily refused. It was defective perhaps in the absence of a single qualification. The plaintiff had alleged in part of her case that the captain had not kept an adequate lookout. In connection with the answer to this point, it is necessary to examine the grounds of other errors assigned by the defendants. The jury were instructed in the answer to the plaintiff's tenth point, that "if the steam-vessel had a proper lookout, and a man at the wheel, they were bound to have seen the sailing-boat in their path, and if they did see it, and continued on their course without changing or stopping the vessel, it is evidence of negligence on their part," subject to the qualification, "if the jury," in the language of the Court, should "find the facts mentioned contributed to the accident." In answering the plaintiff's twelfth point, the Court ruled that "if the steamer did see, or ought to have seen, the rowing-boat in time to avoid the collision, and did not avoid it, she was guilty of negligence, and the verdict should be for the plaintiff." The thirteenth point, that "if the steam-vessel did

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see, or could by a proper lookout have seen, the row-boat a square off, and if that was distance sufficient to allow her to change her course, or stop, so as to avoid collision, she was bound to do so, and failing to do so, she was guilty of negligence;" and the fourteenth point, that "the effort to stop the steamer, if not made soon enough to be successful, if she saw or ought to have seen the row-boat, will not excuse such negligence," were also affirmed. The assignments in which these rulings are specified present the most prominent question to be considered. The fifteenth assignment alleges error in the refusal of the Court to affirm the sixth point of the defendants, "that it was the duty of those in charge of the row-boat to keep out of the steamer's way," and as the evidence showed "they did not do so, the plaintiff could not recover." The point assumed the ability of the crew of the boat to move. The plaintiff alleged that the men were not able to get out of the channel; that the captain of the steamer ought to have regarded this inability, and that it was for the jury to say whether the boat could have been moved or not.

Were the men in the boat within the protection of the "Steering and Sailing Rules" embodied in the navigation laws of the United States? That as between a steamer and a sailing-vessel the steamer shall give way and the sailing-vessel shall keep its course, and that as between sailing-vessels, one that is going free shall give way to one that is close-hauled, are regulations corresponding with well-settled regulations for the use of public highways on the land. But does a steamer owe any such duty to a row-boat? As usually equipped and manned, such a boat is moved with greater facility, and is more within the control of the crew than the steamer itself. The collier of the defendants was in the channel of the Delaware for the purposes and in the prosecution of a lawful business, and had the right, in the absence of conditions creating duties to others, to maintain its course. Ordinarily the crew of a row-boat can remove it from the track of danger by a movement or two of its oars, and in scarcely an appreciable interval of time. The captain of a steamer passing down the channel would have the right to assume that the boat would be equipped in the usual way, and that the ordinary precautions would be taken and the ordinary movements made. A crippled condition of the boat, inadequate appliances, or the inability of the crew to escape collision, shown to have been known or apparent to the captain, would change his relations and responsibilities at once. But is it possible that the bare fact that the boat was in the channel required that the course of the steamer should be altered or its speed checked before it became manifest that the danger of collision was impending? Principles have long been settled which are inconsistent with those under which this cause was tried. It was declared in Cobb *v.* Bennett (25 P. F. Sm. 326), that a vessel may hold her course in a navigable stream without regard to a fisherman's net, if the master acts without wantonness or malice; and that while the right of fishery is acknowledged, it is subordinate to the right of navigation. In Beach *v.* Parmeter (11 Harris, 196) damages were claimed for injury to the leg of a horse produced by collision with a buggy which, in passing the horse, kept its course in the beaten track of the highway. It was said in the opinion there that "where a road is narrow, and there is difficulty in passing, if a horseman can turn out without danger to himself or beast, and the buggy cannot be turned without incurring danger, it is the duty of the former to give way." And in Grier *v.* Sampson (3 Casey, 183) it was held, that while it is the general custom in this country for persons meeting on a highway to pass to the right, yet when a horseman or the driver of a light carriage meets a heavily laden team, it is his duty to give way and leave the choice of the road to the more unwieldy vehicle. The cases of The Scotia (14 Wall. 170), and of The Free State (1 Otto, 200), decided that it is the duty of a steamer to keep out of the way of a sailing-vessel; that this duty implies a correlative obligation on the part of the sailing-vessel to keep her course, and to do nothing to mislead; that the steamer is required to take no precautions when there is no apparent danger; and that where a steam-vessel is approaching another vessel, and where a collision might be produced by a departure of the latter from the rules of navigation, the former vessel is not bound to slacken her speed, or to stop and reverse. Up to the moment when the captain of the "Leopard" had reasonable ground to apprehend a collision, he was not bound to change his course, or to take other precautions to protect the boat from a danger which it must have seemed entirely practicable for the crew to avert.

In the fourth assignment of error complaint is made of the affirmance of the plaintiff's sixth point, "that the accident which will excuse the party who committed the injury must be such inevitable accident as human foresight, under the circumstances, could not have prevented." Just how deeply into the minds of a jury such an instruction might have struck, can only be conjectured. It was an unfortunate use of terms, although their misleading tendencies may have been modified by the qualifying phrase "under the circumstances." The jury would have been warranted in rendering a verdict for the defendants if they had found that the "accident" had occurred notwithstanding the careful, prudent, and energetic use of all needed appliances by

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competent, earnest, and faithful officers. To hold one whose act has injured another excusable only when the "accident" was one which the keenest human intelligence could not anticipate, would be to carry the law of negligence far beyond the rule which demands due skill, prudence, care and diligence proportioned to the requirements of a particular emergency. In Beach *v.* Parmeter (*supra*) the President of the Common Pleas had charged that the defendant was not liable "if the collision was entirely accidental," and if the injury was "the result of the accident." It was said here, in affirming the judgment, that the Judge "must have meant *inevitable* accident, such as no human foresight could avert." Applied as the words were in that case and to its circumstances, they could perhaps neither help nor hurt, but it is believed that as a formula for the instruction of a jury, its adoption would always prove to be unsafe.

In the plaintiff's twentieth point the measure of damages was defined with accuracy, and the point was affirmed. But in the general charge the subject was referred to the jury in the broadest possible way. The Court said: "It would be impossible to fix any rule or standard by which damages of this kind could be estimated. They depend upon conditions of life . . . which the jury will know about as perfectly, . . . no doubt, as any lawgiver, or any one whose duty it is to instruct the jury on the purposes of the law. Whatever it may be, it should be governed by a disposition . . . to arrive, if possible, at a fair compensation, and to do right between these parties, just as each of us would expect under like circumstances, if our cause should be viewed and judged by a jury." This could only have been received as an intimation that the damages were to be assessed without the application of any rule of law whatever. In the Pennsylvania R. R. Co. *v.* Ogier (11 Casey, 60) the question of damages was submitted to the "fair and reasonable discretion" of the jury, "based upon the law and the evidence." Latitude at least as great was given here as was given either in Railway Company *v.* Kelly (7 Casey, 372) or in Railroad Co. *v.* Books (7 P. F. S. 339), in both of which cases the judgments were reversed for error in unguarded instructions relating to assessments of damages.

Without detailed reference to the fifteen assignments of error, what has been said covers the essential points of controversy in this cause which are believed to have been improvidently determined.

Judgment reversed and *venire facias de novo* awarded.

Opinion by WOODWARD, J.

Jan. '79, 166. March 5, 1879.

Spencer et al. v. Colt.

Evidence—Admissibility of—Parol evidence to contradict written instrument—Degree of proof necessary.

Parol evidence to reform written instruments must be *clear, precise, and indubitable;* but these words are to be accepted with their inherent limitations, for parol evidence can never be beyond all possible doubt and controversy.

Per WOODWARD, J. When such terms as "clear, precise, explicit, unequivocal, and indubitable," are used by the Courts in defining the requisite proof of a particular fact to be made out by verbal testimony, it is meant that a conviction shall be fastened in the minds of the jurors as strong as verbal testimony is able to convey, that the witnesses shall be found to be credible, that the facts to which they testify are distinctly remembered, that details are exactly narrated, and in due order, and that their statements are true.

In a suit on bonds, the defendant was asked in chief: What was the inducement to his signature; if it had been affixed in reliance upon certain allied contemporaneous agreements, and in consequence of the act and declarations of the plaintiff:

Held, sustaining the ruling of the Court below, that everything that was said and done at the time of the execution was evidence, but that the unexpressed intent, motive, or belief existing in the defendant's mind was not admissible.

Error to the Common Pleas of Lehigh County.

Debt, by Henry Colt against Osborn Spencer and Jacob Mauser on fifteen bonds of $1000 each. Plea "*nil debet*."

The facts as they appeared at the trial, before HARVEY, P. J., are thus stated in the opinion of the Supreme Court:—

[On the 1st of April, 1874, the defendants below (Mauser and Spencer) executed and delivered to the plaintiff (Colt) a mortgage and fifteen accompanying bonds, to secure the payment of fifteen thousand dollars, the purchase money for a parcel of land in the city of Allentown. The mortgage and bonds, as well as the deed from the plaintiff, were all made out in pursuance of a written agreement previously entered into between the plaintiff and Mr. Spencer. Mr. Mauser became interested in the purchase while the contract was executory. The agreement was given in evidence (but has not been brought up). When the deed was made and the securities delivered, a stipulation signed by the plaintiff and Mr. Spencer, was endorsed on the agreement setting forth that it should "remain in force as the covenant between the parties for the performance of every matter therein contained, except the execution and delivery of the deed, and the giving of the mortgage and bonds."

Upon the trial some facts were undisputed. When the parties met to execute the contract, the bonds were found to have been prepared with

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accompanying warrants of attorney. Mr. Mauser refused to sign them, on the ground that he was dealing in real estate and would be hampered by the lien of the judgments. The defendants consulted Mr. Rupp as counsel, and negotiations were entered into by him and them with the plaintiff and Mr. Stiles. The result was, that the warrants of attorney were severed from the bonds, and a stipulation was inserted in the mortgage that the whole amount of it should become due and collectable if there should be delay in making any one payment for a period of forty days. The plaintiff took the bonds with the remark that he would put them in bank for safe-keeping, and the parties separated.

From this point the facts were contested. The defendants alleged that at the time when the papers were delivered, it was agreed that the plaintiff would look to the land alone for the whole purchase money, and that any judgment or judgments that should be obtained on the bonds should be liens only on that land. The witnesses who testified in support of the agreement were Mr. Rupp and the defendants themselves. The substance of Mr. Rupp's statement was, that he found in Mr. Stiles's office fifteen bonds for $1000, each with powers of attorney to confess judgment, and that Mauser refused to sign them as they were written. He then stated his recollection of the agreement in these words: "As I understand it, Colt was to look to the coal-yard property only for his money, and I recollect no other circumstances now. I think this restriction never applied to Spencer." Mr. Mauser's version of the agreement was this: "I told him (Mr. Colt) then and there that I would not sign anything, that I was in the real estate business, and would sign nothing that was a lien or would become a lien on anything but that property. Mr. Colt said the property was cheap, that he would take it back at any time if the investment did not give satisfaction. Mr. Rupp said, 'If that is the understanding that it shall be restricted to that property alone you can sign it.' Mr. Colt agreed to it, he said, 'Yes, I agree to it, the property is cheap, and I will take it back at any time.' On that agreement I signed the bonds." On cross-examination Mr. Mauser said he had testified on this subject before an auditor in October, 1878. He was asked: "Didn't you say before the auditor that the judgment parts of the bonds were torn off, and that then you signed them—just those words?" The answer was, "Yes, sir." Mr. Spencer's testimony was this: "Mr. Mauser said he would not sign the bonds, and went on to explain in the presence of Mr. Colt, saying that these bonds extended to all the property we owned. I then said I would not sign them either. . . . After he found that Mr. Mauser insisted on not signing them, Mr. Colt was satisfied to alter the papers so that the mortgage was a lien on this property alone. If I am right, Mr. Colt, after Mr. Mauser told him how he wanted the papers drawn, said, 'Very well, we will fix them up in that way.' They then went on and fixed them up in that way. If I recollect rightly, they were signed as soon as they got them ready. . . . After Mr. Rupp said it was drawn up so as to confine it to this property, we signed it. I asked Mr. Rupp at the time if it extended beyond this property, and he said 'No.'" The plaintiff, on the other hand, declared in positive and distinct terms that such an agreement as that alleged by the defendants was never made.]

The defendants made the offers embraced in the following questions:—

"What was the inducement that led you to sign the bonds and mortgage?" Objection.

"The Court is of the opinion that the jury is to determine what induced the parties to sign the instrument from what was said and done before the time of signing, and that it is improper to allow the witness to state the intention or purpose that was in his mind at the time of the execution. We sustain the objection." Exception.

"Did you sign these bonds and the mortgage, relying at the time upon the contemporaneous agreement in parol, that Mr. Colt was only to look to the real estate for the payment?"

Objected to as incompetent.

The Court: "I am of the opinion that it is proper for the defendants to prove by legitimate proof what was contained in the offer, but I am of the opinion that it is not proper to present it to the witness in this form for the purpose of getting out of him what intention or purpose existed in his mind at the time of the execution of the paper. The objection, therefore, is sustained." Exception.

"In consequence of the acts and declarations of Mr. Colt, did you sign these papers?"

Objected to as incompetent.

"The Court permits the defendants to give all that was said and done before and at the time of the execution of the bonds, but will not permit them to give any intention that existed in the mind at the time of their execution, and as the offer seeks only to give the intention we sustain the objection." Exception. (Seventh, eighth, and ninth assignments of error.)

The Court charged the jury, *inter alia*, as follows: In considering it (the alleged contemporaneous agreement) you are admonished that the bonds are primarily regarded as the voluntary and lawful contract of the parties, and before it can be overthrown, it is incumbent on the defendant to prove the alleged contemporaneous agreement or stipulation by evidence that is clear,

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precise, and indubitable." (First assignment of error.)

"Hence you will observe, that it must be shown that the alleged condition or stipulation was agreed to by Mr. Colt. In other words, it must be shown that Mr. Colt on the one hand, and Messrs. Spencer and Mauser on the other, agreed that the alleged condition or stipulation should be part of this contract. . . . Or, is it probable that the defendants might have claimed exemption from personal liability; might have done and said all they claim to have done or said, and yet Mr. Colt did not assent to it?" (Second assignment of error.)

"The defendants could have called him (meaning John D. Stiles, the subscribing witness), and it must be confessed that the omission to call him is as much, if not more, the duty of the defendants than of the plaintiff." . . .

"If you find that he (meaning Mr. Colt) has shown himself forgetful of some of the material statements made when the bonds were executed; if he has given reasons, or testified to things that are irreconcilably inconsistent with the undoubted proof as it appears in the cause, it will be some reason why you should not consider his testimony potent enough to create a beneficial doubt in his behalf." . . .

"If the defendants have established that it was agreed between them and Mr. Colt, that the alleged parol conditions should be a part of the contract, and it was the operating cause of the execution of these bonds, and this has been shown by clear, precise, and indubitable proof, then these bonds must be regarded as containing that stipulation." . . .

"If the defendants have established, that it was agreed between them and Mr. Colt, that the alleged parol condition should be a part of the contract, and *it was the operating cause* of the execution of these bonds, . . . then these bonds must be regarded as containing that stipulation." (Third, fourth, fifth, and sixth assignments of error.)

Verdict and judgment for plaintiff, whereupon the defendants took this writ, assigning for error the rejection of their offers, and that portion of the charge quoted *supra*.

A. B. Longaker (with whom were *John Rupp*, *C. J. Erdman*, and *Wm. H. Sowden*), for the plaintiffs in error.

It was error to charge that the evidence must be *indubitable*. All that is necessary is that it be sufficient to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest.

Young *v.* Edwards, 22 Sm. 257.

We do not seek to vary or contradict the terms of a written contract, but simply to control the legal operation of it.

Chalfant *v.* Williams, 11 C. 212.
Martin *v.* Berens, 17 Sm. 459.
Caley *v.* Phila. and Chester Co. R. R., 30 Id. 368.
Graver *v* Scott, Id. 88.

The assent of Mr. Colt can be implied from his conduct. He was estopped from denying the verbal contract.

Whenever a party to an action is a competent witness, and the intent or motive with which an act is done, is an essential ingredient to sustain the action, it is permissible for him to testify to that intent.

Snow *v.* Paine, 114 Mass. 520.
Thatcher *v.* Phiney, 7 Allen, 149.
Lombard *v.* Oliver, Id. 155.
Sowers *v.* Dukes, 8 Minn. 23.
Spaulding *v.* Strang, 36 Barb. 310.
Moore *v.* Davis, 49 N. H. 45.
Broom's Maxims, 352.

The same rule prevails in criminal cases.

Kerrains *v.* The People, 60 N. Y. 221, 228.

John D. Stiles, for the defendant in error.

The law requires clear, explicit, and indubitable testimony to overthrow the validity of a written instrument.

Martin *v.* Berens, 17 Sm. 459.
Stine *v.* Sherk, 1 W. & S. 195.
Miller *v.* Smith, 9 C. 386.
Irwin *v.* Shoemaker, 8 W. & S. 75.
Dean *v.* Fuller, 4 Wr. 474.
Hart *v.* Carroll, 5 WEEKLY NOTES, 378.
Woods *v.* Farmare, 10 W. 195.

The intent or purpose of the parties cannot be given in evidence; it must be inferred by the jury from the facts.

Irwin *v.* Shoemaker, *supra*.
Courtland Co. *v.* Shoemaker Co., *supra*.
Lancaster Bank *v.* Smith, 12 Sm. 47.

May 5, 1879. THE COURT. (After stating the facts, as above.) In view of the facts admitted or clearly proved at the trial, this attempt to strike down and annihilate bonds amounting to $15,000, which the plaintiff thought worth depositing in a bank for safety, seems to have resulted in enveloping the transactions of the 1st of April, 1872, in a sort of hazy cloud. The testimony in its vague and shifting forms tended to mystify rather than to elucidate those transactions. But the Court were not asked to express an opinion as to the adequacy of the proof to warrant a reform not only of the bonds, but of the original agreement between Spencer and the plaintiff. The cause has been brought here for a review of the errors of law charged to have been committed at the trial. Those of them that seem material relate to the measure of proof which the judge required, to the rejection of some testimony offered by the defendants, and to a portion of the charge in which the character and effect of the plaintiff's testimony were discussed. The

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duty of this Court consists merely in passing upon the questions which the parties have presented.

It was said in Hart *v.* Carroll (4 Norris, 508) that "in the very nature of things that conclusive and absolute proof which results from the production of record evidence, or rests on the solution of a mathematical problem, can never be the effect of the verbal testimony of human witnesses," and that "the language of the authorities is to be taken and treated in its connection with and its relation to the subjects and instrumentalities to which it has been applied." A preceding sentence in the opinion in that case was made meaningless by the omission in transcribing of a qualifying clause. When such terms as "clear, precise, explicit, unequivocal, and indubitable" are used by the Courts in defining the requisite proof of a particular fact to be made out by verbal testimony, it is meant that a conviction shall be fastened in the minds of jurors as strong as verbal testimony is able to convey. It is meant that witnesses shall be found to be credible, that the facts to which they testify are distinctly remembered, that details are narrated exactly and in due order, and that their statements are true. The word "indubitable," the application of which by the President of the Common Pleas has been made the ground of such urgent complaint, was used in a sense subject to these limitations, and would necessarily be so understood. Absolute certainty is of course out of the question. Terms are used with relation to their subject-matter. The apparently distinct testimony of the most intelligent witness may possibly be fabricated. The clear statement of the most upright witness may possibly be mistaken. It has been in view of considerations like these, that in certain classes of cases proof is required that is "clear, distinct, and entirely satisfactory" (Rearich *v.* Swinehart, 1 Jones, 233); that is "clear, explicit, and unequivocal" (McGinity *v.* McGinity, 13 P. F. S. 42, and Plumer *v.* Guthrie, 26 P. F. S, 455); that shows "a case of clear and *palpable* fraud" (Hain *v.* Kalbach, 14 S. & R. 161); or that is "full, satisfactory, and indubitable" (Woods *v.* Farmare, 10 W. 195). In the Attorney General *v.* Sitwell (1 Younge and Collyer, 583), a remark of Lord THURLOW in Shelburne *v.* Inchiquin (1 Bro. Ch. C. 347), to the effect that "the final evidence must be strong, irrefragable evidence," was criticized in these words, "If by this language his Lordship only meant that the mistake should be made out by evidence clear of all reasonable doubt, its accuracy need not be questioned, but if he meant that it should be in its nature or degree incapable of refutation, so as to be beyond any doubt and beyond controversy, the language is too general." This criticism states fairly enough the rule that governs our own courts. It requires that in controversies in which parol sales of land are set up, or where written instruments are sought to be reformed, juries must not hesitate or doubt, they must have clear convictions—they must believe the witnesses, and must find the facts in issue definitely and distinctly established. In this case the Court charged that the alleged agreement should be made out by "clear, precise, and indubitable proof." These words, restrained as they are by inherent limitations, could do no harm.

Brief discussion only is required of the remaining assignments of error. The two portions of the charge coupled together in the second assignment, were upon two different branches of the case, and were separated from each other to the extent of almost a printed page of the paper-book. The last clause, of which special complaint is made, occurred in the instruction to the jury as to their duty in reconciling conflicting testimony. They were asked whether, if they found that the defendants did and said all that they declared they had done and said, they could still find that the plaintiff did not accede to their demands. If so, there was no contract. In a proper issue some questions of estoppel might be presented. But no such question here was raised or tried.

Surely no obligation rested on the plaintiff to put Mr. Stiles on the stand. It is true he was the subscribing witness to the bonds, but he was also the counsel who was trying the cause. All that the Court said on this subject was brought out by the argument of the counsel for the defence, founded on the neglect to make him a witness. If his testimony was desired or would have been useful, he could have been called on behalf of the defence.

Taking in connection and as a whole the instructions to the jury in regard to the plaintiff's testimony, it was fairly submitted.

It was the very point of the case of the defendants that the parol agreement was the inducement "the operating cause" for the execution of the bonds. The fifth and sixth assignments are without foundation. No principle can be recalled that would have justified the Court in admitting the testimony specified in the seventh, eighth, and ninth assignments. Everything that was said and done at the time when the bonds and mortgage were executed, was received. The unexpressed intent, motive, or belief existing in Mr. Mauser's mind when he signed the papers, could not aid the jury in ascertaining whether the language or conduct of the plaintiff had been such as to create such an intent, motive, or belief. The parties to a contract may often have

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different impressions regarding its effect upon their respective interests, but the thoughts of one certainly cannot be proved to bind the other.

Judgment affirmed.

Opinion by WOODWARD, J. PAXSON, J., absent.

Jan. '77, 96. Mar. 28, 1879.

Hoopes v. Beale.

Evidence—Admissibility of parol testimony to vary, contradict, or avoid written instrument—Act of 15 April, 1869—Suit by or against administrators—Specialty—Assignment of, under seal.

Clear and precise parol testimony of what occurred at the execution of a written instrument, is always admissible to contradict, vary, or even avoid that instrument, where it is proved that but for the oral stipulation it would not have been executed; excepting only in the case of negotiable paper.

A. executed his bond and mortgage to B. who assigned it to C.; C. subsequently died; in a suit brought by B. to the use of C.'s administrators against A.:

Held, that parol testimony was admissible to prove that the bond and mortgage had been executed on the understanding that there would be no personal liability.

Held, however, further, that the suit being in reality by an administrator, A. was incompetent to testify.

Error to the Common Pleas of Chester County.

Debt, by Wm. B. Hoopes to the use of the administrators of A. Baily against H. A. Beale, R. D. Wells *et al.*, members of the Williamson Lodge No. 309, A. Y. M. The narr. contained a count on a bond and the usual common counts. Pleas *non est factum, nil debent*, payment with leave, etc.

On the trial, before BUTLER, P. J., it appeared that R. D. Wells *et al.*, trustees of the lodge, had on April 1, 1870, executed to Wm. B. Hoopes a bond for $10,000 secured by a mortgage of lands of the lodge; and that this bond and mortgage were shortly afterwards assigned to A. Baily. The plaintiff proved further that the lands of the lodge had been sold by the sheriff under a prior mortgage, and that an auditor had found that $5646.53 were due to plaintiffs out of the fund brought by the sale; this suit was brought to recover the balance. The defendants proposed to call R. D. Wells and other defendants, and to prove by them that, at the time the bond was executed, the trustees had hesitated about putting their names on it, and had said they would not do so, if there was to be any personal liability; that Mr. Hoopes said distinctly he did not ask any personal liability—that all he asked was the real estate—and that then the transaction was completed. Objected to, on the ground that the evidence itself was inadmissible, and also that the witnesses were incompetent to testify in the action as to the matters proposed: objection overruled; exception.

Verdict for defendants and judgment thereon. The plaintiff took this writ, assigning for error, *inter alia*, the ruling on evidence above given.

Wayne MacVeagh (with him *C. H. Pennypacker* and *J. J. Lewis*), for plaintiffs in error.

The witnesses were incompetent, for this was an action by administrators; the administrators could have sued in their own name, and were the only real plaintiffs; the case therefore falls within the exceptions to the Act of 1869. The evidence itself was also inadmissible, for parol testimony cannot be admitted to contradict a written instrument in the absence of fraud.

Martin *v.* Berens, 17 Sm. 459.
Coughenour *v.* Suhre, 21 Sm. 462.

R. E. Monaghan and *P. F. Smith* (with them *G. F. Smith* and *J. J. Pinkerton*), for defendants in error.

The evidence was clearly admissible under the law of this State.

Lippincott *v.* Whitman, 3 WEEKLY NOTES, 313.
Greenawalt *v.* Kohne, 4 Norris, 369.

Under the Act of 1869, the witnesses were competent.

Pattison *v.* Armstrong, 24 Sm. 476.

The object of the Act is to admit the *parties to a transaction* to testify, except where one of the parties is dead. Moreover, the suit here is by Hoopes.

May 7, 1879. THE COURT. That parol evidence may be admitted to contradict, vary, or even avoid a written instrument, where it is proved that but for the oral stipulation it would not have been executed, is a doctrine now so well settled that its discussion would be a mere waste of time. It is understood that this rule does not apply to negotiable paper, when in the hands of innocent holders for value, but other than this, we know of no exception.

Admitting the competency of the evidence, and there is no doubt but that Wells, Mullin, and Doan, the trustees of the lodge, signed the bond in suit with the express understanding that they were not to be personally liable, and it is manifest that under no other condition would they have executed it.

This brings the transaction directly within the ruling of Irwin *v.* Shoemaker (8 W. & S. 75), wherein it was held that where a mortgage and bonds were given to secure the purchase money of land sold, it was competent, in an action on one of the bonds, for the vendee to prove that it was part of the contract that the vendor was to look alone to the property sold for payment of the said purchase money. It is indeed true, as was said by Mr. Justice ROGERS in that case, in

* See Keough v. Leslie 8 W.A. 172
see contra Thomas to Wardfflien 12 W.A. ~~245~~ 425

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order to set aside the solemn agreement of the parties and convert it into an obligation of a different import the evidence of the fraud or mistake ought to be of what occurred at the execution of the instrument and should be clear and precise, but when these conditions are fulfilled there is no limitation to the power to modify, alter, explain, or reform written agreements by parol evidence, excepting only negotiable paper as above stated.

It is urged, however, that in the case in hand there is no evidence of fraud in the original transaction. It may be that William B. Hoopes intended no fraud when the bond in suit was executed, but having obtained the obligation for one purpose, his attempt afterwards to use it for another was such a fraud as brings the case within the rule above stated. (Renshaw *v.* Gans, 7 Barr, 117.)

A more serious question arises upon the admission of the defendants, Wells, Mullin and Doan, as witnesses. The action is by administrators, and hence, as to it the Act of April 15, 1869, does not apply. As was said by our brother MERCUR in Taylor *v.* Kelly (30 P. F. S. 95), "The same imperative 'shall not apply' extends as well to a case in which an executor is a party, as to the prohibition of husband and wife testifying against each other, and counsel to the privileged communication of his client. The language is neither doubtful nor obscure. Its clear and mandatory edict takes all these cases out of the statute." It follows that cases falling within the proviso stand just as though the Act of 1869 had never been passed, and we need scarcely say that before the passage of that Act, the evidence of these defendants would not have been admissible. It is true the assignor of the bond, Wm. B. Hoopes, is alive, and was admitted to testify on part of the plaintiffs, but this bond was assigned to Baily in his lifetime, and at his death was part and parcel of his estate, and as such is now sought to be collected by his administrators. The assignment was made in due form under the Act of 28 May, 1815, and so became as absolutely the property of Baily as though it had been originally drawn to him. The administrators might have brought suit in their own names. The use of Hoopes's name as legal plaintiff is surplusage. This, however, is of minor importance, because the determining facts of the case are, that the suit is by the administrators and for the estate, and it alone must reap the benefit or suffer the loss resulting therefrom. It follows that none of the parties to the bond are made competent witnesses. The judgment is reversed and a new *venire* is ordered.

Opinion by GORDON, J.

[See preceding case.]

May, '79, 130. May 21, 1879.

Blauser v. Diehl et al.

Guardian and ward—Liability of sureties upon guardian's bond—Sale by order of Orphans' Court—Special security for proceeds.

The sureties upon a guardian's bond are not liable for the failure of the guardian to pay over the proceeds of the sale of the real estate of his ward, made under an order of court.

Error to the Common Pleas of Adams County.

Debt on bond, by M. B. Blauser, guardian of Savannah I. Hartzel, against J. H. Myers, Jeremiah Diehl, and John Wolford.

The following were the facts: On the 20th of August, 1860, Myers was appointed by the Orphans' Court of Adams County guardian of the person and estate of Savannah I. Hartzel, a minor child of Lebright E. Hartzel, deceased, and on the same day filed a bond in the usual form, under the Act of March 29, 1832, § 8, which was approved by the Court, in the sum of $2000, with Jeremiah Diehl and John Wolford as sureties. The estate of the minor consisted of an undivided one-fourth part of a farm and a small amount of personal property.

On August 21, 1865, the guardian applied to the Orphans' Court for and received an order to sell the real estate of his ward for maintenance and education and reinvestment, the farm being unproductive, dilapidated, and expensive. Upon the same day a proper bond, conditioned for the faithful appropriation of the proceeds of the sale of the real estate, was filed and approved by the Court. Under this order the real estate was sold, and the sale confirmed December 28, 1865. Myers, having received the purchase-money, retained it in his hands until 1877, when he became insolvent, and was removed, his account showing a balance in his hands due his ward of $1108.70. Michael B. Blauser was thereupon appointed guardian, and this suit was brought upon the original guardian bond. Myers having removed from the county, no service was made upon him, and the defence was made by the sureties, who filed a special plea, alleging that the money claimed was the proceeds of land sold by order of the Orphans' Court, and that a bond with good security had been given to secure this part of the estate, which bond was a valid and sufficient security. To this plea the plaintiff demurred, and issue was joined upon it.

It was subsequently agreed between counsel that of the sum claimed, $1020.10 was the proceeds of the real estate, and $88.60 of the personal property of the ward.

Upon argument the Court (MCCLEAN, P. J.) overruled the demurrer, entering judgment for

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the plaintiff for $94.11, being the amount only of the personal estate of the ward in the hands of Myers, with interest.

The plaintiff thereupon took this writ, assigning for error the judgment of the Court below overruling his demurrer.

R. G. McCreary, for plaintiff in error.

The bond in suit is in the form prescribed by the 8th section of the Act of March 29, 1832, and is quite sufficient in amount and in its terms to embrace and secure the estate real and personal. It requires a just and true account of the management of the *property and estate* of the minor under his care, and to deliver up *said property* agreeably to the order and decree of the Court or direction of the law, *and in all respects to faithfully perform the duties of guardian.* The terms "property" and "estate" comprehend all earthly possessions. A devise of "property" will pass real estate.

Rosseter *v.* Simmons, 6 S. & R. 454.

The change of *form* of the estate did not vary the liability of the sureties on the bond. The conversion was by act of the law, the possibility of which must have been contemplated at the time the bond was given.

The security required by statute to be given on sale of a minor's land is cumulative and not substitutionary. The provision of the law is for the benefit of the ward, and not for the relief of the original sureties, who continue liable for the default of their principal, but may use the second bond to enforce contribution from the parties to it, as in other cases where additional security is given.

Com. *v.* Cox's Administrator, 12 C. 442.

David Wills, for defendant in error.

A distinction is evidently made in the 8th section of the Act of 29th March, 1832, between *property* and *estate*, the one referring to personal property and the other to real estate. It is provided that the guardian "shall deliver up the *said property*," etc., the property referred to being that in his manual possession, *i. e.*, personal property. It is true he has the management of the real estate of his ward, receiving the rents, issues, and profits, but the *estate* itself is in the minor, and the guardian does not hold it so as to deliver it up. The bond is, therefore, only security for the property of the minor which he receives, including the rents accruing from the real estate.

The case of an administrator is analogous. The sureties on his administration bond are not in any way liable for the proceeds of the real estate.

Reed *v.* Commonwealth, 11 S. & R. 441.
Beale *v.* Commonwealth, 17 Id., 392.
Commonwealth *v.* Gibson, 8 W. 214.
Commonwealth *v.* Hilgert, 5 Sm. 286.

So too the sureties upon the official bond of a Register of Wills cannot be held liable for his failure to pay over to the Commonwealth collateral inheritance tax collected by him, even although he neglected to give the special bond required by the Act of 22d March, 1841. PAXSON, J., in Lloyd *v.* Commonwealth (35 Leg. Int. 171), refers to the marked distinction between a statutory bond and one given as cumulative security under an order of Court for the protection of the interest of a minor.

June 23, 1879. THE COURT. The Court refused to charge the defendants, sureties of John H. Myers, guardian of Savannah I. Hartzel, child of Lebright E. Hartzel, for the default in his account of the proceeds resulting from a sale of the real estate of his ward, under the order of August 21, 1865.

This, we think, was right. A guardian has by virtue of his appointment no power to alien the land of the minor or minors of whom he has charge; that power is conferred by statute, and only under and subject to prescribed conditions. It is a power entirely separate and distinct from that conferred by the appointment, the latter embracing only the *management* of the minor's realty. The statute under which these proceedings were had requires the Court, before it confers such new power upon the guardian, to see that he executes a bond, with sufficient sureties, conditioned for the faithful appropriation of the proceeds of the proposed sale. Thus we have a collateral provision complete in itself, and designed to be operative in cases not embraced in or contemplated by the original appointment. It thus necessarily results that one who becomes surety for a guardian does so in view of the duties and obligations which the law then imposes upon his principal, and with the knowledge that, should a sale of land become necessary, with the grant of new power required for that purpose, new and ample security will be provided. The sureties of the guardian are liable for all moneys or property that may come into his hands under the original power, and we therefore hold them to such liability where money came into his hands from proceedings in partition. (Lloyd *v.* Com., 35 Leg. Int. 171.) But in such case there is no new power conferred upon the guardian, he takes by virtue of his original appointment.

In this then is the distinction: in the one case the guardian takes the property by virtue of his original power, in the other only by virtue of a new power conferred by the order of sale, and this also distinguishes the responsibilities of the two classes of sureties; they are independent and their obligations are distinct.

The case of Beale's Exrs. *v.* Commonwealth (17 S. & R. 392), though depending upon an administration bond, is nevertheless parallel to the one in hand. Both real and personal estate

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are in Pennsylvania assets for the payment of debts; reasoning from this axiom, the Court below, in the case cited, held that the sureties in an administration bond were responsible for the proceeds of real estate sold by order of the Orphans' Court. But in reversing the case the Supreme Court, by ROGERS, J., say that the bond is usually taken in double the amount of the goods and chattels which properly form the inventory, and of which the real estate constitutes no part, and that no surety considers himself answerable for the value of the land; that the bond required by the Act justifies this construction, since the condition only requires a proper inventory of the goods and chattels of the estate, and a just and legal disposition of them; that the interest of the estate requires nothing more, for it is not certainly known that the land will be wanted for the payment of debts, for, though the lands are assets in the administrator's hands, they are so *sub modo* only, and, when a sale becomes necessary and is ordered, sufficient security must be taken from the administrator for the faithful execution of the powers thus committed him. Every word of this reasoning can as well be applied to a guardian. His bond is conditioned only for the proper management of the property and estate of the minor under his care, and for its return upon the order of the Court, and his bondsmen have no reason to believe that they will be responsible for a sale of real estate which the guardian has no right to make. Such real estate is not assets in his hands for the maintenance of his ward, but the rents, issues, and profits thereof only: it is not certainly known, that a sale of land will become necessary, or that the Court will order it, and, finally, if such sale is ordered, sufficient security must be taken to secure the proper disposition of the proceeds thereof. Such, then, being the accurate parallelism of the two cases, the one may well be permitted to rule the other, especially as in this way we the better reach the justice and equity of the case in hand.

The judgment is affirmed.

Opinion by GORDON, J. PAXSON and WOODWARD, JJ., absent.

Jan. '79, 165. March 5, 1879.

Erdman et al. v. Barrett.

Election—Contested elections—Incumbent holding over—Tie vote—Who may contest—Who are the proper parties to contest in case of tie vote.

Although the contingency be not expressly provided for by Act of Assembly, it is clearly within the spirit of the Act that, when a tie vote is returned, either party may contest.

In the event of a tie vote, and contest by one candidate, the proceedings are against, and notice thereof is to be given to the other candidate. The incumbent holding over, although indirectly interested, is in no wise a party to the contest.

Certiorari to the Quarter Sessions of Bucks County.

Petition by H. M. Erdman *et al.*, contesting the election of prothonotary, held November 5, 1878.

The general certificate of result of election, filed in the office of the prothonotary, certified that Thomas T. Ochs received 7610 votes, Thomas L. Folwell 7610 votes, and William Martien 161 votes for the office of prothonotary.

The petition alleged that no one was returned elected, inasmuch as there was a tie vote between the two highest candidates; that the election was undue and illegal; that Thomas T. Ochs was duly elected; and prayed for a rule to answer upon James Barrett, the incumbent, who, by virtue of the tie vote, claimed the right to hold the office until the next election.

The rule was granted, and the Court ordered notice of the filing of the petition, together with a copy thereof and of the rule, to be duly served upon the "opposite party."

James Barrett filed an answer claiming the right to hold the office until his successor should have been lawfully chosen.

Upon the hearing, the Court, of its own motion, dismissed the petition upon the ground that notice of the proceedings had not been given to Thomas L. Folwell, the counsel for the petitioners declining to make the said Folwell a party.

WILSON, P. J., delivered the following opinion:—

"On the 8th of January, 1879, for reasons then verbally stated, the Court directed this proceeding to be dismissed; a formal decree to be drawn and entered thereafter, and also, if thought proper, a written opinion to be filed upon the subject. This opinion and the decree appended will therefore be filed as of that day.

"I have no doubt of the right of a candidate returned as having received an equal number of votes with another candidate voted for at the same time, or of others acting in his interest, to contest the election in the same manner and to the same extent as when the opposing candidate is returned as having received a plurality of votes and the contestant is apparently in the minority. Where there is a tie vote returned, either party ought to have the right to contest the election. This contingency is not expressly provided for by the Act of Assembly on the subject, but the case is clearly within the spirit of the Act, and I have no doubt of the right of either party to proceed under it. If this were not so, then it might happen that the two highest

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candidates returned as having received an equal number of votes would both be in a worse position than if one of them was apparently in the minority, for both alike would be without remedy for the purpose of showing irregularities in the election, and that the one or the other of them received a plurality of the ballots, and was entitled to the office. The Act is broad enough to meet the case.

"The contest is to be begun and carried on in the same manner, and is to be followed by the same judgment as when one candidate is apparently in the majority, and the other in the minority. The object is to determine who has received the highest number of votes legally cast. The Court is to investigate the election, to correct alleged errors when they are shown to exist, and to determine the true result.

"Upon the presentation of the petition, a day is to be fixed for hearing, notice is to be given to the person whose right of office is contested, and a rule served upon him to appear and answer the complaint. By the Act of 1839, notice was to be given to the 'person returned.' The Act of 1874 directs it shall be given to the 'person whose right of office shall be contested.' I regard these provisions as the same. The distinction between them is verbal, merely. The evident design is to provide for notice to the opposing candidate who may claim the office by virtue of the election in question. The proceeding is by no means *ex parte;* the hearing is to be after full notice; the declared will of the voters in the choice of the officer is to be ascertained if possible; and their verdict at the polls is to be respected and enforced.

"We are to inquire into and determine the right of office by virtue of the election to be investigated and not by virtue of a previous election under which the present prothonotary holds. The contest is between the candidates voted for; they only can claim the right of office under the election to be investigated. To my mind, it follows clearly and necessarily that the notice in this case should have been given to Mr. Folwell, the opposing candidate, and not to Mr. Barrett, the present prothonotary. Mr. Barrett, it is true, may be indirectly interested, as he will hold the office until his successor shall be duly qualified, but he has no direct interest whatever in the contest, and is in no wise a party to it; whether it result in favor of the one or the other of the candidates is a matter of no more consequence to him than to any other citizen of the county.

"If either of them should be declared elected and become duly qualified, he must resign his place to his chosen successor. The burden of maintaining a contest that is in no sense his cannot be thrown upon him, nor can he be set up as a respondent to avoid the necessity of notice to the real party in interest. The notice in this case, being given to Mr. Barrett only, is therefore defective. The rule upon him was improvidently granted; the attention of the Court was not called to the fact that he was named in the petition as respondent, and the rule asked for upon him. It was granted upon and notice directed to be given to the 'opposite party,' who was assumed to be Mr. Folwell, without examining the concluding part of the petition to see who was named. If our attention had been called to the subject the error would have been corrected at the time.

"But the remedy invoked ought not to be defeated by the mistake that has been made. Full opportunity should be afforded for the investigation of the election and the correction of alleged errors therein, in order that the true result may be ascertained, and the candidate who has received the votes of a plurality of his fellow-citizens may be declared elected, and enjoy the office to which their choice has entitled him. This may yet be done.

"If the counsel for the petitioners desire it, we will continue the proceeding, fix another day for the hearing, and grant a rule now upon Mr. Folwell to appear and answer upon that day.

"The counsel, after consultation, say they decline to ask that this be done. The Court will not of their own motion direct it. The proceedings are, therefore, dismissed in accordance with the following decree:—

"And now, to wit, January 8, 1879, this case came on to be heard upon the petition and answer; and the Court being of the opinion that the rule upon James Barrett, the present prothonotary, as respondent, was improvidently granted, and that the notice to him is defective as not in compliance with the Act of Assembly in such case made and provided; and the counsel for the petitioners declining to ask that the proceedings be continued to another day to be fixed for the hearing thereof, and a rule be now granted upon Thomas L. Folwell, who was returned as a candidate voted for at the election and receiving an equal number of votes with Thomas T. Ochs, whose election is claimed by the petitioners, to appear on the day to be so fixed, and answer the complaint of the petitioners; it is therefore, after due consideration, adjudged and decreed by the Court that the said complaint be dismissed.

"And the Court being of opinion that the facts set forth in the petition constitute probable cause for the complaint therein, does therefore direct that the costs of the proceedings be paid by the county."

The petitioners took this appeal, assigning for error the dismissal of their petition.

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Robert L. Cope (with whom were *N. C.* and *J. D. James*), for the appellant.

Neither the petitioners nor the persons claimed by them to have been elected, can withdraw the petition. The public are interested in the result.

Kneas's Case, 2 Parsons, 553.
Mann's Case, 1 Brewster, 41.

The petitioners should not have been refused, on the day when the objection was raised, leave to amend, so as to bring in the necessary parties. They had a right to be heard after a reasonable notice, which, by the rules, is fourteen days.

Rules of Equity Practice, No. 27.

If we had asked to have Folwell made a party, we could not afterwards have objected to his right to contest on the ground of laches, by which he was, in fact, barred. Being so, the decree could not affect him; he had no interest. If the opinion of the Court below be adopted, then Martien should be made a party also. But in that opinion it is assumed that either Ochs or Folwell was elected, whereas there might in truth have been a tie vote.

The proper party to the contest was the incumbent.

Mark *et al. v.* Park, 7 Leg. Gaz. 55.

George Ross and *L. L. James*, and *Harman Yerkes*, for the appellee, presented no paper-book, but relied on the opinion of the Court below.

March 24, 1879. THE COURT. We affirm the proceedings in this case upon the opinion of the learned President of the Court below. Proceedings affirmed.

PER CURIAM. PAXSON, J., absent.

Common Pleas—Law.

C. P. No. 2. June 14, 1879.

Ashworth v. Addy.

Attachment under Act of 1869—Defendant's right to exemption—Practice.

Rule to show cause why the appraisement made by the sheriff under the defendant's claim for exemption, should not be set aside and the exemption disallowed.

An attachment had been issued under the Act of March 17, 1869 (P. L. 8), upon an affidavit that the debt was fraudulently contracted, and that the defendant had fraudulently concealed his goods. Under this eleven bales of yarn were attached. A rule to dissolve the attachment had been discharged, and a judgment for want of an affidavit of defence subsequently entered. After an execution had been issued and the sale advertised, the sale was postponed for the reason that the exemption was claimed. Upon the appraisement ten bales of yarn were appraised at $300, and one bale was sold.

A. Lewis Smith, for the rule.

The defendant, by not answering the affidavit, admitted the facts alleged. And if a man fraudulently conceals his goods, he forfeits his right to exemption.

McCarthy's Appeal, 18 Sm. 217.
Emerson *v.* Smith, 1 Id. 90.
Yelverton *v.* Burton, 2 C. 354.

John J. Ward, contra.

THE COURT. In an attachment under the Act of July 12, 1842, the defendant was held to be entitled to an exemption (Waugh *v.* Burket, 3 Gr. 319); the Act of 1869 does not differ.

Rule discharged.

C. P. No. 3. March 12, 1879.

Knap to use v. Duncan.

Administrator—Pleading—Act of 22 February, 1834.

Rule for judgment to be levied *de terris intestatoris* and of assets *quando acciderunt.*

In an action of debt, the defendant pleaded the general issue and died before trial. A scire facias was issued to substitute his administrator as party defendant, and the latter being subsequently ruled to plead, filed a plea of no assets, whereupon the plaintiff took the present rule.

Silas W. Pettit, for the rule.

A plea of no assets admits the debt.

Saunderson *v.* Nicholle, 1 Shower, 81.
Bullers N. P. 140.
Lockyer *v.* Coward, 3 Wils. 52.
Smith *v.* Tateham, 2 Exch. 205.

The plea is no longer necessary, since the Act of 24 February, 1834, § 37; Purd. Dig. 426, pl. 105.

Sinclair *v.* Wilson, 3 Penna. 167.
Sergeant *v.* Ewing, 6 Casey, 75-82.

It has always been the practice in this State, even before the Act, to enter the judgment asked for, notwithstanding the issue of "no assets" was determined in favor of the defendant.

Reed *v.* Commonwealth, 11 Serg. & Rawle, 442.
Bank *v.* Stambaugh, 13 Id. 300.
Wilson *v.* Hurst, 1 Peters C. C. 441.

Angelo T. Freedley (with whom was *E. Coppée Mitchell*), contra.

Two insuperable objections militate against this rule.

(1) Since the Act of 24 February, 1834, § 34;

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Purdon, 426, pl. 102, a judgment cannot be levied *de terris intestatoris* without a scire facias against the heirs of the decedent.

(2) The general issue pleaded by the intestate is still outstanding, as original pleadings are not affected by the death of a party after plea and replication and before trial.

Clow *v* Brown, 1 Yeates, 324.
Haussman *v.* Reiss, 33 Leg. Int. 83.

The plea was an additional plea, and is so marked. Nothing appears of record to charge the administrator in his representative capacity. But having been ruled to plead, although improperly, it became his duty to plead no assets.

3 Williams on Executors, [1954].
2 Wms. Saunders, 72 *n*, 72 *t*.
3 Id. 216.
Sinclair *v.* Wilson, 3 Penna. 168.
Sergeant *v.* Ewing, 6 Casey, 75.

THE COURT. We are of opinion that we cannot grant this rule.

Rule discharged.

C. P. No. 3. June 5, 1879.

Knap to use of Gatzmer v. Duncan, Administrator.

Effect of discharge in bankruptcy—Collateral contract—Equitable plaintiff—Mortgage—Pleading.

Sur demurrer to plea.

Debt, by Charles Knap to the use of William H. Gatzmer against the defendant as administrator.

The narr. averred that in 1872 Gatzmer conveyed certain premises to Knap, in consideration whereof Knap executed a mortgage thereon for five thousand dollars, and gave his promissory notes for ten thousand dollars, secured by an additional mortgage upon the same premises; that upon the same day, by a sealed agreement between the said Knap and the defendant, it was recited that the above conveyance had been made to Knap solely for the use and benefit of the defendant, and that the said mortgages and notes had been executed on behalf of the latter, and the said defendant therein agreed to furnish and provide the funds whereby to pay, *inter alia*, the said mortgages when and as the same should become due and payable, and thereupon the defendant took possession of the premises.

The contract itself (which by written agreement of counsel at the hearing was incorporated *verbatim* in the narr.) was as follows:—

ARTICLES OF AGREEMENT made the twentieth day of February, Anno Domini one thousand eight hundred and seventy-two, between Charles Knap of the city of Washington, gentleman, party of the first part, and John Collins Duncan and John W. Duncan, guardians of Peter S. and Sarah F. C. Duncan, minor children of Martha Duncan, of the second part. Whereas, by indenture of this date, intended to be recorded, William H. Gatzmer and wife granted and conveyed unto the party of the first part hereto and his heirs, the messuage and lot of ground situate on the east side of Nineteenth Street, at the distance of 144 feet north of Arch Street, in the city of Philadelphia, being No. 113 North Nineteenth Street, for the price or sum of twenty-five thousand dollars (which said consideration includes also the furniture in said messuage, which has been also assigned and transferred by bill of sale of even date herewith, from the said William H. Gatzmer to the said party of the first part), and which said consideration was payable as follows, that is to say, ten thousand dollars thereof being a mortgage now existing upon the said premises; five thousand dollars thereof to be secured by a second mortgage bearing even date herewith, to be executed by the said Charles Knap to the said William H. Gatzmer, and the balance of ten thousand dollars to be secured by two promissory notes of five thousand dollars each, payable, one at twelve and the other at fifteen months after this date, with interest, to be given by the said Charles Knap to the said William H Gatzmer. Now it is hereby covenanted, understood, and agreed by and between the parties hereto, their heirs, executors, administrators, and assigns, in manner following, that is to say:—

1. The said party of the first part has purchased the said premises and furniture, and received the conveyance thereof, not on his own behalf or for his own use, but solely for the use and benefit of the said parties of the second part, for whom and on whose behalf he has so executed the said mortgage and the said two promissory notes.

2. The parties of the second part are to furnish and provide the funds whereby to pay the said mortgage of $5000, and the two promissory notes when and as the same shall become due and payable, and to indemnify and save harmless the said party of the first part from all liability by reason thereof, as well as of and from the said mortgage of $10,000; and upon the payment by them of the said mortgage of $5000, and the said two promissory notes, and the assumption of the said mortgage of $10,000, the said party of the first part shall and will execute to the said John Collins Duncan and the said Peter S. Duncan and Sarah F. C. Duncan and their heirs, a conveyance of said premises clear of all encumbrance other than the said mortgage of $10,000, and also an absolute transfer of the said household furniture.

3. In the mean time the parties of the second part are to enter into immediate possession of the said premises and furniture, and to pay for the use, occupation, and possession thereof, to the said party of the first part, the sum of fifteen hundred dollars a year, which sum is to be applied by the said party of the first part to the payment of the interest on the said encumbrances. The said rent to be apportioned up to the date of the said conveyance so to be made by the said party of the first part.

4. The taxes, water rent, and repairs to be paid by the said parties of the second part, who are also to keep the furniture insured for five thousand dollars.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

CHARLES KNAP, [SEAL.]
JOHN COLLINS DUNCAN, [SEAL.]
JOHN W. DUNCAN, Guardian. [SEAL.]

Sealed and delivered in presence of us.
H. P. MUIRHEID,
WM. SHARP.

The narr. further averred that the said defendant failed to pay the said mortgages at their

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maturity, and that at the sheriff's sales thereunder, at the suit of Gatzmer, a deficiency had occurred, for the amount whereof this action was brought.

The plaintiff's counsel being ruled to file his warrant of attorney, filed a warrant executed by both Knap and Gatzmer.

The defendant pleaded that since the making of the various agreements in the said narr. recited, and the arising of the indebtedness therein averred, and since the commencement of this action, the plaintiff had been duly adjudicated an involuntary bankrupt in the District Court of the United States for the Western District of Pennsylvania, and had been duly discharged from all liability to debts existing prior to that date (reciting the proceedings and discharge); wherefore, as the plaintiff was discharged from all liability to the said Gatzmer in respect to the subject-matter of this action, the defendant prayed judgment, etc.

Gatzmer demurred to this plea.

(1) Because neither the adjudication nor discharge of Charles Knap in bankruptcy can affect the liability of the defendant's intestate to W. H. Gatzmer, the equitable and real plaintiff.

(2) Because such adjudication and discharge, having both occurred since the rights of said Gatzmer were fixed by the institution of this suit, cannot affect the liability of defendant's intestate to the said plaintiff.

Joinder in demurrer.

Silas W. Pettit, for demurrer.

The rights of Gatzmer cannot be affected by the acts of Knap. Gatzmer is the party for whose benefit the agreement between Knap and the defendant's intestate was made, and is entitled to sue upon it.

Campbell *v.* Shrum, 3 Watts, 60.
Taylor *v.* Preston, 29 P. F. Smith, 436.
Moore's Appeal, 6 WEEKLY NOTES CASES, 474.

Angelo T. Freedley and *E. Coppée Mitchell*, contra.

Gatzmer has no individual cause of action. He was neither privy to the agreement nor the consideration therefor, nor was it made for his use or benefit. Gatzmer accepted Knap as his debtor, and the agreement was a collateral undertaking to indemnify Knap from loss, and widely differs from cases where a grantee deducts the amount of an encumbrance from the consideration and then expressly agrees to pay the holder of the encumbrance. The defendant never acquired the legal title, but simply paid a rent under the agreement. Had the agreement been by parol, Gatzmer could not have maintained assumpsit in his own name.

Blymire *v.* Boistle, 6 Watts, 182.
De Bolle *v.* Penna. Co., 4 Wharton, 68.
Ramsdale *v.* Horton, 3 Barr, 330.
Finney *v.* Finney, 4 Harris, 380.
Hamilton *v.* Brown, 6 Id. 87.
Peterson *v.* Lothrop, 10 Casey, 223.
Campbell *v.* Lacock, 4 Wright, 448.
Grubbs' Appeal, 16 P. F. Smith, 117.
Kountz *v.* Holthouse, 4 Norris, 235.
Mississippi R. R. *v.* Southern R. R., 4 Brewster, 79; s. c., 8 Philada. 107.

Moreover a warrant of attorney has been filed by Knap. The effect of Knap's bankruptcy is twofold:

1. All pending suits abate unless prosecuted by the assignee.

Bump on Bankruptcy (10 ed.), 546 *et seq.*
Lacy *v.* Rockett, 11 Alabama, 1002.
Springer *v.* Vanderpool, 4 Edward Ch. Cas. 362.

2. As Knap's liability to Gatzmer was discharged, so the liability of the defendant to plaintiff is likewise discharged.

If Gatzmer has no independent right of action the form of the action cannot avail him, for it is well settled that a use plaintiff is subject to any defence valid against the legal plaintiff, and that a defendant can only attack the legal title.

Armstrong *v.* Lancaster, 5 Watts, 68.
KcKinney *v.* Mehaffey, 7 Watts & Sergeant, 278.
Com. *v.* Lightner, 9 Id. 118.
Chambers *v.* Davis, 3 Wharton, 40, 48.
Com. *v.* Shuman, 6 Harris, 346.
Memphis *v.* Wilcox, 12 Wright, 168.

C. A. V.

June 6, 1879. THE COURT. Demurrer overruled and judgment entered for defendant.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, SEPT. 25, 1879.* [NO. 22.

Supreme Court.

May '79, 151 and 152. June 9, 1879.

City of Williamsport v. The Commonwealth ex rel. Bair and Shenk.

Mandamus—When issued to compel payment of interest on city bonds—What no defence to attachment for not obeying—Mandamus is a civil proceeding under Act of March 30, 1875, relating to change of venue—One presenting coupons for payment need not show title.

A peremptory mandamus may be issued against a city treasurer to compel him to apply money in his hands, already appropriated to other uses by city councils, to the payment of overdue interest on city bonds, provided the withdrawing of the amount from the treasury will not embarrass, much less stop the wheels of the city government.

A city cannot require those who present for payment coupons cut from its bonds to give the numbers of the bonds, and to give a history of their claim of title thereto.

It is no defence on the part of a city treasurer, as against an attachment for not obeying a mandamus, that the amount of coupons presented was largely in excess of the amount in hand, and that, therefore, he cannot discriminate between them.

A mandamus is a civil proceeding within the meaning of the Act of March 30, 1875 (P. L. 35), relating to changes of venue.

Commonwealth *v.* Commissioners of Lancaster Co., 6 Binn. 5, distinguished.

Error, and certiorari, to the Common Pleas of Columbia County, to which county the venue had been changed from Lycoming County under the provisions of the Act of March 30, 1875 (P. L. 35).

The writ of error was taken to a final order of the Court below in the nature of a mandamus, requiring Daniel Longsdorf, treasurer of the city of Williamsport, to pay overdue interest on certain bonds of said city.

The certiorari was taken to review the action of the Court below in granting an attachment against the said Daniel Longsdorf, treasurer, for non-compliance with said order.

The material facts of the case were these: By the decision and decree of the Supreme Court in the case of Williamsport *v.* Commonwealth ex rel. Bair and Shenk (3 Norris, 487; S. C., 4 WEEKLY NOTES, 385), filed Oct. 1, 1877, the treasurer of the city of Williamsport was ordered to apply any money in the treasury of said city, not otherwise appropriated, to the payment of the accrued interest, or overdue coupons, on certain bonds of the city known as "Series A." In pursuance of this decree a peremptory mandamus was issued by the Court of Common Pleas of Columbia County on November 3, 1877, directed to the councils of the city of Williamsport, and the said Longsdorf, treasurer thereof. On December 3, 1877, the Court granted a rule to restrain the said treasurer from paying out any money in his hands, so much of which rule was, on December 12, 1877, rescinded as to allow the payment by him of the necessary running expenses of the city. On January 4, 1878, the Court again granted a rule on the said treasurer to show cause why he should not be restrained from paying out any money in his hands. Testimony was taken, and on March 13, 1878, the rule was discharged, on the ground that it had been shown that the amount of money in the treasury was no more than was necessary for the current expenses of the city, and also because it had been testified by the city officials that councils were proceeding to levy and collect the tax required by the mandamus, as soon as practicable. In May, 1878, the city councils passed an ordinance levying a tax, the whole of which was appropriated by them to pay current city expenses. The duplicates were at once placed in the hands of the city treasurer, and collections were made by him. No provision, however, was made by them for the payment of the overdue interest on the city bonds, until September, 1878, when an ordinance was passed levying a tax for this purpose, under the provisions of the Act of March 22, 1870 (P. L. 535), but no effort was made to collect this tax, nor were any duplicates handed to the city treasurer for collection until February 28, 1879. On February 11, 1879, the Court granted a rule upon the said Longsdorf to show cause why he should not apply the amount then in his hands as city treasurer in payment of overdue interest on the said bonds. Answers were filed both by Longsdorf and the city councils, and the evidence of the treasurer and controller taken, showing that the whole fund in the treasury was not necessary for the city expenses of the current year. After hearing, the rule was, on March 10, 1879, made absolute upon the treasurer to pay $8000 of the amount then found to be in his hands on account of the interest of the city bonds known as Series A.

To this order the present writ of error was taken by defendants.

The said treasurer did not comply with this order, but filed an answer which set forth *inter alia* (1) that he had been advised to require all

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persons presenting coupons for payment to give him the numbers of the bonds, and to trace their title thereto; (2) that he had paid, out of said $8000, judgments recovered on coupons amounting to $2999.29.

The same day the Court ordered an attachment to issue against him for contempt of Court, unless he should on or before the third day of April, then next, pay the sum of $5000 upon those coupons which should be first presented for payment under the order of March 10, 1879.

Longsdorf did not pay the said sum, and before April 3, this writ of certiorari was taken by him to review the action of the Court in awarding this attachment.

H. C. McCormick (*H. W. Watson*, City Solicitor, with him), for plaintiffs in error.

There is no money in the treasury except that assessed for the current expenses of the city. The operation of this writ of mandamus would withdraw $8000 from the purpose for which it is held, and creditors must not be allowed thus to stop the wheels of the city government.

Commonwealth ex rel. *v.* Commissioners of Phila., 1 Wh. 1.

Commonwealth *v.* Commissioners of Phila., 2 Wh. 286.

Commonwealth *v.* Floyd, 2 Pitts. R. 345.

There is a right on the part of the city treasurer to make inquiry as to the title to the coupons presented for payment. The amount of coupons to be presented was largely in excess of $8000. The city treasurer could not discriminate between them, and could not, therefore, pay any of them. The Act of March 30, 1875, provides only for a change of venue "in any civil cause in law or equity." A proceeding by mandamus is not within the Act.

Commonwealth ex rel. Witmer *v.* Commissioners of Lancaster Co., 6 Binn. 5.

The Act of June 14, 1836 (P. L. 626), restricts the powers of the Courts of Common Pleas in issuing writs of mandamus to the limits of their respective counties. The action of the Court of Columbia County was, therefore, erroneous.

Wolf *v.* Commonwealth, 14 P. F. Smith, 252.

Whitemarsh T'p *v.* Pa. & R. R. Co., 8 W. & S. 365.

B. S. Bentley, Jr., *J. O. Parker*, and *J. A. Beeber*, contra.

The facts testified to before the Court below show that this $8000 is unnecessary for payment of current city expenses, and should, therefore, be appropriated to pay the overdue interest on the city bonds. It would be impossible for the holders of coupons to give the title to every bond, much less to every coupon. These latter are as much negotiable securities as bank notes. A mandamus has all the qualities and attributes of a civil action, and is, therefore, within the Act of March 30, 1875.

High on Extraordinary Legal Remedies, p. 10, § 8.

Commonwealth ex rel. *v.* Commissioners of Allegheny County, 8 Casey, 221.

The original mandamus issued from the Court of Common Pleas of Lycoming Co., within which venue Williamsport lies. All orders subsequent thereto were simply the execution process of the Court. No exception can be taken to want of jurisdiction after judgment and decree in the Supreme Court.

June 23, 1879. THE COURT. The proceeding out of which the orders complained of grew, was a writ of peremptory mandamus issued at the relation of certain creditors of the city of Williamsport, to compel the councils of said city to make provision for, and pay the arrears of interest due upon its bonds, and to provide for the accruing interest. The question of the validity of these bonds was before this Court, and settled in City of Williamsport *v.* The Commonwealth ex rel. Bair and Shenk (3 Norris, 487). In affirming the judgment in that case we said: "We do not mean to deprive the city of any special defence to any particular bond or bonds in Series A, and not embraced in this suit." This was intended, as the language implies, out of abundance of caution, to save the right of the city to make any special defence, not set up in that suit, to any special bond or bonds not embraced therein. It was not intended, nor can we allow it to be used as a pretext for not paying the interest on all bonds whatever. It was a part of our judgment "that the treasurer of the city of Williamsport do forthwith apply any money now in the treasury of said city, and not otherwise appropriated, to the payment of the accrued interest or coupons now overdue on said bonds known as Series A." The record now before us discloses the fact that since our judgment was entered, October 4, 1877, the Court below has been constantly engaged in an attempt to enforce our decree. It issued a peremptory mandamus on Nov. 3, 1877, and the docket entries since that time, and up to the month of April, 1879, when the present writ of error and certiorari were filed, show an unusual degree of activity, with results not encouraging to holders of municipal bonds. Passing by those matters which are not material, we come to those orders of the Court below of which complaint is now made, and which are assigned for error. First, we have the order of March 10, 1879, by which the treasurer of the city of Williamsport was directed to pay the sum of $8000 on overdue interest on bonds known as Series A. This order was made upon a rule granted Feb. 11, 1879, on Daniel Longsdorf, treasurer of said city, to show cause why he should not apply the amount in his hands as treasurer in payment of overdue interest on the said bonds, which was due and payable prior to the third day

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of November, 1879. To this particular order a writ of error was taken, and we are called upon to pass upon its propriety.

Somewhat similar rules to show cause had previously been discharged by the Court below upon the ground that a mandamus or statutory execution ought not to be enforced to the extent of withdrawing from the city treasury the funds absolutely needed for the ordinary expenses of the city. A previous order to pay had been vacated *ex parte* upon the city coming in and showing that all the money in the treasury would be required to defray expenses up to Sept. 1, 1878. Says the learned Judge: "It was also contended that there was no occasion for the order, and it was testified by officials of the city that the councils were proceeding to levy and collect the tax required by the mandamus in this case as early as practicable. In view of these facts we discharged the rule. If what was then stated would be the case, had been actually carried out, there would have been no occasion for this rule. It is now one year since that hearing was had, the interest has not been paid, and the facts presented in answer to this rule are nearly identical with those testified before us at that time." The learned Judge, after ascertaining that the withdrawal of the sum of $8000 from the treasury would not embarrass, much less stop the wheels of the municipality for the fiscal year ending April 1, 1879, made the order which is the subject of this contention. In doing so he was clearly right; in his own words it was giving "to the creditors referred to in the rule, a small portion of what under the decree of the Supreme Court they were entitled to months since."

We now come to the subsequent order of March 29, 1879. The city treasurer having neglected and refused to comply with the order of March 10, to pay over the money referred to, he was duly notified that an application would be made to the Court of Common Pleas on the 29th of March, 1879, for an attachment against him for contempt in disobeying the said order. The treasurer appeared on the said day, and filed an answer under oath, disavowing generally any intention of committing a contempt, and setting forth specifically, as reasons for not having complied with the order of the Court, *inter alia*, the following: (1) that the city solicitor had advised him to require all persons holding coupons for interest maturing prior to Nov. 3, 1877, to give him the numbers of the bonds, the names of the owners, and from whom the title to the same was derived, in order that he, the said treasurer, might report the same to councils with a view to ascertain whether or not there was any specific defence to the payment of any of the coupons so presented; (2) that the said treasurer had paid out of said sum judgments recovered on coupons amounting to $2999.29. There were a number of other matters set up in the answer which we do not consider it important to notice. The Court below recognized the payment of $2999.29 as proper; but the remaining reasons were possibly regarded as frivolous, as on the same day the rule for attachment for contempt was made absolute, and the attachment directed to issue against Daniel Longsdorf, treasurer, "unless he shall on or before the third day of April next pay the sum of $5000 now in his hands upon those coupons maturing prior to Nov. 3, 1877, which were first presented to said treasurer for payment under said order of March 10, 1879." The treasurer did not pay, and before the 3d of April arrived removed the record and proceeding to this Court upon a writ of certiorari.

There was nothing in the answer of the treasurer to cause the Court below to hesitate, much less to require discussion here. That it is the duty of the holder of a coupon, a thing that passes by delivery like a bank note, to give a history of such coupon, with the chain of title, at the counter where he demands payment, is a proposition that need not be seriously considered. A coupon is always numbered with the number of the bond from which it is cut. This enables the owners of stolen bonds to stop the payment of the coupons. But it was never supposed that by stopping the payment of the coupon you could thereby ascertain if the bond were stolen. If the city of Williamsport has a just defence to one or more bonds, the fact must certainly be known to the authorities, with the date and number of the bond, and the name of the person to whom issued, and a proper notice from them to the treasurer would enable him to decline payment for such reason when such coupons are presented. But payment ought not to be declined for frivolous reasons. In the absence of any notice from the city authorities not to pay particular coupons by reason of a defence to the bonds to which they belonged, the city treasurer incurred no responsibility by payment. The order of the Court would be a full protection for him (Monaghan *v.* The City, 4 Casey, 207; In re Sedgley Avenue, 7 WEEKLY NOTES, 1). Equally untenable was the position that because the amount of coupons presented was largely in excess of the amount of money on hand, $8000, he could not discriminate between them, and must, therefore, decline to pay any of them.

A further objection was made to the orders of March 10 and March 29, that the Act of Assembly of March 30, 1875, does not authorize a change of venue in proceedings by mandamus, and consequently the Court of Common Pleas in Columbia County, to which the cause has been removed, had no jurisdiction. It was certainly late to make this objection, after a final decree in this Court.

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We will, however, consider it as if the point had been made at an earlier stage in the proceedings.

The Act of March 30, 1875 (P. L. 35), provides "That changes of venue shall be made in any civil cause in law or equity depending in any of the Courts of this Commonwealth," in the particular cases specified in said Act. It was not denied that the cause was removed for one of the reasons enumerated in the Act, but it was alleged that a mandamus was not "a civil cause in law or equity," and the case of Com. *v.* The Commissioners of Lancaster County (6 Binney, 5), was cited in support of this view. A careful examination of that case, however, will show that it is not authority for any such principle. It was a rule for a mandamus, issued out of this Court upon the Commissioners. The jurisdiction was denied for the reason that the Act of 24 February, 1806, declared that "the Supreme Court shall have no jurisdiction in civil cases." The Court sustained its jurisdiction upon the ground that it was manifestly the intent of the Legislature by the Act in question not to take away the mandamus jurisdiction from the Supreme Court, for the reason that at that time the Common Pleas had no power to issue such writs. Says TILGHMAN, C. J., "At the time the law was passed the Supreme Court were overwhelmed with business arising from civil actions commenced in the city and county of Philadelphia. Before the year 1786 no such actions were commenced in this Court, and it was judged proper to place its jurisdiction on the same footing that it formerly stood." The Court in placing a construction upon the language of the Act of 1806, very properly looked to the mischief to be remedied. Therefore, whilst it was admitted that the term "civil cases" in its broadest sense might include the case of a mandamus, yet, in its application to the mischief, it must be held to mean "civil actions," which in common parlance do not comprehend writs of mandamus, certiorari, habeas corpus, etc. Turning now to the Act of 1875, it is plain to see that a mandamus is as much within the mischief sought to be remedied as any other cause. Without going over the details of the Act in which a change of venue may be had, we will refer only to two of the reasons assigned: "Whenever the Judge who by law is required to try or *hear* the same shall be personally interested in the event of such cause, or in the question to be determined thereby;" and (2) "Whenever any near relation of such Judge shall be a party to any such cause, or interested in the event thereof." These reasons for a change of venue apply with as much force to a mandamus as to any other form of proceeding. The Act in question is remedial, and must have a liberal interpretation. The tendency of recent legislation has been liberal in the matter of change of venue. This is noticeable in the Act of 18 March, 1875 (P. L. 30), in regard to the change of venue in criminal cases. Whilst a mandamus is not in common parlance a civil cause, it is so in its broad sense, being really in this case but a proceeding for the collection of money. It is said in High on Legal Remedies, p. 10, sec. 8, "While in this country the writ (mandamus) has been regulated by constitutional and statutory enactments, it has lost but few of its ancient remedial incidents, and is still governed by common law rules where such rules have not been abrogated. Though in form and name the proceedings partake somewhat of a criminal nature, yet the remedy is in substance a civil one, having all the qualities and attributes of a civil action. And since the proceeding has all the elements of an ordinary action at law, including parties, pleadings, mesne and final process, it is regarded as an original proceeding or suit rather than the more final process of a suit, or a mode of obtaining execution on a judgment." And in the case of Com. ex rel. *v.* Commissioners of Allegheny County (8 Casey, at page 221), it was said by Mr. Justice WOODWARD that "a mandamus under our statute answers the form of an ordinary action at law, and all questions properly arising are to be tried in the same manner as was formerly done at common law in the action for a false return." We are of opinion that the case came within the Act of 30 March, 1875, and that the cause was properly removed to Columbia County. It follows that the Court had jurisdiction.

We regret to see a disposition, only too apparent upon the face of this record, to evade our decree of October 4, 1877. Perhaps too much importance has been attached to the fact that there was a difference of opinion between some of the members of the Court as to the principles which should govern the case. Be that as it may, it is only proper to say that the Court is a unit in the enforcement of our decree. No man nor corporation in Pennsylvania is strong enough to successfully evade, much less resist, the decree of this Court. It has been attempted in the past, with what success is a matter of history. From the date of our decree to the present time the city of Williamsport has not to our knowledge voluntarily paid a dollar of interest to its bondholders. It is sincerely hoped that wiser counsels will ultimately prevail, and that we may see that obedience to law manifested which the Commonwealth has a right to demand from every citizen and municipality within her borders.

This record is entirely barren of error, and the proceedings are affirmed upon each writ. It will be the duty of the Court below to compel prompt obedience to its order.

Opinion by PAXSON, J.

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May, '78, 132. May 9, 1879.

Grubb v. Grubb.

Equity jurisdiction—Fraud, accident, mistake—Reformation of deeds—Injunction—Account.

The proper construction of a deed is not a subject of equitable jurisdiction, and, in the absence of averment and proof of fraud, accident, or mistake, a court of equity cannot undertake its reformation.

When a person, not a tenant in possession, but possessing a right to dig ores, takes more than his right calls for, he commits neither waste nor trespass, and it is not within the province of a court of equity to restrain him by an injunction.

In such case equity will not decree an account where the items are a mere matter of charge for a certain number of tons of ore, with no entries on the other side. This is clearly the subject of an action at law.

Appeal from the Common Pleas of Lancaster County.

Bill in equity, filed by Clement B. Grubb against A. Bates Grubb, setting forth the following facts:—

In 1845 Clement B. Grubb and his brother Edward B. Grubb were co-tenants in fee of certain lands, known as Mt. Hope Estate, including thereon an iron furnace known as Mt. Hope Furnace, in Lancaster County, and were also co-tenants with others of an undivided one-sixth interest in certain mine-hills known as the Cornwall Ore Banks. At some time during this year Edward B. Grubb and the respondent formed a partnership for the purpose of manufacturing iron at Mt. Hope Furnace. On October 29, 1845, a deed was executed by complainant and wife to respondent, conveying complainant's half of Mt. Hope estate, and the right to take ore from the Cornwall Ore Banks, in the following words:—

"Together also with the right, title, and interest, so far as the said Alfred Bates Grubb's right under this conveyance in the said Mt. Hope Furnace is interested and concerned, of them the said Clement B. Grubb and Mary Ann, his wife, to raise, dig up, and carry away for the use and advantage of said furnace, iron ore out of and from the . . . . Cornwall Ore Banks . . . . for the purpose only of procuring ore for the said Mt. Hope Furnace."

This deed was decided, in Grubb *v.* Grubb (24 Sm. 25), to grant to respondent only a special and limited right of taking ore, the complainant retaining in himself the corporeal estate in the mine-hills, which he did not convey.

Edward B. Grubb and the respondent, now tenants in common of Mt. Hope, continued to operate the furnace, in partnership, with ore obtained from the Cornwall Ore Banks, until the death of Edward in 1867. In 1870 the heirs of Edward B. Grubb instituted a suit in partition against respondent, and as a result of these proceedings respondent became, on April 11, 1874, sole owner of the Mt. Hope estate. The respondent has recently asserted a right to take ore from Cornwall without limit. The complainant, who owns one-twelfth of Cornwall, has entered into articles of agreement with his co-proprietors under which the ore taken by respondent is considered as taken by complainant and is at his exclusive cost.

The bill prayed that it be decreed that respondent's right is to take but one-half the ore used at Mt. Hope, that, if the words of the deed of 1845 do not so clearly confine his right, it may be reformed, and that respondent be decreed to account for one-half the ore taken by him.

The defendant, in his answer, claimed that the one-sixth interest in Cornwall was a part of Mt. Hope estate, and that he, by virtue of his ownership of said estate, is entitled to an unlimited right to take ore; that a true construction of the deed of 1845 gives him a right to a full supply of the said ore. The answer further averred that the matters alleged in the complainant's bill are not such as to entitle him to relief in equity.

The cause was referred to an examiner and master, George Nauman, who reported that the jurisdiction of a court of equity in the case was at least doubtful, and that in his opinion the deed of 1845 intended to grant to respondent the right to a full supply of ore. He therefore recommended that the bill be dismissed.

Exceptions to this report were filed both by complainant and respondent. Those of the complainant were sustained by the Court, and a decree entered adjudging that the respondent was possessed of an interest to take only one-half the ore used at Mt. Hope Furnace, and ordering the cause to be referred to a master to take an account of the amount and value of the ore already taken by respondent in excess of his right. The master reported the amount due, and a final decree was entered adjudging the said amount to be paid by respondent to complainant.

The respondent took this appeal, assigning for error, *inter alia*, the opinion of the Court below that "The powers and jurisdiction of a court of equity are sufficiently broad and comprehensive to extend to and embrace the controversy or case as here developed."

Wayne MacVeagh and *A. Slaymaker*, for appellants.

The Acts of Assembly conferring equity powers on courts of common pleas cannot interfere with the rights of parties to have their controversies settled by the usual common law methods in any cases other than those whereof courts of chancery, where there were such courts, had previously had jurisdiction.

North Penn. R. R. Co. *v.* Snowden, 6 Wright, 488.
Norris's Appeal, 14 Sm. 275.
Tillmes *v.* Marsh, 17 Sm. 507.

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The complainant avers that his legal right is denied, but this must be acknowledged or established at law before he can resort to a chancellor.

Rhea *v.* Forsyth, 1 Wright, 503.
Norris's Appeal, 14 Sm. 282.
City of Phila.'s Appeal, 28 Sm. 33.
Brown's Appeal, 12 Sm. 17.
Minnig's Appeal, 1 Norris, 373.
Haines's Appeal, 23 Sm. 169.

The bill seeks an account only as a consequence of the other relief prayed, and, as the accounts are all on one side and no equitable principle is invoked, a court of equity will decline to take jurisdiction.

Passyunk Building Ass. Appeal, 2 Norris, 441.
Gloninger *v.* Hazard, 6 Wright, 389.

There is ample remedy in this case at law. It is therefore not cognizable in equity.

Clark's Appeal, 12 Sm. 447.
Watson *v.* Sutherland, 5 Wall. 74.
Strasburg R. R. Co *v.* Echternacht, 9 Harris, 220.
Gallagher *v.* Fayette Co. R. R. Co., 2 Wright, 102.

David W. Sellers and *Thomas E. Franklin*, for appellee.

Courts of equity will interfere by injunction to stay waste.

1 Story's Eq. Jurisprudence, 515–518.
Jesus College *v.* Bloom, Ambler, 54.
Bispham's Equity, §§ 434, 435, 436.
Bishop of Winchester *v.* Knight, 1 P. W. 407.
Landsdowne *v.* Landsdowne, 1 Madd. Chan. 116.
Thomas *v.* Oakley, 18 Vesey, 184.
Gibson *v.* Smith, 2 Atk. 182

Nor is it necessary to wait till waste is committed where the intention and right so to do are asserted.

Perrot *v.* Perrot, 3 Atk. 94.
Packington's Case, 3 Atk. 215.
Coppinger *v.* Gubbins, 9 Irish Eq. 310.
Wellesly *v.* Wellesly, 6 Simons, 497.
Duke of Leeds *v.* Amherst, 14 Id. 357.
Morris *v.* Morris, 15 Id. 509.

Waste is within the purview of our legislation on the equitable powers of the Courts.

Denny *v.* Brunson, 5 Casey, 382–385.

So are cases of repeated acts of trespass.

Scheetz's Appeal, 11 Casey, 88.
Unangst's Appeal, 5 Sm. 128.
Carty *v.* Shields, 5 WEEKLY NOTES, 241.
Gass's Appeal, 23 Sm. 47.

The equity powers conferred by Acts of Assembly should be extended by every interpretation of which the words are susceptible.

Wesley Church *v.* Moore, 10 Barr, 280.
Kirkpatrick *v.* McDonald, 1 Jones, 393.
Yard *v.* Patton, 1 Harris, 282.

In this case no doubt can be entertained as to complainant's legal rights. The case is therefore within the jurisdiction of the Court, who will inquire into and determine all matters necessary to decide the rights of the parties to the controversy.

McGowin *v.* Remington, 2 Jones, 56.
McCallum *v.* Germantown Water Co., 4 Sm. 43.
Allison and Evans' Appeal, 27 Sm. 221.

June 23, 1879. THE COURT. The appellant denies the jurisdiction. As this point if well taken disposes of the present proceeding, we will consider it first.

The bill, stripped of all unnecessary matter, is a proceeding to compel the appellant to pay for one-half the ore hauled from the Cornwall ore banks to the Mt. Hope furnace. Whether he ought to pay for it depends upon the construction of the deed of 1845 of Clement B. Grubb and wife to Alfred Bates Grubb. These are both legal questions properly belonging to a court of law. If this were all, we would at once dismiss the bill for want of jurisdiction. But as some other matters have been introduced into it, evidently with the view of bringing the case within the cognizance of a court of equity, we will consider them briefly. They are (1) That the claim of a full supply, instead of a moiety, is contrary to the agreement of purchase, to the construction of the deed, and to the continuous and uninterrupted usage thereunder, and that if the terms of the license are vague, the deed should be reformed. In support of this averment there is the prayer "That, if the words of the deed of 1845 do not clearly confine the defendant's right to a half supply, the deed should be reformed." It is sufficient to say in regard to this, that the proper *construction* of the deed is not a subject of equity jurisdiction, and that, as to its reformation, there is neither averment nor proof of fraud, accident, or mistake.

The second averment is, "That the wrong of taking all the ore is one continuous and recurring, would cause a multiplicity of suits, against which relief could be had in equity only." It was strongly urged that this averment gave the Court jurisdiction under that provision of the Act of 16 June, 1836, conferring equity powers upon the Courts of Common Pleas, which provides that such powers shall include "the prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community, or the rights of individuals." It is not contended that the appellant is doing any act contrary to law or prejudicial to the community. Has he done anything prejudicial to the rights of the appellee which is sufficient to give a court of equity jurisdiction? The contention of the appellee is that the case comes within the same rule as waste, which may be restrained by injunction as well as by writ of *estrepement*, and of continuing trespasses, which equity will restrain to prevent multiplicity of suits, and Denny *v.* Brunson (5 Casey, 385), Sheetz's Appeal (11 Id. 88), and other cases were cited in support of this view. I have no fault to find with the authorities cited, but their application is not manifest. No question of waste is raised by this record. Waste is spoil or destruction done

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or allowed to be done to houses, woods, lands, or other corporeal hereditaments by the tenant thereof, to the prejudice of the heir, or of him in reversion or remainder. By the Act of 27 March, 1833 (P. L. 99), the provisions of the second section of the Act of 2 April, 1803, restraining waste are extended to quarrying and mining. But it has never been held that a person who is not a tenant in possession, but possessing a right to dig ores, is guilty of committing waste when he takes out more ore than his contract or his right calls for. Nor does the case come within the rule of repeated trespasses, for the reason that the appellant is not a trespasser. His right to dig ore at the Cornwall banks is not disputed. The question whether he has a right to a whole supply for his furnace or only a half is another matter, and has no bearing upon the question of trespass. If his right is limited to a half supply, and as to this we express no opinion, it becomes a mere question of accounting for the surplus. I am of opinion that the question of a half supply will be found to be full of practical difficulties, when it comes to be established, if it ever shall be. For the present it is sufficient to say that the mere fact, if it exists, that the appellant has taken more ore than he was entitled to under the deed of 1845, does not make him a trespasser. Even if it did the equity jurisdiction of the Court would not attach in the face of the appellant's denial of the appellee's right. A bill in equity is not a panacea. It was never intended nor has it ever been used to settle disputed rights in trespass. Where the right is clear it will restrain the commission of repeated acts of trespass on the sole ground of preventing a multiplicity of suits.

There is the further prayer that the appellant be decreed to account to the proprietors of Cornwall for one-half the ore. The appellee is the only one of the proprietors of Cornwall who is party to the bill. Even if they had been joined as plaintiffs, the account is a mere matter of charge for a certain number of tons of ore, with no entries on the other side of the account. It was clearly the subject of an action at law, and the appropriate form of action is assumpsit.

These are substantially all the points that need to be discussed. There is a growing disposition on the part of the bar throughout the State to favor equity practice, culminating in the filing of bills in many instances where the jurisdiction is at least doubtful. We were compelled at the last term of the western district to dismiss a bill of our own motion for this reason. Orders and decrees in equity where there is no jurisdiction are simply *coram non judice*.

We are clear that this bill must be dismissed upon this ground. If any authority were needed it may be found in the North Penna. R. R. Co. *v.* Snowden (6 Wright, 488), and Norris's Appeal (14 P. F. S. 275). There are several other cases to the same point, but those cited are sufficient.

The decree is reversed and the bill dismissed for want of jurisdiction; the costs to be paid by the appellee.

Opinion by PAXSON, J. STERRETT and WOODWARD, JJ., absent.

May, '79, 58. May 6, 1879.

Boyd v. Peach Bottom Railway Company.

Railroad Companies—Evidence of subscription—Cash payment required by Act of 1849—Conditional subscription to capital stock—Estoppel.

A subscriber to the capital stock of a railroad company before letters patent had issued, gave his demand note for the $5 on each share required to be paid in by the Act of Feb. 19, 1849, Sect. 1:

Held, That the note was not the payment contemplated by the law, and that, in the absence of active participation by the subscriber in the affairs of the company, he was not estopped from setting up the absence of such payment as a defence to an action of assumpsit brought upon his subscription.

The giving of his note by the defendant to the commissioners upon presentation of the subscription book to him, impliedly admitted and was sufficient to establish the fact of his subscription, though his signature thereon was not proved.

A subscription to the stock of a public corporation before letters patent have issued and an organization effected, must be considered absolute and unqualified. Commissioners have no right to receive conditional subscriptions. If they do, the subscription itself is valid and the condition void.

Error to the Court of Common Pleas of Lancaster County. Assumpsit, by the Peach Bottom Railway Company against Samuel Boyd, on a subscription to the capital stock.

The plaintiff was incorporated by the Act of March 24, 1868 (P. L. 778), which provided that the corporation should have all the powers and be subject to all the provisions and restrictions of the Act regulating railroad companies, passed February 19, 1849, the first section of which contains the following:—

"No subscription for such (capital) stock shall be valid unless the parties making the same shall at the time of subscribing pay to the . . . commissioners five dollars on each and every share subscribed for the use of the company."

Commissioners were named by the said Act to open books and receive subscriptions.

On the trial, before PATTERSON, A. L. J., the plaintiff gave in evidence a subscription book containing the following:—

"We, the undersigned, agree with one another and bind ourselves, our heirs, executors, and administrators to the

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Peach Bottom Railroad Company, to the number of shares of stock set opposite our respective names, in the capital stock of said company, provided the route be constructed upon what is known as the Northern Route, connecting with the Philadelphia and Baltimore Central Railroad at Oxford, Chester County, and passing near Hopewell, Pine Grove, White Rock, King's Bridge, Smedley's Mill, Centreville, Chestnut Level, and along Fishing Creek to its mouth; and provided these subscriptions be spent on the east side of the Susquehanna River.

* * * * * * *

Samuel Boyd, two shares

* * * * * * *

There was no evidence that the name of Mr. Boyd was his signature.

John A. Alexander, Treasurer of the Railway Company, called by the plaintiff, testified that he went to Mr. Boyd to collect his subscription, and told him that "to secure letters patent it was necessary for the commissioners to certify to the Governor that ten per cent. of the subscriptions were paid in; that as the work had not yet begun, they were not collecting any money, but taking demand notes." That Mr. Boyd then gave him his demand note for ten per cent. of his two shares of stock for which he obtained a receipt. This note was never paid, nor were any further payments on account of his subscription to the stock paid by the defendant.

The note was delivered by Alexander to the commissioners, and they certified to the Governor a list of subscribers, including the name of Samuel Boyd.

Letters patent were subsequently issued to the company, Samuel Boyd being named as one of the corporators. The road was built upon an entirely different route from that set forth in the subscription book.

The defendant offered no evidence, but asked for a nonsuit, which was refused, and the Court directed a verdict for the plaintiff. Verdict accordingly for the plaintiff and judgment thereon. The defendant took this writ, assigning for error the refusal of a nonsuit and the instruction of the Court in favor of the plaintiff.

D. M. North and *G. Hay Brown*, for plaintiff in error.

There is no evidence of the plaintiff's subscription in writing. Such a contract cannot be proved by parol evidence.

Pittsburgh and Steubenville R. R. Co. *v.* Gazzam, 8 Casey, 340.

The Act of 1849 requires a payment of five dollars *in money* on every share. The giving of a note is not such a compliance with the terms of the Act as to validate the subscription.

Hibernia Turnpike Co. *v.* Henderson, 8 S. & R. 219.
Leighty *v.* Turnpike Co., 14 S. & R. 434.
Kishacoquillas Turnpike Co. *v.* McConaby, 16 S. & R. 140.

The doctrine of estoppel does not apply here, as the defendant never took any active part in the affairs of the corporation.

The subscription is conditional, and the condition having been violated by the plaintiff, the contract is void.

Nippenose Manufacturing Co. *v.* Stadon, 18 Sm. 256.

Wm. Augustus Atlee and *George Nauman*, contra.

The giving of his note by defendant is sufficient evidence of his subscription. The defendant is estopped from taking advantage of his non-payment to the commissioners of $5 on each share subscribed for, because he gave his note therefor and took a receipt, and besides so far identified himself with the company by allowing himself to be named a corporator as to fix his liability.

Clark *v.* Monongahela Navigation Co., 10 Watts, 364.
Plank Road Co. *v.* Brown, 1 Casey, 160.
Pittsburgh & Connellsville R. R. Co. *v.* Stewart, 5 Wright, 57.
Bedford R. R. Co. *v.* Bowser, 12 Wright, 34.
Bavington *v.* P. & S. R. R. Co., 10 Casey, 358.
Graff *v.* P. & S. R. R. Co., 7 Casey, 489.
Grayble *v.* Turnpike Co., 10 S. & R. 269.
Hays & Black *v.* P. &. S. R. R. Co., 2 Wright, 88.
Garrett *v.* D. & M. R. R. Co., 28 Sm. 468.

Subscriptions before letters patent are to be treated as unconditional, no matter what stipulations are attached to them.

Bedford R. R. Co. *v.* Bowser, 12 Wright, 34.
R. R. Co. *v.* Bigga, 10 Casey, 455.
Caley *v.* P. & C. R. R. Co., 30 Sm. 367.
Ligonier Valley R. R. Co. *v.* Williams, Leg. Int. 1878, p. 40.

June 16, 1879. THE COURT. The commissioners appointed to open books and receive subscriptions to the capital stock of the defendant in error were public agents, clothed with limited powers and duties of a purely ministerial character, clearly defined by law. By the Act of March 24, 1868, incorporating the company, it was invested with all the powers and made subject to all the provisions and restrictions prescribed by the general Act of 1849, regulating railroad companies. One of these provisions is that no subscription shall be valid, unless the party making the same shall, at the time of subscribing, pay the commissioners five dollars on each and every share for the use of the company. The language is plain and emphatic, and the manifest object of the requirement was to protect the public against fictitious corporations, with capital stock subscribed perhaps by irresponsible persons, and not a dollar thereof paid or intended to be paid in. The commissioners acting as ministerial agents of the public before the issuing of letters patent, had no authority whatever to dispense with the actual payment of the required sum. Giving a note for the amount was not payment within the meaning of the law. In Leighty *v.* The Turnpike Company (14 S. & R. 434), under a similar charter, it was held that actual payment in money was required. The doctrine of that case, for reasons given at

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length in the opinion, is sound, and should be adhered to. A demand note such as was given by the plaintiff in error in this case, is not money, it is only a promise to pay money at a future time, and perhaps may never be complied with. The testimony was quite sufficient to establish the fact of defendant's subscription; on which the suit was based. Afterwards, when the book was presented to him by Mr. Alexander, he impliedly admitted the subscription, by giving his note for the ten per cent. which should have been paid in cash; but this was before the letters patent were obtained.

The conditional feature of the subscription furnished no ground of defence. It is scarcely necessary to repeat what has been so often said, that a subscription to the stock of a public corporation, made before letters patent are issued and an organization effected, must be considered absolute and unqualified, and any condition attached thereto void. Commissioners have no authority to receive conditional subscriptions. If they do, the subscription itself is valid and binding, and the condition null and void. (Caley *v.* The Railroad Company, 30 P. F. Smith, 367.)

The only available defence presented in the Court below was the non-payment of the ten per cent. required by the Act; and it was technical rather than meritorious. Aside from making the subscription in the first instance, and afterwards giving his note for the ten per cent. when called on by the collector, the plaintiff in error appears to have been entirely passive. If he had acted as commissioner or director, or participated in stockholders' meetings, or performed any act recognizing his membership of the company, or tending to fasten liability on other subscribers, he should be held to the payment of his subscription, notwithstanding the failure of the commissioners to exact the payment required by law to make it valid and binding; but he appears to have stood aloof and did nothing by which he was estopped from insisting on the technical defence which he has seen fit to interpose. Legally he is entitled to the benefit of it, and the second and third assignments of error must be sustained.

Judgment reversed.

Opinion by STERRETT, J.

Jan. '78, 228. March 25, 1879.

Lewis's Appeal.
Estate of William Skiles.

Wills—Construction of—Intention of testator—Ambiguous phrase—Devise of a part—Where persons are to share how proportions to be determined.

Where distribution is to be made among two or more without anything to indicate the proportions in which they are to take, the presumption is that the shares are to be equal.

W., by his will, devised the balance of his property to "my sister S. her lifetime, and after her death it is my desire that a part of it go to H. and his heirs." S. was W.'s heir-at-law:

Held, that W. was presumed to know that S. was entitled to his property under the Intestate Act, and that his design was to designate some one to share it with her.

Held further, that in the absence of any indication of the proportion in which they were to take, the shares must be equal.

Appeal from the Orphans' Court of Chester County.

This was an appeal by Joseph J. Lewis, administrator of Hopkins Skiles, deceased, from a decree of distribution in the estate of William Skiles, deceased.

Before the auditor appointed to settle the account of the administrator of Wm. Skiles the following facts appeared:—

William Skiles died, having made his will, dated April 13, 1859, wherein, after certain specific bequests, he provided as follows:—

"Also, all the balance of my property, personal and real, I give and bequeath to my sister, Susanna Skiles, her lifetime, and at her death it is my desire that a part of it go to Hopkins Skiles and his heirs."

At his death Susanna, his sister, and fourteen cousins (of whom Hopkins was one) survived him; all the cousins except Hopkins were provided for by specific bequests.

Soon after the testator's death the executors sold a tract of land of 89 acres to Susanna, she giving a mortgage for the entire purchase money "without interest during her life." Susanna died May 22, 1876, leaving a will by which she disposed of her estate to others than the legatees of her brother. On September 10, 1877, the surviving executor of William Skiles filed his final account, in which he charged himself with the mortgage given by Susanna. The fund was claimed by the executors of Susanna Skiles and by the administrator of Hopkins Skiles, deceased.

The auditor, after reciting the words of the will, *supra*, reported: "It is claimed that the division or parting is to be made between 'Hopkins Skiles and his heirs,' and Susanna Skiles; in other words, that the clause should be made to read 'a part of it to go to Hopkins Skiles and his heirs,' and a part (or the other part) to Susanna Skiles. This view in the opinion of your auditor, is equally erroneous and untenable; for it is clear from the language of the will, that the testator intended giving his sister Susanna Skiles a life estate and nothing more, for he not only uses the words 'her lifetime,' but adds 'and at her death it is my desire,' etc. He does not intend or attempt to dispose of the residue until after her death, so that it would be utterly impossible for her to take with

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'Hopkins Skiles and his heirs' under the will. It being therefore beyond controversy that Susanna Skiles can take only a life estate under the will, any other interest she may derive in her brother's estate must come through the medium of the intestate laws. But if she take under the intestate laws, she takes not under but outside of the will, whilst 'Hopkins Skiles and his heirs' take under the will or not at all, and as it is evident the testator intended to dispose of the whole of his estate by his will, we cannot presume that he intended Hopkins Skiles and his heirs to take a part of the residue under the will, and his sister Susanna the other part under the intestate laws. If Susanna Skiles takes anything more than a life estate it must be under the intestate laws, whilst if 'Hopkins Skiles and his heirs' take anything at all it must be under the will of William Skiles.

"But there is another and conclusive answer to both the views just discussed, viz., that they require the supplying of words to carry them into effect, and to that extent the making of a will for, and not the interpreting the will of the testator, which the law will not permit. . . . .

"Your auditor is therefore of the opinion that as to the residue of his estate, the testator died intestate, and that the fee simple could not be in abeyance, but vested immediately upon his death and in his next of kin, Susanna Skiles; that consequently she took, instead of a life estate, the fee simple, and that the funds now for distribution being a portion of that estate, must be paid over to her executor, to be disposed of according to the provisions of her will."

The administrator of Hopkins filed exceptions, which, after argument, were overruled by the Court. Whereupon he took this appeal, assigning as error the action of the Court.

P. F. Smith and *Joseph J. Lewis*, for appellant.

It is to be presumed that a testator intends, by his will, to dispose of his whole estate; and in construing a will no word will be rejected.

Griffith *v.* Woodward, 1 Yeates, 319.
Oswald *v.* Kopp, 2 Casey, 518.
Covenhoven *v.* Shuler, 2 Paige, 122.

The Court will give some meaning to the instrument if any can fairly be gathered from the words.

Redfield on Wills, 434.

It is plain that the testator intended Hopkins Skiles to have something. To part means to divide; and a division, unless otherwise directed, would be an equal division. The only other person entitled is Susanna, and it is not unreasonable to suppose that the testator, having made all the disposition he desired, was willing to permit the balance go under the Intestate Act.

It is well established that where a fund is to be divided the Court will make an equal division.

Doyle *v.* Attorney-Gen., 4 Vin. Ab. A. 6, 486.
Salisbury *v.* Denton, 3 K. & J. 529.

Wm. B. Waddel (*Talbot* with him) *contra.*

Hopkins's title to one-half of the fund is dependent upon Susanna's title to the other, yet it is clear that under the will Susanna took nothing. Her claim, to be sustained, must be based upon something more than mere conjecture.

Bradford *v.* Bradford, 6 Whart. 244.
Duffield *v.* Morris, 8 W. & S. 349.
Nyce's Estate, 5 Id. 259.

An heir-at-law can only be disinherited by express words.

Bender *v.* Dietrick, 7 W. & S. 284.

May 5, 1879. THE COURT. The fund for distribution in this case represents real estate, and the question is, what interest, if any, did Hopkins Skiles take under the residuary clause of his cousin's will. The testator, after giving sundry pecuniary legacies, and directing his executors to sell sufficient real and personal estate to pay debts and the legacies, disposed of the residue of his estate in the following words: "Also all the balance of my property, personal and real, I give and bequeath to my sister, Susanna Skiles, her lifetime, and at her death it is my desire that a part of it go to Hopkins Skiles and his heirs." The learned Judge of the Orphans' Court held that the bequest of *a part* was void for uncertainty; that as to the residue of his estate, subject to the life estate given to his sister, the testator died intestate; that immediately upon his decease, the same vested in her as his next of kin under the intestate law, and consequently she took the entire residue absolutely, instead of a life estate therein. This of course resulted in a decree in favor of the executor of Susanna Skiles, from which the administrator of Hopkins Skiles took this appeal.

If the bequest was void for uncertainty it is conceded the decree is correct. On the part of the appellant, however, the contention is that the bequest was valid and that his intestate took under the will at least one-half of the residuary estate.

The first paragraph of the will contains the usual declaration of intention by the testator to dispose of his entire estate, but it is manifest from the residuary clause that he did not fully carry out his original purpose. In the first part of this clause he gave in express terms a life estate to his sister; and if he had stopped there, it is very clear that the entire remainder, at the termination of the life estate, would have been undisposed of and would have passed, as in case of intestacy, to his next of kin. It appears, however, that this was not his will, for in the same breath he expresses a desire that a part of the remainder should then go to his cousin Hopkins Skiles, but he made no disposition of the

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other part. It must be presumed that the testator knew what the effect of this partial disposition of the remainder would be, viz., that the undisposed part or portion would pass under the intestate law to his sister as his next of kin. We have then the clearly expressed intention of the testator to give the residue of his estate to his sister for life, and at her death a part or portion thereof to his cousin, leaving the remaining part undisposed of, so that upon his decease it would vest absolutely in her. If then, after carving out the life estate, the testator declared that a part of the remainder should go to his cousin, and knew that the law would give the undisposed of part to his sister, in what proportions did they take, the one under the will and the other under the intestate law? Under the circumstances it is manifest that not more than the two could participate, and hence the remainder was to be parted or divided between them, and in the absence of anything to indicate an unequal division, the presumption is that equality was intended, that the testator used the word *part* as synonymous with *moiety*, a sense in which it is sometimes popularly employed in speaking of a division between two. If he had said that one part should go to his cousin and the other to his sister, it would certainly be construed to mean an equal distribution between the two. What difference can it make that he expressly gave a part to Hopkins, and so drafted his will that, by his silence as to the other part, it would go to his sister? He is presumed to know that this would be the effect, and to have had the result in contemplation when he published his will. Giving effect, then, to the will so far as it speaks, and appealing to the intestate law as to that wherein the will is silent, we reach the conclusion that Hopkins took one part under the will and the sister the other part under the intestate law. In other words, the remainder, subject to the life estate, vested in the two, each taking a separate portion or interest and presumptively an equal share. Equality is equity, and where distribution is to be made among two or more without anything to indicate the proportions in which they are to take, the presumption is that the shares are to be equal. Salisbury *v.* Denton (3 Kay & J. 529) bears some resemblance to the present case. There the testator bequeathed property to be at the disposal of his wife, to apply *a part* to such charitable endowment for the benefit of the poor of Offley as she might prefer, and the remainder to be at her disposal among his relations in such proportions as she might direct. Here two classes were contemplated, and it was held that the property so bequeathed was divisible in two equal parts—one of such parts for charitable purposes and the other for the child of the testator absolutely.

It appears to us that the construction of the will above indicated is not unnatural or unreasonable. It gives full force and effect to every word it contains, and at the same time contravenes none of its provisions. If we were to hold that the bequest of *a part* of the remainder to Hopkins Skiles was void for uncertainty, we would defeat the clearly expressed intention of the testator to make him one of the objects of his bounty, and at the same time result in giving testator's sister more than he intended she should have. Both of these results should be avoided if it can be accomplished without doing violence to the language employed by the testator.

Decree reversed and set aside at the costs of the appellee, to be paid by him out of the fund in his hands as executor of Susanna Skiles; and it is now adjudged and decreed that the net amount for distribution, viz., $2610.90, be equally divided, and one-half thereof paid to Joseph J. Lewis, administrator of Hopkins Skiles, and the other half to William J. Burnsides, executor of Susanna Skiles, deceased.

Opinion by STERRETT, J.

TRUNKEY, J. dissents.

July '78, 85. March 19, 1879.

Constein v. Rice.

Practice—Appeal, condition precedent of—Costs; actual payment of—Record, contradiction of, by extraneous evidence—When payment of costs as a condition precedent to a valid appeal is complied with.

One of the conditions precedent to a valid appeal from an award of arbitrators is the *actual* payment of costs within the twenty days allowed by the Act.

A record contained the entry: "March 18, 1878. Defendant appealed, made oath, paid costs to Prothonotary Kerns, to wit, $43.23, and entered into recognizance. Same day affidavit and recognizance filed with prothonotary:"

Held, reversing the judgment of the Court below, that resort could not be had to extraneous evidence to contradict the record, and show that the costs had been paid by check.

Held further, that the condition of the appeal had been complied with, inasmuch as the check had been paid within the twenty days allowed by the Act.

Richter *v.* Cummings (1 Leg. Chron. 52), Walker *v.* Graham (24 Sm. 35), Carr *v.* McGovern (16 Sm. 457), and Ellison *v.* Buckley (6 Wr. 281), *distinguished.*

Per STERRETT, J. In theory the record imports absolute verity, and as a general rule it should be so regarded in practice.

GORDON, PAXSON, and WOODWARD, JJ., dissent.

Error to the Common Pleas of Schuylkill County.

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Capias sur slander, by H. J. Constein against Moses Rice. A rule to arbitrate was taken by the plaintiff, and on February 28, 1878, the award of arbitrators was filed, finding in favor of the plaintiff the sum of $100.

The record showed that on the "18th March, 1878, defendant appealed, made oath, paid costs to Prothonotary Kerns, to wit, $43.23, and entered into recognizance. Same day affidavit and recognizance filed with prothonotary."

On March 26, the affidavit of Wm. A. Marr was presented and filed, setting forth that the costs, to wit, $43.23, had not been paid in money, but by the check of the defendant drawn upon the Ashland National Bank. A rule was granted to show cause why the appeal should not be stricken off. It was agreed that the check given by the defendant to the prothonotary was deposited in bank in Pottsville, and presented by the Philadelphia & Reading Express, at the counter of the Citizens' National Bank of Ashland, on March 20, 1878, and on that day was paid by the bank to the agent of the express company. That the prothonotary gave the check to one Moses Hirshler, and told said Hirshler to give him, the prothonotary, credit for it, but the prothonotary received no money for said check. That the prothonotary had no knowledge of the payment of said check by the bank upon which it was given. It was further agreed that the check was given to said Express company by the bank in Pottsville for collection, and that the same was collected by the Express company on the day aforesaid.

The Court made the rule absolute, WALKER, A. L. J., delivering the following opinion:—

"The depositions in this case show that the costs of the appeal were paid on the 18th March, 1878, by a check and not in cash. Such payment by all the authorities is held to be invalid. (Richter *v.* Cummings, 1 Leg. Chron. 49; Ellison *v.* Buckley, 6 Wr. 283; Carr *v.* McGovern, 16 P. F. Sm. 457; Walker *v.* Graham, 24 P. F. Sm. 35.) This is also in accordance with the decision made by this Court in Hoppes & Co. *v.* Breisch, Hale & Co., No. 1286, June Term, 1875, and filed on July 3, 1876."

On April 29, 1878, the affidavit of the defendant was presented and filed, setting forth that the check which had been given to Prothonotary Kerns for the costs, had been paid by the defendant on March 20, 1878, and within the twenty days allowed by law to enter an appeal. The Court ordered a reargument of the case, and again made the rule absolute, BECHTEL, J., dissenting. The defendant took this writ, assigning for error the action of the Court in striking off his appeal.

D. B. Green (with whom was *M. M. L'Velle*) for the plaintiff in error.

The check was paid within twenty days, and thus the Act was complied with.

Richter *v.* Cummings, 1 Leg. Chron. 52.

The record shows payment, and cannot be contradicted.

Selin *v.* Snyder, 7 S. & R. 172.
Clark *v.* McComman, 7 W. & S. 470.
Van Horn *v.* Frick, 3 Id. 278.
Brun *v.* David, 1 Br. 323.
Harvey *v.* Thomas, 10 W. 67.

William A. Marr for the defendant in error.

The condition precedent to a valid appeal was not complied with.

Ellison *v.* Buckley, 6 Wr. 281.
Dime Savings Institution *v.* Allentown Bank, 15 Sm. 125.
Carr *v.* McGovern, 16 Id. 458.
Walker *v.* Graham, 24 Id. 35.
Richter *v.* Cummings, 1 Leg. Chron. 52.

It is not necessary to contradict the record, for it does not show how the costs were paid in money. The effort was to explain it.

March 31, 1879. THE COURT. One of the conditions precedent to a valid appeal from an award of arbitrators is the payment of costs within the twenty days allowed by the Act, and it has been repeatedly held that actual payment is required. Payment by check, as in Richter *v.* Cummings (1 Leg. Chron. 52) or by draft, as in Walker *v.* Graham (24 P. F. Smith, 35), or by charging them to the appellant's attorney, as in Carr *v.* McGovern (16 P. F. Smith, 457), is not payment within the meaning of the Act. In these cases it was shown by the record that the costs were not actually paid in money, and in Ellison *v.* Buckley (6 Wright, 281) the record failed to show payment in any manner. It was unnecessary therefore to resort to evidence *dehors* the record to show non-compliance with the Act. The fact was apparent on its face. In the present case however it appears by the record that the provisions of the Act were fully complied with. The entry is "March 18, 1878, defendant appealed, made oath, paid costs to Prothonotary Kerns, to wit, $43.23, and entered into recognizance. Same day affidavit and recognizance filed with prothonotary."

In the deposition presented to the Court below, it is stated that the word *check* appears in connection with the entry of the amount paid on the docket. It was conceded that the witness referred to the prothonotary's private cash book and not to the court docket or record. The entry on the latter reads as above quoted. It thus appeared affirmatively that the costs had been actually paid to the prothonotary, and all other requirements of the Act complied with. It was only by going outside of the record that the Court could be informed that a check had been given to the prothonotary, in lieu of money, on the day the oath and recognizance were filed. In

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theory the record imports absolute verity, and as a general rule it should be so regarded in practice. It is not on every occasion that resort should be permitted to affidavits and depositions to contradict the record or explain it away. When it is lost, or destroyed, or error has intervened, and the due administration of justice requires that it should be supplied, amended, or reformed, it can and should be done in the appropriate and orderly way. In this case there was no necessity for resorting to extraneous evidence, the only effect of which could be to relieve the prothonotary and deprive the appellant of a trial by jury. There was clear record evidence of compliance with the requirements of the Act, and this should have been considered conclusive of the fact. There was nothing in the circumstances of the case to call for any other course of action. The prothonotary by his own entry was fixed for the costs, and had no just claim for relief; nor was he asking any. He was bound to pay them, on demand, to the party entitled thereto; and the rights of the appellee could not in any manner be prejudiced.

But aside from this view of the case, there is another ground on which the appeal should have been sustained. While it appears from the testimony that a check was given to the prothonotary for the costs, it was also shown that it was actually paid in cash within the twenty days. In this respect, also, the case is distinguishable from those above cited.

The order of Court striking off the appeal is reversed, and set aside, and the appeal reinstated.

Opinion by STERRETT, J., GORDON, PAXSON, and WOODWARD, JJ., dissenting.

Jan. '79, 120. Mar. 3, 1879.

Markley v. Stevens.

Affidavit of defence law—Affidavit when insufficient—Evasive averments—Set-off.

An averment of set-off to be available in an affidavit of defence must be precise and certain as to time.

Error to the Common Pleas of Berks County.

Covenant on a lease, by Sadosa S. Stevens against Benjamin H. Markley to recover arrears of rent.

A copy of the lease was filed, which was under seal, dated July 1, 1872, and was for the term of five years at the rate of sixty dollars per month, on which there remained unpaid the sum of $210, being rent from Jan. 15, to May 1, 1877.

In his affidavit of defence the defendant averred that on June 28, 1872, he had purchased from the plaintiff a drug store in the city of Reading; that the plaintiff guaranteed that there were in the store at the time of the sale at least $8000 worth of drugs, medicines, etc., that the plaintiff induced the defendant to agree to give $8000, which the defendant agreed to pay upon the special guaranty of the plaintiff that the stock consisted of drugs, medicines, etc., of the value of $8000; that the defendant immediately upon taking possession of the store had a careful inventory taken of the contents of the store, where he found but $4781.73 worth of drugs and medicines (including counter and shelving), instead of $8000 worth as the plaintiff had guaranteed; that the defendant acting upon the special guaranty of the plaintiff paid him the sum of $8000, of which $5000 was paid before the defendant took possession of the store; that upon this transaction, the plaintiff is indebted to the defendant in a sum exceeding $3000, not including interest; that the plaintiff is further indebted to the defendant in the sum of $5.01 for drugs and medicines furnished by the defendant, and also in the sum of $8.30 for a bill paid by the defendant for the plaintiff to E. J. Nolan, a plumber.

A rule for judgment for want of a sufficient affidavit of defence was made absolute, SASSAMAN, J., delivering the following opinion:—

The counsel for plaintiff in this case says his party knew nothing of the bill for drugs for $5.01, and Nolan's plumbing bill for $8.30, due by plaintiff to defendant, but that he thinks they may be proper charges, and agrees that they shall be deducted from the amount of the claim, which must accordingly be done.

The only dispute then is the amount of deficiency claimed by an inventory of the drugs in a certain store, made immediately after obtaining possession of the demised premises. The cases cited by the defendant's counsel in this case are not applicable in this suit for the reason, that what he now claims to set off against the balance of the claim in suit, is for money voluntarily paid by him, for the most part after he had full knowledge of the alleged facts. Even though there should have been a guaranty, if after he knew the failure of the amount guaranteed, he made payment in full without defending on that contract, he could not now set up any amount voluntarily and knowingly overpaid in a suit upon this contract for the lease of the premises described in the copy filed for a certain rent, by way of defalcation. The criterion to go by would be, could he maintain a suit for what he offers to defalcate. Money paid and received voluntarily, though not strictly demandable, cannot be recovered back. (Morris *v.* Tarin, 1 Dallas, 147; Kennedy *v.* Hughey, 3 W. 265; Keener *v.* Bank, 2 Barr, 237; Natcher *v.* Natcher, 11 Wri. 497.) Money voluntarily paid cannot be recovered back, on the ground of a

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mistake of law as to the right of the other party to receive it. (Ege *v.* Koontz, 3 Barr, 109.) Money voluntarily paid with knowledge or means of knowledge of the facts, and without fraud on the party cannot be recovered back, because paid in ignorance of the law. (Real Est. Sav. Inst. *v.* Linder, 24 P. F. S. 371.) It seems strange to us that a person should pay thousands of dollars voluntarily in satisfaction of one contract, and that the same person should apparently, also voluntarily, pass along for a number of years, paying monthly dues on another contract, and make no defence of defalcation until sued for a comparatively small balance on the last contract. We do not consider the affidavit of defence sufficient.

The defendant took this writ, assigning for error the entry of judgment.

Frank R. Schell, for the plaintiff in error.

The affidavit of defence disclosed a substantial *prima facie* case. It is not necessary that an affidavit should expressly negative every objection or argument which can be raised against it. It is only necessary that the facts constituting the defence should be averred with reasonable precision and distinctness and with certainty to a common intent.

Hugg *v.* Scott, 6 Wh. 274.
Bronson *v.* Silverman, 27 Sm. 94.

In both these cases an inference was required to complete the affidavit.

The affidavit is to receive a reasonable construction in favor of the defendant, and a reasonable intendment is to be made in his favor.

Roberts *v.* Austin, 5 Wh. 313.
Twitchell *v.* M'Murtrie, 27 Sm. 383.

In the Court below no reasonable construction was put on the affidavit. The only inference which could be made from the omission to state with exact precision the time of payment of the balance of the purchase money is that it was paid *when* or *after* the defendant received possession. It is expressly stated that $5000 were paid before possession, and the legal presumption is that the balance of $3000 was paid when possession was received. The presumption that it was paid not only after possession but before the inventory, would be a hardship to the defendant, for it would deprive him of the benefit of a jury trial.

Geo. F. Baer (with whom was *Amos B. Wanner*), for the defendant in error.

The omission to state the time of payment of the balance of the purchase money is fatal to the defendant's claim. If it was paid after a knowledge of the deficiency in drugs, etc., the payment was voluntary, and the defendant cannot recover. If it was paid before the inventory or upon possession, the defendant should have so stated it in his affidavit. The defendant cannot ask the Court to guess at his meaning or to draw the inference he claims.

May 7, 1879. THE COURT. In this case judgment was entered against the plaintiff in error for want of a sufficient affidavit of defence. The validity of the debt claimed by the defendant in error was not denied, but the defence is set off arising out of a separate transaction. The question then is whether the affidavit, with reasonable certainty, avers facts that would establish a valid claim against the defendant in error? Substantially it avers that the affiant purchased of the defendant in error a drug store under a guaranty that there was at the time of sale, at least $8000 worth of drugs, medicines, etc., therein. That immediately on taking possession he had a careful inventory taken of the contents and found the value of the whole to be $4798.73. That he paid $8000, $5000 thereof before he took possession of the store. He, therefore, claimed the defendant in error was indebted to him in that transaction in a sum exceeding $3000.

It will thus be observed that there is an entire omission to state the time when the $3000 were paid. The clear inference is that they were not paid before possession was taken, and it is left to conjecture to determine whether they were paid before or after the taking of the inventory was completed.

If paid before it might constitute a valid claim. If voluntarily paid afterwards and with knowledge of all the facts averred, no fraud being alleged, it could not be recovered back. (Keener *v.* Bank, 2 Barr, 237; Ege *v.* Koontz, 3 Id. 109: Natcher *v.* Natcher, 11 Wright, 496; Real Estate Savings Institution *v.* Linder, 24 P. F. Smith, 371.)

It is true an affidavit is sufficient which avers with reasonable precision and distinctness, and with certainty to a common intent, facts which will constitute a defence. A reasonable intendment should be given to the language used for the purpose of sustaining the affidavit. It is not, however, sufficient to designedly and unnecessarily use language intended to create the presumption of a fact, which if it actually existed would readily and naturally have been expressly averred.

The affidavit in the present case expressly avers that $5000 were paid before possession was taken but studiously omits to state when the remaining $3000 were paid. It cannot be claimed that this omission occurred through ignorance of the time of its payment. In view of the minuteness with which the other facts are stated, and the known importance of the time when this payment was made, the omission to state that it was before the inventory was taken or before the facts were fully known to the affiant, creates the presumption that such was not the fact. It is, to say the least, evasive, inasmuch as no just cause appears for the absence of an express and distinct

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statement of the time. The reasonable conclusion therefore is that the time of payment was stated as favorably for the affiant as the facts would warrant. As then it was necessary to aver facts which, if proved, would sustain the claim set up, it is evident that this affidavit failed so to do with reasonable precision and certainty, and the learned Judge was right in ordering judgment to be entered.

Judgment affirmed.

Opinion by MERCUR, J.

Quarter Sessions.

June 28, 1879.

Commonwealth ex rel. Anthony Hale v. Superintendent of the County Prison.

Discharge of untried prisoner under the "two-term rule"—Fugitive from justice, afterwards surrendering himself, is not entitled to the benefit of the rule.

Application for discharge under the two-term rule.

Anthony Hale was arrested on the 23d of July, 1877, and bail entered for his appearance at the August term of the Court. On the 7th of August, 1877, an indictment was found against him and four others for conspiracy. On September 1, 1877, not having renewed his bail, his recognizance was forfeited. It then became his duty to deliver himself into the custody of the Court. Instead of doing so he left the country and went to Brazil. On the 29th of January, 1879, he returned and delivered himself up and has since been in prison.

O. P. Cornman, for the petitioner.

The departure of the defendant for Brazil under the circumstances did not make him a fugitive from justice. Even if he were such he was entitled to his trial within two terms after he surrendered himself.

William W. Ker, Assistant District Attorney, for the Commonwealth.

The Act of March 31, 1860, does not apply where the trial has been delayed by the prisoner, as in this case.

Vide foot-note to the Act of March 31, 1860, Purdon's Dig. p. 388.

THE COURT. This is an application for a discharge under what is known as the two-term rule. The prisoner alleges that he has been in prison for over four months, and that he has not been tried during that time, nor has the delay occurred on his application or with his assent, and that therefore, under the Act of 18th February, 1785, and March 31, 1860, he is entitled to be discharged.

There can be no doubt that if he had delivered himself up on September 1, 1877, and had remained four months in prison untried, the delay not being caused at his request, he would have been entitled to his discharge. But as he chose to leave the country, his trial became impossible until his return, and the case, when called for trial, had to be continued. He now puts himself into custody when he is ready to be tried, having refused to do so when the Commonwealth was ready to try him and he was bound to be present.

While the law humanely provides that one committed to custody shall be tried within two terms, it does not mean that a fugitive from justice can select the year and the months in which he will deliver himself up and demand a trial. If this were so he might time his own trial at the very time he knew the Commonwealth's witnesses were beyond reach or his confederates in crime inaccessible.

The object of this enactment, as was said by the Supreme Court, was to protect against the malice and procrastination of prosecutors, and it is a novel application for a fugitive from justice to complain of the law's delay. It is a perversion of language for one who has defeated his trial for more than a year by his unwarranted absence from the country to say, in the words of the Act of 1860, "that the delay in his trial has not happened on the application or with the assent of the defendant."

The relator is remanded into custody.

Opinion by BIDDLE, J.

Common Pleas—Law.

C. P. No. 3 Wm. M. M. June, 1879.

Kern v. Simmons.

Ejectment—Municipal claim—Service of scire facias—Effect of judgment in curing irregularities in the service—Act of March 14, 1865—Act of March 29, 1867.

Rule for judgment on point of law reserved.

Ejectment by W. R. Kern against S. Simmons to recover a lot at the northwest corner of 32d and Pearl streets.

From the evidence the following facts appeared: On December 21, 1874, a lien for laying a culvert was filed by the city to use of one Maull against the lot in question, which was owned by the defendant, Simmons, whose deed bore date June 8, 1870, and was duly entered in the registry bureau. On August 21, 1875, the use-plaintiff filed an affidavit setting forth that the

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defendant, Simmons, was owner or reputed owner, and that the affiant had personally served upon him a notice in due form that the above claim had been filed against the lot, and that if it was not paid within ten days a *sci. fa.* would issue, etc. On August 26, 1875, the *sci. fa.* issued, returnable the third Monday of September [September 20], and the sheriff returned thereto as follows:—

Made known by posting a true and attested copy of the within writ on the premises within described September 11, 1875, and by advertising twice a week for two weeks in the *Evening Bulletin*, a daily paper published in this city, agreeably to the Act of Assembly in such case made and provided. *Nihil habet* as to Samuel Simmons.

So answers, etc.

Defendant did not appear. On October 12, 1875, judgment was entered against him for want of an affidavit of defence, and on December 21, 1875, a *levari facias* issued, under which the property was sold to W. R. Kern; a deed was duly acknowleged by the sheriff and this suit brought.

FINLETTER, J., directed the jury to find for plaintiff subject to the following point of law reserved, viz.:—

That the Court . . . had no jurisdiction over the case of City to use of Maull *v.* Simmons . . . . under the execution in which plaintiff in this cause claims title to the real estate in dispute, and that the judgment and the execution in the said cause were and are null and void, and that the said W. R. Kern, took no title thereunder: all by reason of the operation of the Act of Assembly approved March 14, 1865 (P. L. 320) . . . as amended by the Act of March 29, 1867, § 1 (P. L. 600).

Chas. Gilpin and *Hood Gilpin*, for plaintiff.

The plaintiff here is a *bona fide* purchaser for value; the defendant has been guilty of the grossest laches; though personally served with a notice of the lien filed against his property, he never appeared in the original suit or moved to have the judgment opened.

The irregularities in the proceedings on the municipal claim cannot be taken advantage of here; the law is that they are cured by judgment and the acknowledgment of a sheriff's deed.

Delaney *v.* Gault, 6 Casey, 63.
Cadmus *v.* Jackson, 2 Sm. 295.
Wilkinson's Appeal, 15 Sm. 189.
Taylor *v.* Young, 21 Sm. 81.
Sheetz *v.* Wynkoop, 24 Sm. 198.
Wistar *v.* The City, 5 WEEKLY NOTES, 279.

It is objected that in City *v.* Simmons the *sci. fa.* was not served as a summons as is required by the Act of March 29, 1867, § 1,* but if this law is so strictly construed, a registered owner out of the county cannot be served and the city cannot collect her taxes; moreover, such a construction would injuriously affect a great number of titles. But here, also, the law is that the defect in the service of the *sci. fa.*, if any, was not incurable, and cannot be taken advantage of in this suit.

Taylor *v.* Young, 21 Sm. 81, and cases *supra*.

By the Act of May 23, 1874 (Purd. 1916, pl. 98), municipal claims are to be recovered by proceeding by *sci. fa.* as in cases of mechanics' claims. The return to the *sci. fa.* in City *v.* Simmons is a substantial compliance with the requirements of the law for a return to a *sci. fa.* sur mechanic's claim where no persons occupy the premises.

Purdon 1035, pl. 51.
Shoemaker *v.* Duganne, 5 WEEKLY NOTES, 403.
Sullivan *v.* Johns, 5 Wh. 367.
Donahoo *v.* Scott, 2 J. 47.

J. B. Cox, for defendant.

A review of the Acts of Assembly on the subject will show that the Legislature has been constantly more and more solicitous to protect liened property from sale without notice to the owner. A return identical with the one in City *v.* Simmons has been held invalid.

Wistar *v.* City, 5 WEEKLY NOTES, 279.

The return in this case was then fatally defective under the Acts of March 14, 1865, and of March 29, 1867, and under the latter Act the sale was void. The Court, therefore, had not jurisdiction of the case at any stage subsequent to the issuing of the *sci. fa.*

C. A. V.

June 21, 1879. THE COURT. Judgment for plaintiff on point of law reserved.

* This Act provides that "No property returned . . . for registry in the survey bureau shall be subject to sale for taxes or other municipal claims thereafter to accrue as a lien of record thereon, except in the name of the owner as returned, and after recovery by suit, and service of the writ on him as in case of a summons."

C. P. No. 2. Sept. 15, 1879.

Boyer v. Clairborne.

Pleading—Special plea of agency, when amounting to the general issue—Practice.

Rule to strike off special plea.

Assumpsit for goods sold and delivered, by Boyer against R. R. Clairborne. The narr. consisted of the common counts; the bill of particulars was for coal sold.

The pleas were non-assumpsit, payment with leave, etc., set-off, and a special plea "that in the purchase of the coal for which the suit is brought, defendant acted as agent for Eleanor Clairborne and not on his own account; and that said fact was well known to the plaintiff," etc.

B. F. Fisher, for the rule.

The special plea amounts to the general issue.

J. R. Rhoads, contra.

Rule absolute.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, OCT. 2, 1879.* [No. 23.

Supreme Court.

Jan. '78, 15. March 17, 1879.

Continental National Bank v. Draper.

Attachment under the Act of March 17, 1869—Real estate.

Real estate cannot be attached under the Act of March 16, 1869.

Error to the Common Pleas of Schuylkill County.

A writ of attachment under the Act of March 17, 1869, was issued at the suit of The Continental National Bank of Boston, against John W. Draper, under which the sheriff attached a lot of ground in the borough of Pottsville, which the plaintiffs by affidavit alleged had been conveyed by the defendant to his son in fraud upon the rights of his creditors.

The defendant thereupon took a rule to quash the attachment, upon the ground that the Act of March 17, 1869, did not authorize the attachment of real estate.

The Court below made the rule absolute, WALKER, J., delivering the following opinion: "In this case a writ of attachment under the Act of the 17th of March, 1869 (Purd. Dig. 53, pl. 71), was issued upon a judgment of $9331.89, originally obtained in Massachusetts by the plaintiff against the defendant, and entered up in the Court of Common Pleas of Schuylkill County, to March Term, 1877, No. 680. A house and lot of ground in the borough of Pottsville were attached, and this rule upon the part of the defendant is to quash said writ.

"Under the view we have taken of this case it becomes unnecessary to consider the many reasons urged upon the Court to quash the writ, as the question turns upon a single point. The writ was issued under the provisions of the Act of 1869, and the defendant's real estate is attached. Can this be done, or is the Act confined to personal property solely? We do not deem it necessary to discuss this question, as all the law Judges of this Court have given the subject a full and careful investigation, and have unanimously come to the conclusion that the provisions of the Act were intended solely to apply to personal property and not to real property."

The defendant took this writ of error, assigning for error the action of the Court.

Samuel Dickson and *Fergus G. Farquhar*, for the plaintiff in error.

The important question is whether the Act of March 17, 1869, authorizes the attachment of land. The case is a novel one, and has never been adjudicated in this State. The Court below construed the word "property," which occurs in several sections of the Act, to mean only "personal property." In other words, they added the word "personal." It is submitted that such a construction is consonant with neither the spirit of the Act nor with the remedy it proposes to give for the protection of creditors against fraudulent debtors. In the absence of any positive limitation of the right of attachment, real estate may be attached as well as personalty.

Drake on Attachment, § 223.
Isham *v.* Downer, 8 Conn. 282.

In a devise, the words, "all my property," pass a fee in land without words of inheritance.

Morrison *v.* Semple, 6 Binn. 94.

The word "property," which is *nomen generalissimum*, covers both realty and personalty, and by a fair construction embraces every kind of property. If the construction contended for on the other side is to prevail, then the door is open to the commission of fraud, for by a disposition of his realty the owner can evade his creditors' demands. The Act creates "a lien," which must have been inserted in contemplation of real estate, for where personal property is attached, the property itself is taken into the custody of the Court. Therefore the term, as applied to personalty, is without meaning. Undoubtedly it is a *casus omissus*. Land was not mentioned in the Act of 1705, and it was not expressly said that an attachment would bind it, yet the Court held that land was assets for the payment of debts, making no distinction between realty and personalty, the policy of the law making every subject of property liable to attachment.

Schacklett and Glyde's Appeal, 2 Harris, 329.
Ludlow *v.* Bingham, 4 Dal. 44.
M'Clenachan *v.* M'Carty, 1 Id. 376.

D. C. Henning and *James Ryan*, for defendant in error.

The word "realty" does not appear in the Act, the Legislature therefore did not mean to include it, for *expressio unius exclusio alterius*. The Act provides a remedy contrary to the common law, and must therefore be strictly construed. Its aim was to give the creditor a speedy remedy where the debtor was fraudulently removing his property. Personal property alone was contemplated, for obviously realty cannot be removed nor be concealed. The Act makes no provision for the seizure of real estate, whereas the Foreign Attachment Act provides in express

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terms for the seizure of real estate, and also for the manner in which it is to be disposed of. It also provides for a description of the property which is to be filed of record, in order that third parties may have notice of the lien of attachment. In the Act of 1869, no such provisions are made.

May 7, 1879. THE COURT. We think, with the learned Judge of the Court below, that the Attachment Act of March 17, 1869 (Purd. Dig. 53, pl. 71), was not intended to embrace real property. An examination of the Act will make this obvious. In the first place, this writ is issuable upon the affidavit of the creditor that the debtor or debtors "is about to remove his, her, or their property out of the jurisdiction of the Court in which the attachment is applied for, with the intent to defraud his, her, or their creditors; or that said party defendant has property, rights in action, or interest in any public or corporate stock, money, or evidences of debt, which he, she, or they fraudulently conceal; or that the said party defendant has, or have, assigned, disposed of, or removed, or is about to assign, dispose of, or remove any such property, money, rights in action, interest in public or corporate stock, or evidences of debt, with the intent to defraud his, her, or their creditors." In all this there is clearly no intent to embrace realty. The "property" spoken of is such as may be removed or concealed, and hence, necessarily, embraces only personalty. Real estate not being susceptible of removal, and its conveyance in fraud of creditors being otherwise amply provided for, the Legislature in this Act made no provision against its disposition.

Turning to the second and third sections which provide for the service and return of the process, we find that the sheriff is directed to attach "so much of the money, stocks, rights in action, evidences of debt, or other property of said party defendant, not exempt from sale upon execution, as will be sufficient to pay the debt demanded, with costs." Now it may be conceded that the words "other property" might be made to include land, and we might agree that such was the legislative intent, were it not that several difficulties oppose themselves to a construction of this kind: First, we have already seen that the statute in the preceding section has attached the idea of mobility to "other property;" secondly, there are no provisions or directions for the attachment of real estate, as in the Foreign and Domestic Attachment Acts; and thirdly, the language of the Act precludes such a conclusion. An inventory of the attached property is to be made, and a copy thereof left with the defendant if he can be found within the county, but if he does not reside in the county, then such copy is to be left "with the person in whose possession or care said property may be, or in whose hands it may be attached." We need scarcely say that the above stated language can properly be applied only to personalty. But again, "It shall be the duty of the officer serving such attachment, to take the property attached into his possession *when the same is capable of manual seizure*, and when not, the same shall be bound by such attachment in the hands or possession of such party from whom it is *due or owing, or whose duty it is to account for the same.*" This part of the Act informs us definitely what may be attached. In the first place, it is something that the officer may take into his own possession by manual seizure; and in the second place, if it is not capable of such seizure, then it is something of a kind that may be due or owing, or that it is to be accounted for. The first embraces personal goods and chattels; the second, debts, obligations, stocks, etc.; but by no stretch of the imagination can this language be made to embrace real estate, since of it there can be no manual seizure; neither is it a thing which may be due, or owing, or to be accounted for in the meaning of the Act. But further, the defendant may retain the property thus attached by giving bond for its surrender in as good condition as when attached, "to any officer having an execution against said defendant on any judgment rendered in said attachment in favor of the plaintiff." Language of this kind, we know, is applicable only to personal property. Applied to real estate, it is meaningless. If, indeed, we are to deal with this Act as Chief-Justice GIBSON tells us the Act of 1705 was dealt with, we might make it cover realty. He says, in Schacklett and Glyde's Ap. (2 Harris, 326): "It is an undoubted fact that the framers of the Act of 1705 intended to exempt land from attachment, but as there was no reason for an exemption, as land was liable to execution as a chattel, and as the language of the Act was not imperative, though its details were adapted to cases of garnishment, the courts made no distinction. Nor ought they to have done otherwise; at least they did not." In these days, however, this Court can hardly make so free with a statute as to inject into it what may be thought to be an improvement, the clear intention of the law making power to the contrary notwithstanding.

The order of the Court below quashing the attachment, is affirmed.

Opinion by GORDON, J.

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Jan. '79, 176. March 19, 1879.

Eilenberger v. Protective Mutual Fire Insurance Company of Pennsylvania.

Fire insurance—Mutual Insurance Company—Status of, during preliminary negotiations for policy—Insurance policy—Breach of warranty—Fraud or mistake of insurance agent—When company will be bound by, notwithstanding stipulation to the contrary in policy—Parol evidence to explain mistake or fraud in warranties; when admissible.

When there is a mutual mistake between the contracting parties to an insurance policy, parol evidence is admissible to reform the policy.

The fraud or mistake of an insurance agent, committed within the scope of the powers given him by the company, will not enable the latter to avoid a policy to the injury of the insured, who innocently became a party to the contract.

When an agent of the assurer has cheated the assured into signing the warranty, and paying the premium, and the policy is issued upon the false statements of the agent himself, the assured may prove the fact, and hold the principal to the contract as if he had committed the wrong.

As to all preliminary negotiations, the agent acts only on behalf of the company; and a company may not escape the consequences of the fraud or mistake of the agent by inserting a stipulation in the policy that such agent shall be deemed the agent of the insured, who, at the time of applying for the policy, was ignorant of the insurer's intention so to stipulate.

In the case of a *mutual* fire insurance company, membership dates only from the consummation of the contract. During negotiations for insurance, a mutual company occupies no other or better position than one organized on the stock plan.

Error to the Common Pleas of Wyoming County.

Debt, by R. E. I. Eilenberger, against The Protective Mutual Fire Insurance Company of Pennsylvania, to recover the loss by fire upon plaintiff's buildings and stock insured in the defendant's company. Plea: "*Nil debet*, payment, set-off with leave," etc.

Upon the trial, before INGHAM, J., the defendant filed an amended plea assigning breaches of the warranty, and that the plaintiff had made false representations in the application for the insurance.

The facts, as stated in the opinion of the Supreme Court, were as follows:—

"Soellner was defendant's agent, and as such solicited insurance, made out applications, sent them to the home office, and the company issued the policies, and forwarded them for delivery to the agent, who received and remitted the premiums. The plaintiff's application, thus solicited, prepared, and transmitted, contained a stipulation that it should form a part of the policy, and all statements therein constitute warranties by the insured. Among the statements are these: Chimneys are constructed from the ground; the title is in the name of the insured, in fee simple; and the building has never been on fire, nor has the applicant suffered loss by fire. In fact, the chimney was built from the loft, the title of the premises was in the name of applicant's wife, and the building had been on fire, and the plaintiff burned out once before. He showed Soellner through the house, correctly answered all questions asked, did not read or hear the answers read, and thought everything was down in the application, as he had stated, when he signed it. Soellner examined the chimney, and wrote the answer respecting it from his own knowledge. In response to the applicant's answer that his wife owned the building, he said that would make no difference, he could insure it with his stock. He noticed there had been a fire, and asked the applicant if he had suffered loss by fire, and was answered he had been burned out once before. The written falsehoods were Soellner's mistakes."

The application for insurance closed with the following questions and answers, signed by the agent of the company:—

"Have you personally examined this risk? Do you think it advisable to take it? Yes. Are stoves, pipes, and chimneys all secure? Yes. Are you personally acquainted with the applicant and risk, and do you fully approve it? Yes. Has he ever met with loss by fire? No."

The policy contained the following stipulation:—

"It is agreed that the person or persons, if any, other than the assured, who have procured this insurance to be taken by this company, shall be deemed to be the agent or agents of the assured and not of this company, in any transactions relating to this insurance. . . ."

Upon motion of the defendant, the Court excluded from the consideration of the jury the testimony of Soellner relating to his writing the answers to the interrogatories in the application, and the testimony offered to explain the mistakes made in regard to the answers first quoted above.

The Court then entered a compulsory nonsuit, upon the ground that "the plaintiff had given no sufficient evidence to entitle him to recover a verdict as is in law sufficient to maintain the action." The plaintiff thereupon took this writ, assigning for error the withdrawal of the evidence from the jury, and the entry of the nonsuit.

I. W. Piatt (with whom were *Wm. M. Piatt* and *Sittser & Harding*), for the plaintiff in error.

When the application was made, the plaintiff did not know of any stipulation of agency in the

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policy, and could not, therefore, be bound by it.

Wood's Insurance, 278, 401, and note 6.
Ins. Co. *v.* Wilkinson, 13 Wall. 222.
Roth *v.* City Ins. Co., 6 McLean, 324.

In order to be efficacious, such notice must be given before the negotiations are completed.

Wood's Ins. 644.
Commercial Ins. Co. *v.* Ives, 56 Ill. 402.
Beebe *v.* Hartford Ins. Co., 25 Conn. 51.

Notice to the agent was notice to the company, and gave the plaintiff the right to show by parol testimony what took place at the time.

Wood's Ins. 632, 276.

The defendant is estopped from insisting on the warranty.

Wood's Ins. 663-681.
Howard's Ins. Co. *v.* Bruner, 23 Pa. St. R. 50.
Ins. Co. *v.* Cooper, 50 Id. 331.
Rowley *v.* Empire Ins. Co., 36 N. Y. 550.
Ætna Ins. Co. *v.* Olmstead, 21 Mich. 246.

The agent in this case had sufficient power to receive notice.

Flander's Ins., 2d Ed. 115.
Beebe *v.* Hartford Ins. Co., *supra.*
Lycoming Ins. Co. *v.* Woodworth, 2 N. 223.

The question is not only what powers the agent had, but more particularly what power did the company hold him out as possessing.

Wood's Ins. 640, 661.
Eclectic Life Ins. Co. *v.* Fahrenbery, 68 Ill. 463.
Haughton *v.* Ewbank, 4 Camp. 88.
Neal *v.* Erving, 1 Esp. 61.
Perkins *v.* Washington Ins. Co., 4 Cow. 645.
Beal *v.* Park F. Ins. Co., 16 Wis. 241.
N. Y. Ins. Co. *v.* Nat'l Ins. Co., 20 Barb. 476, aff'd 14 N. Y. 85.
Nicoll *vs.* Amer. Ins. Co., 3 W. & M. 529.
Gloucester M'f'g Co. *v.* Howard F. Ins. Co., 5 Gray, 497.
Lungstrass *v.* German Ins. Co., 57 Mo. 107.
Palm *v.* Medina Ins. Co., 20 Ohio, 529.
Dayton Ins. Co. *v.* Kelley, 24 Ohio St. 345.
Flanders Ins., 2d Ed., 112 and cases cited.
Hough *v.* City F. Ins. Co., 29 Conn. 10.

Osterhout & Little, for the defendant in error.

The authority of the agent was that of a solicitor of risks at most. He was not authorized to represent the company beyond the specific powers committed to him; any action beyond this scope cannot form the subject of estoppel.

Susquehanna Ins. Co. *v.* Perrine, 7 W & S. 348.
Cooper *v.* Ins. Co., 14 W. 299.
Ins. Co. *v.* Johnson, 11 H. 72.
Mitchell *v.* Ins. Co., 1 Sm. 402.
Smith *v.* Ins. Co., 12 H. 320.
Ins. Co. *v.* Arthur, 6 C. 315.

The plaintiff was guilty of neglect in not reading the application before signing it.

Greenfield's Est., 2 H. 496.
Penn. R. R. Co. *v.* Shay, 1 N. 198.

The warranty by plaintiff was a condition precedent to defendant's liability.

Cooper *v.* Ins. Co., *supra.*
Ins. Co. *v.* Arthur, *supra.*
Phillips on Ins., 346.

May 5, 1879. THE COURT (after stating the facts *ut supra*). Thus stood the facts, shown by the oral testimony of the plaintiff and Soellner, the truth of which was admitted by the motion for nonsuit. Whatever credit the jury might have given them, had the cause been submitted, the Court, in disposing of the motion, was bound to treat their testimony as true, and draw every reasonable inference therefrom in favor of the plaintiff. In considering whether there was error in ordering a nonsuit, it matters not that a portion of the evidence was ruled out before the motion, for if competent it should not have been withdrawn, and if incompetent there was no error in the judgment.

The defendant relies on the authority of Susquehanna Ins. Co. *v.* Perrine (7 W. & S. 348), Smith *v.* Ins. Co. (12 Harris, 320), State Mutual Fire Ins. Co. *v.* Arthur (6 Casey, 315), and Cooper *v.* Farmers' Mutual Fire Ins. Co. (14 Wright, 299), to preclude oral testimony of its agent's fraud or mistake, in preparing the application. In the first the by-laws were specific in the requirements of the application, and that if made by a surveyor he should be deemed the applicant's agent. It was said, that knowing he would become a member of the company on acceptance of the policy, the presumption is that he made himself acquainted with its charter and regulations, and that he was bound to know that the surveyor was acting as his instrument, and not as the instrument of the company; and consequently, a material fault in the application vitiated the policy. Smith's case rests upon a doctrine that ought to prevail everywhere, to wit: "The principal is bound by the acts of his agent whilst he acts within the scope of the deputed authority; but if departing from that sphere, or continuing in it, he commits a fraud on his principal, a *particeps criminis* shall not profit by the fraud." In the Arthur case, the facts in issue were "nothing more than knowledge by the defendants of the manner in which the buildings were used at the time the policy was made." The warranty and its breaches were considered as admitted by the pleadings. Upon the single fact that the assurer knew that the buildings were not occupied as warranted by the assured, it was decided that knowledge by the underwriter, or by him and the assured, is no basis for reforming the policy, though it is conceded that equity will reform it where there was a mutual mistake of facts. It was ruled in Cooper's case, that what is a warranty in a policy by its terms, cannot be shown by parol evidence to have been a mistake. There the agency of Mr. Herr, who filed the application, was defined in writing, "to make surveys, receive applications, premium notes, and cash premiums, for said company, agreeably to the by-laws." It is said in the opinion,

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that the agent had no authority to make the contract or arrange any of its conditions; that if he and Cooper were both mistaken, his mistake was not that of a party to the contract; that the plaintiff's offer was not to show a mutual mistake; that it was a fatal objection to the offer, that, if admitted, it would not show a mistake by both parties; and, so far as appeared, the defendants had not been informed of any representation other than in the written application upon which they issued the policy. The offers themselves show that Cooper neither read nor heard read the answers, but they also show that he and the agent talked over and agreed that the judgments were not encumbrances, and the answer was written accordingly. The insured knew what was in the warranty he had signed. An examination of the facts in those cases will aid in understanding the scope of the opinions. In each there was no question but that the warranty was made, and it was conceded that if there were a mutual mistake between the contracting parties, parol evidence is admissible to reform the policy. None declares that the fraud or mistakes of a knavish or blundering agent, done within the scope of the powers given him by the company, will enable the latter to avoid a policy to the injury of the insured, who innocently became a party to the contract. The authorities go far, very likely not too far, in holding the assured responsible for his warranty, and in excluding oral evidence to contradict or vary it; but they do not establish that where an agent of the assurer has cheated the assured into signing the warranty and paying the premium, and the policy was issued upon the false statements of the agent himself, the assured shall not prove the fact and hold the principal to the contract, as if he had committed the wrong. The defendant is a mutual company, and holders of its policies are members. Membership dates from consummation of the contract, and not before. During negotiations for insurance, a mutual company occupies no other or better position than one organized on the stock plan, and cannot profit by a contract induced by the fraud of its agent; for the membership arises from, but does not precede the contract. (Lycoming Fire Ins. Co. *v.* Woodworth, 2 Norris, 223.) As to all preliminary negotiations, the agent acts only on behalf of the company. A stipulation in a policy, that if the agent of the company, in the transaction of their business, shall violate the conditions, the violation shall be construed to be the act of the insured, and shall avoid the policy, will not render the insured responsible for the mistakes of the agent. (Columbia Ins. Co. *v.* Cooper, 14 Wright, 331.) This was said where the mistake was of representations, and does not qualify the rule which holds the assured upon his covenants or warranties. But it shows that a company contracting by its agent will not always escape the consequences of the fraud or mistake of its agent, by inserting a stipulation in the policy that such agent shall be deemed the agent of the insured, who, at the time of applying for the policy, was ignorant of the insurer's intention so to stipulate.

Upon the verity of the plaintiff's testimony, he had no knowledge of the fraud or mistake of the defendant's agent previous to the fire. The agent falsely induced him to sign a statement he had not made, and did not intend to make. Moreover, appended to the application is the following, signed by the agent: "The following questions must be answered fully and definitely by the agent, and when this is not done, the application will be declined: Have you personally examined this risk? Do you think it advisable to take it? Yes. Are stoves, pipes, and chimneys, all secure? Yes. Are you personally acquainted with the applicant and risk, and do you fully approve it? Yes. Has he ever met with loss by fire? No." Thus answered the insurer's agent, without which the policy would not have been issued. The application and agent's certificate agree. Oral and written evidence show that the agent was acting within the scope of his employment, but in bad faith to his principal. He was not only to solicit and make out applications, but his own answers from personal examination were relied upon by the insurers in making the contract. By what rule shall the contract be void as respects an innocent party who first discovered the fraud after his loss? The assurer believed both statements; the assured knew nothing of the contents of either. Which party shall suffer? By elementary principles, the one who employed and gave character to the agent, and issued the policy upon his act, and not he who innocently paid his money.

It is not alleged the case was defective for any cause other than breach of warranty.

Judgment reversed, and a *procedendo* awarded. Opinion by TRUNKEY, J.

[See next case.]

Jan. '79, 192. March 3, 1879.

Smith v. The Farmers & Mechanics' Mutual Fire Insurance Co.

Fire Insurance—Conditions avoiding the policy—Technical seizure—Application for a policy, answer to questions in—Admissibility of parol evidence to explain.

A mere technical levy upon real estate under judicial process, unaccompanied by change of possession or in-

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crease of risk, will not avoid a policy of insurance containing a condition that the insurance "should cease from the time the property insured should be levied upon, or taken into possession or custody under any proceeding in law or in equity."

Parol evidence is admissible to prove that an agent, whose duty it was to take down answers to questions in the application for a policy of insurance, and to certify to the company the correctness of the answers, which by the terms of the policy were warranties, had either negligently or intentionally written an erroneous or ambiguous answer.

Error to the Common Pleas of Berks County.

Covenant upon a policy of fire insurance, by William B. Smith against the Farmers & Mechanics' Mutual Fire Insurance Company. Plea: Covenants performed, *absque hoc*.

Before the referee, to whom the case was submitted under the Act of May 14, 1874, the following facts appeared: On Nov. 9, 1875, William B. Smith, upon the solicitation of the agent of the Farmers & Mechanics' Mutual Fire Insurance Co., applied for a policy of insurance amounting to $1800, upon his carriage manufactory and contents in Kutztown. Among the printed questions in the application for the policy, which by the terms of the application were a warranty on the part of the assured, and which it was the duty of the agent to write down correctly, were the following: (12) "Is the property encumbered? If so, state the amount, and also the estimated value of the real estate covered by the encumbrance." *Answer*. "No morg. judgment." (13) "Are all the facts material to the risk made known?" *Answer*. "Yes." Upon the back of the application were certain printed questions, to the correctness of which the company required the agent to certify, and, among others, the following (6) "Are *your* answers by the applicant all correct so far as you can discern?" *Answer*. "Yes." The plaintiff paid a premium of $27, and gave a premium note for $270 to the order of the company, in which he covenanted, *inter alia*, to accept a policy based upon the application and survey, and, in case of loss, to adjust the same in accordance with the by-laws of the company and the conditions of the policy, and further, that if any untrue answer was given to the printed questions in the application, whereby the company was deceived as to the character of the risk, the policy was to be void. The company thereupon issued the plaintiff a policy of insurance for $1800, on Nov. 12, 1875, in which the assured agreed, *inter alia*, that his representations in the application were a warranty, containing a just, full, and true exposition of all the facts in regard to the condition, situation, and value of the property insured, and, that, if any fact or circumstance was not fairly represented the policy was to be void, and further, that the policy was drawn and accepted with reference to the application and conditions annexed, which were made a part of the policy.

One of the conditions of insurance was as follows:—

(15) The insurance under this policy shall cease at and from the time the property hereby insured shall be levied on or taken into possession or custody under any proceeding in law or equity, and should there, during the life of this policy, an encumbrance fall or be executed upon the property insured sufficient to reduce the real interest of the insured in the same to a sum only equal to or below the amount insured, and he neglect or fail to obtain the consent of the company thereto, then and in that case the policy shall be void.

At the time of application for the policy there were on record nine judgments against the plaintiff, upon one of which proceedings had been begun under a *fi. fa.* and *vend. exp.*, under which the real estate of the plaintiff was levied upon and condemned before the issue of the policy.

The property was burned on Dec. 4, 1875. The company refused to pay the loss on the ground of a violation of the terms of the policy and the conditions of insurance.

At the trial, upon the close of the defendant's testimony, the plaintiff offered to prove in rebuttal that the agent of the company, before the plaintiff signed the application, asked him whether he had any mortgages on his property, to which he answered "No, but other debts on it." That the agent then replied "that makes no difference, you will be all right and safe," and that in consideration of this promise the plaintiff signed the application. Objection. Objection sustained. Exception. [First assignment of error.] The referee (John B. Dampman) was of the following opinion:—

"All the facts necessary to make out a *prima facie* case for the plaintiff were proven. The defendant offered in evidence copies of the records of the Court of Common Pleas of Berks County—showing that at the time of the occurrence of the fire, the property had been levied upon by the sheriff—with a view of avoiding the policy under the condition thereof; condition 15 providing that the insurance should cease from the time the property was levied upon, under any proceeding in law or equity, etc. The evidence was admitted, but it does not become necessary in the decision of this case to pass upon the effect of it.

"The defendants also proved that at the time of effecting this insurance the property insured was encumbered with judgments, while in the application for insurance the plaintiff had said there were no judgments or mortgages, this for the purpose of showing such false representations by the plaintiff as under the terms of the policy would avoid it.

"The plaintiff then offered to prove in rebut-

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tal that a truthful answer had been given to the question in the application referring to encumbrances, but that the agent of the company, C. A. Z. Griesemer, who wrote the application, had written the answer wrong, this for the purpose of avoiding the forfeiture of the policy under the previous evidence. There can be no doubt that under certain circumstances he would have been entitled to show these. But under the provisions of the policy in question it could avail him nothing. By the terms of the policy this representation was covenanted to be a warranty, and being a warranty, on the authority of Cooper *v.* The Farmers' Mutual Fire Ins. Co. (14 Wright, 299), it cannot be shown by parol to have been a mistake; therefore the evidence was excluded. This was the vital point in the case. This evidence having been ruled out, the case of the plaintiff fails, and the decision must be for the defendants.

"And now, Jan. 4, 1879, judgment for defendants with costs."

The plaintiff took this writ of error, assigning for error the rejection of his offer of testimony in rebuttal, and the entry of judgment for the defendants.

Richmond L. Jones (with whom was *A. H. Schmehl*), for the plaintiff in error.

A technical seizure, unattended by change of possession or increase of risk, does not avoid a policy of insurance.

Insurance Co. *v.* O'Maley, 1 Norris, 400.

The real defence of the company is based upon the answer of the applicant to the question in regard to encumbrances, which the agent wrote in an abbreviated form, and which is ambiguous. In every case in which the assured has been held liable, the answer was plain and unambiguous. It is submitted that the Court has never gone so far as to permit an insurance company to construe the language of an application, and, after acting upon its own interpretation of an ambiguous answer, to bring itself, by a technical strain, within the rule laid down for the relief of companies acting upon an express warranty, and not guilty of negligence. The ambiguity and uncertainty of the answer was sufficient to put the defendants upon inquiry. This case is ruled by—

Columbia Ins. Co. *v.* Cooper, 14 Wr. 331.

The case is distinguishable from that of Cooper *v.* The Farmers' Ins. Co. (14 Wr. 299), cited on the other side, for in this case it was the duty of the agent to take down the answers of the applicant, and to certify their correctness to the company. The agent, not the applicant, warranted the correctness of the answers. Verbal testimony is admissible to explain a representation of an agent, which is not a statement of the insured.

Insurance Co. *v.* Wilkinson, 13 Wall. 223.

Geo. F. Baer, for the defendant in error.

The application and the policy make all the answers warranties, and an untruthful answer, or a failure to answer fully when specifically interrogated, vitiates the policy.

Gottsman *v.* Pennsylvania Ins. Co., 6 Sm. 210.

Cooper *v.* The Farmers' Mutual Fire Ins. Co., 14 Wr. 299.

There was in this case an omission to state the amount of mortgages and judgments, which avoided the policy. The Insurance Co. *v.* Wilkinson, cited *supra*, is a case of life insurance, in which the applicant's statements were not warranties.

May 5, 1879. THE COURT. In the Court below a clear *prima facie* case was made out by the plaintiff. To meet this the company interposed the defence that the policy was void under the fifteenth condition thereof, because the property was taken in execution before the fire; that it was void also for the reason that the plaintiff at the time the insurance was effected had falsely represented, in answer to the twelfth interrogatory, that the property was not encumbered either by mortgage or judgment. In support of the former ground of defence, it was shown that the real estate was levied on before the insurance was effected; that it was subsequently condemned, and a *venditioni* issued to the next term. It did not appear, however, that there was anything more than a technical seizure, unaccompanied by any change of possession, or increased risk. This was not sufficient to avoid the policy. The condition relied on has no application in the case of a mere technical seizure, such as was shown in this case. This question arising under a similar condition in an insurance policy was ruled in The Insurance Company *v.* O'Maley and Wife (1 Norris, 403).

In support of the second ground of defence it was shown that there were judgments against the plaintiff at the time the risk was taken, some of which were liens on the property insured. It was contended that this conclusively established the falsity of the plaintiff's answer to the twelfth interrogatory, and rendered the policy void. The plaintiff then offered to prove in rebuttal that a truthful reply had been given to the question respecting incumbrances, but that Griesemer, the agent of the company, who solicited the insurance and filled out the application, had erroneously written the answer; and also to prove what he said at the time in regard to the subject matter of the answer. The referee excluded the testimony for the reason that, by the terms of the policy, the answer as written was a warranty by the insured, and that parol evidence was not admissible to explain it or prove anything to the contrary. In this we think there was error.

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The expression "*no morg. judgment*," which composes the answer is, at least, ambiguous. The defendant of course interpreted it to mean, no mortgage and no judgments, and the referee appears to have adopted that construction. On the other hand the plaintiff claimed that it meant, no mortgage but judgments.

The testimony, if it had been received, might have satisfied the referee that the latter was what was really meant, and if so, it would have comported with the answer the plaintiff alleged he gave. The answers to all the interrogatories are very brief. Nine out of the thirteen consist of but a single word. It is not unreasonable to suppose that the agent did not fully write down all that was said by the insured in answer to the several interrogatories, and the abbreviated form of the particular answer complained of would seem to indicate that it was not the full answer to the question. If a truthful answer was in fact given, and the agent either intentionally or negligently wrote it down erroneously, and the plaintiff, resting in the belief that his answer as given was correctly written by the agent, signed the application in good faith, he should have been permitted to prove these facts. Griesemer was the agent of the company in taking and transmitting applications, and as such agent was required to answer certain questions attached to the application. One of these was: Are your answers by the applicant all correct so far as you can discern? This implies that it was his duty to write the answers of the applicant, and if he, while acting within the scope of his employment, intentionally or negligently wrote a wrong answer, or misled the applicant, the company was not in a position to say that the latter should not be permitted to prove the facts. In Eilenberger *v.* The Protective Mutual Fire Insurance Company, decided at last January Term [reported *ante*, p. 373], it is said by our brother TRUNKEY, after reviewing the authorities on the subject, "None declares that the fraud or mistake of a knavish or blundering agent, done within the scope of the powers given him by the company, will enable the latter to avoid a policy to the injury of the insured, who innocently became a party to the contract." Much that was said in that case in regard to the relative rights and duties of the insurer and the insured is applicable to the present case.

Judgment reversed, and it is ordered that the record be remitted to the Court below for a rehearing before the referee.

Opinion by STERRETT, J.

[*Cf.* Kensington Bank *v.* Yerkes, 5 WEEKLY NOTES, 159].

Jan. '78, 245. March 18, 1879.

Penna. and N. Y. Canal and R. R. Co. v. Lacey.

Negligence—Fire caused by sparks from locomotive—Proximate and remote cause of injury—Evidence.

The plaintiffs' storehouse, situated ninety feet from the defendants' railroad track, was destroyed by fire, resulting from loose straw in the yard being ignited by large sparks from the defendants' locomotive. The Court below left it to the jury to determine whether the defendants' negligence in allowing the escape of large sparks was the remote or proximate cause of the injury:

Held, that the question was properly submitted to the jury.

R. R. Co. *v.* Hope, 30 Sm. 373, followed.

Error to the Common Pleas of Wyoming County.

Case, by G. S. & H. R. Lacey against the above named company to recover damages for the burning of their storehouse resulting from the alleged improper management of one of the company's locomotives. Plea: Not guilty.

At the trial, before INGHAM, P. J., the following facts appeared. The building destroyed was a storehouse for straw and coal, situated about ninety feet from the defendants' railroad; several witnesses noticed that a locomotive which passed shortly before the discovery of the fire, was throwing out unusually large cinders. Some loose straw in the plaintiffs' yard, about sixteen feet from the storehouse, caught fire, and though early discovered, the fire, aided by a strong wind, could not be put out till it had reached and destroyed the storehouse. It did not appear that there had been in the yard more straw than might naturally fall to the ground while the plaintiffs loaded and unloaded their stock. For the defendants, evidence was given that improved wire spark arresters were in general use on the locomotives of the company, but no evidence was given as to the locomotive from which the fire in this case originated, and, on cross-examination, it appeared that the spark arresters required frequent repairs.

The defendants presented *inter alia* the following point: The jury in determining accountability in this case, must consider the immediate and not the remote cause of the fire. If the fire communicated from the locomotive first to the straw and from thence to the building of the defendants, the engine was the remote and not the immediate cause, and the defendants would not be liable. *Answer*. This asks us to charge you that if you believe from the evidence that the fire communicated in the straw and that from thence it ran to the building, and the building was thereby consumed, the company would not

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be liable for damages, even if it were proven to your satisfaction that they were running their engines in a negligent manner. We decline to charge you that this is the law.

In his general charge the Judge said: "It seems to me, therefore, a question to be left to you, gentlemen of the jury, whether the fire did originate directly from the neglect of running the engine; it is for you, I say, to determine this under the evidence: if you are satisfied that it did originate from the locomotive and was directly communicated to the straw and then to the building, you would be at liberty to find that the company were guilty of neglect, and in favor of the plaintiffs."

Verdict and judgment for the plaintiffs. The defendants took this writ, assigning for error the answer to the above point and the portion of the charge quoted.

F. Ansart, for the plaintiffs in error.

The defendants' neglect was the remote and not the proximate cause of the fire. The burnings were distinct and separate, and the case is governed by—

R. R. Co. *v.* Kerr, 12 Sm. 353.

When the facts are undisputed the question of remote or proximate cause should be for the Court.

W. E. and *C. A. Little* (with them *Sittser* and *Harding*) contra.

The jury were properly allowed to determine what was the proximate cause.

R. R. Co. *v.* Hope, 30 Sm. 373.
R. R. Co. *v.* Hendrickson, Id. 182.
R. R. Co. *v.* Stranahan, 2 WEEKLY NOTES, 215.

March 31, 1879. THE COURT. This case is ruled by the Pennsylvania R. R. Co. *v.* Hope (30 P. F. Smith, 373). It is a much stronger case than that, for the application of the rule there laid down. The building burned was a storehouse, and the straw fired was a natural incident of the business carried on in the building, and the communication of fire therefrom direct to the building without any intermediate cause.

Judgment affirmed. PER CURIAM.

[See next case.]

July, '78, 83. April 1, 1879.

Lehigh Valley R. R. Co. v. McKeen.

Negligence—Railroad Company—Fire caused by sparks—Proximate and remote cause of injury, when a question for the jury—Evidence.

The plaintiff alleged that his lumber, piled up 100 yards from the defendant's track, was set on fire in consequence of the escape of large cinders from the defendant's locomotive; which cinders ignited certain rubbish and brush on the land of a third person; the fire was then spread by the wind to similar objects on the plaintiff's land which was immediately adjacent, and then to the lumber, which was destroyed two hours after the beginning of the fire, which could not be extinguished by any efforts. There was some evidence, on the part of the defendant, opposed to this theory of the origin and the continuity of the fire. The Court below left it to the jury to say whether the defendant's negligence, if any there was, was the proximate or remote cause of the injury:

Held (affirming the judgment of the Court below), that this question was rightly submitted to the jury.

A number of witnesses having testified that the defendant's locomotive sent out excessively large sparks on the day of the fire, the defendant testified that upon that day the locomotive was provided with the most perfect spark-arrester. The Court below refused to charge that there was no proof of any want of care in the working of the locomotive:

Held (affirming the judgment below), that the question of negligence was one of fact, and rightly submitted to the jury.

Error to the Common Pleas of Northampton County.

Case, brought by McKeen against the above corporation, to recover damages for the burning of his lumber, resulting from the alleged negligent management of the defendant's locomotive. Plea: Not guilty.

At the trial, before MYERS, P. J., the following facts appeared: A lot of lumber belonging to the plaintiff was piled about 100 yards from the track of the corporation defendant. On May 4, 1870, the lumber was destroyed by fire originating in brush and rubbish in the vicinity. For the plaintiff, several witnesses testified that certain brush on a third person's land, between the plaintiff's land where the lumber was and the defendant's track, was fired by sparks of unusually large size emitted from the defendant's locomotive which passed at about noon on May 4; that this fire was promptly discovered; and that every effort was made to extinguish it; but that it was carried by the wind to brush and rubbish on the plaintiff's land, and then to the lumber, which was destroyed in about two hours.

Several witnesses also testified that they had observed the character of the sparks thrown out by the locomotive which passed at noon on different days shortly before the fire; that they were excessively large, and had more than once ignited boards and other materials near the track.

For the defendant, witnesses testified that the locomotive in question had been provided with the best kind of spark-arrester, which was examined on April 30 and May 7, before and after the fire, and found perfect; that trains of the Lehigh and Susquehanna R. R. passed on the track of that road near the plaintiff's lumber; that, on the day of the conflagration, they had observed small fires in the neighboring brush several hours before noon, from some of which fires the lumber might have caught. It was not

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disputed that the wind was strongly in the direction of the lumber from the defendant's track, and that the weather was dry on May 4.

The defendant requested the Court to charge, *inter alia*, as follows:—

(4) There being no proof of any want of care on the part of the defendant in the character of the spark-arrester used on the locomotive which is alleged to have caused the fire that destroyed the plaintiff's lumber, or that there was any want of care and vigilance in running the train, there can be no recovery in this action. *Answer.* This point we cannot affirm. To do so, we should have to take the case from the jury.

In his general charge the Judge said that on the part of the plaintiff, it was testified to that, subsequent to the alleged introduction of the new spark-arrester, up to and on the day of the fire, the engine threw out enormous sparks; while the defendant testified that the emission of such sparks was an impossibility. "Here is a direct conflict of evidence. Both cannot be true. It is your duty to reconcile it if possible," etc. Further on, the Judge said: ["The allegation of the plaintiff is that the sparks of fire thrown from the engine set fire to the combustible materials alongside of the defendant's road . . . that the fire was then transmitted to combustible materials, such as brush, stumps, and logs, on plaintiff's land, and by force of a high wind to his lumber. The defendant contends that, under such circumstances and conditions, the throwing of sparks of fire by the engine was not the immediate or proximate cause of the injury. This is a question of fact for you."] (9th assignment of error.)

(8) It is the undisputed fact that the plaintiff's lumber was not fired by sparks from the locomotive coming in direct contact with it; that the fire originated on the land of another, from which it was transmitted to combustible material on the plaintiff's land, etc.; in these circumstances the maxim *causa proxima non remota spectatur* becomes applicable, and the plaintiff cannot recover. *Answer.* If the jury find that some combustible materials, though on the lands of another, were in the first instance set on fire by sparks . . . from defendant's locomotive, and the fire was transmitted to other combustible materials on lands of the plaintiff, and by means of the latter materials to the plaintiff's lumber, in such case the jury must determine whether such facts constitute a continuous succession of events so linked together as to be a natural whole, or whether the chain is so broken as to become independent; and the final result, to wit, the burning of plaintiff's lumber, cannot be said to be the natural and probable consequence of the setting on fire in the first instance by the sparks or burning coals from the defendant's locomotive. The rule for determining what is proximate cause is, that the injury must be the natural and probable consequence of the act in the first instance, and that it might and ought to have been foreseen. (5th assignment of error.)

(10) Under all the testimony . . . there is not sufficient evidence to prove that the engine of the defendant occasioned the fire. *Negatived.*

(11) Under all the circumstances of the case, the verdict must be for the defendant. *Negatived.*

Verdict for the plaintiff, and judgment accordingly. The corporation defendant took this writ, assigning for error, *inter alia*, the answers to its points and the portion of the charge inclosed in brackets.

H. Green, for the plaintiff in error.

The latest rule is, that, when the facts of a case are ascertained, it is for the Court to determine whether the cause of an injury is proximate or remote.

Hoag & Alger *v.* L. S. & M. S. R. R., 4 Norris, 293.

Here the plaintiff's own evidence was that brush on another's land was first ignited; that the fire was then blown to other dry brush on the plaintiff's land, and thence to his lumber. There are here all the facts allowing of the application of the rule.

If the defendant used ordinary skill in providing the best spark-arrester, it ought not to be held liable for the consequences of the emission of sparks.

Turnpike Co. *v.* R. R. Co., 4 Sm. 345.
R. R. Co. *v.* Yerger, 23 Id. 121.

The evidence by which the plaintiff attempted to show negligence was inferential merely. The positive evidence of the spark-arrester's perfect condition was not rebutted by evidence as to the size of the sparks emitted, in which there was liability to gross misapprehension.

E. J. Fox (with him *J. L. Wilson*), contra.

The case of Hoag & Alger *v.* The R. R. Co. (*supra*) does not overrule the case of R. R. Co. *v.* Hope (30 Sm. 377), which the Court below followed. In that case, as in this, the question of the proximity of cause was held to be one for the jury. The question of negligence in allowing the sparks to escape was fairly left to the jury; the evidence of the escape of enormous sparks being in direct conflict with the theory that the spark-arrester was perfect.

May 5, 1879. THE COURT. However severe animadversions are sometimes made upon juries, the Courts are bound to conserve their rights in the trial of causes. The organic law secures to the people trial by jury, as it was at common law, and nothing is more offensive in the administration of justice than for the Judge to usurp the disposition of facts. Where there is no evidence

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of a disputed fact, or a mere scintilla, the question shall not be submitted; but, where there is sufficient evidence to warrant its finding, it must be, and its determination is exclusively for the jury. If a fact, in the opinion of the Judge, be proved by clear and uncontradicted oral testimony, he may advise, not command, the jury to find it. They may disbelieve the witnesses, though he credits them, and they may understand the testimony differently from him. When a fact essential to the maintenance of a cause is not established by proof, the Judge may order a nonsuit or direct a verdict for defendant, and, when the requisite facts are agreed upon or admitted, he may instruct a finding for plaintiff. These trite principles, called to mind by the line of argument, seem to have been remembered by the learned Judge, and they forbid reversal in absence of error in his rulings upon legal questions. If, indeed, it be true that a prejudice exists affecting jurors in a class of cases, elsewhere it might be profitable to inquire into the causes of and the means for its removal.

The chief complaint in this cause is, "the question of remoteness or proximity was referred as a question of fact to the jury." How it could have been otherwise, without disregarding the authority of Pennsylvania Railroad Co. *v.* Hope (30 P. F. Smith, 373), is difficult to comprehend. There the fire was dropped on a cross tie of the track, "and, running into a small heap of dry grass that had been cut and pulled and thrown into a pile in the fall before, was carried thence by means of rubbish and dry grass on the company's ground across the roadway to the fence, which was fired, and thence across two grass-fields, burning the dry grass in its pathway, until it reached the plaintiff's fence and woodland, about six hundred feet from the railroad, burning the fence and a large part of the woods. The weather was dry and windy, and the direction of the wind was strongly toward the plaintiff's fields and woods." Here the sparks were thrown from the engine to a point alongside of the defendant's track on land adjoining the plaintiff's, about three hundred feet from the lumber, set fire to combustible materials, consisting of leaves, briers, brush, stumps, and logs, burning the same in its pathway, till it reached the plaintiff's lumber. The weather was dry, and a high wind was blowing in the direction of the property destroyed. There the sparks fell on the track, and were communicated to the adjoining land by the dry grass negligently left by the company on its roadway. Here the sparks were thrown into the combustibles on the adjoining land. The fire reaching the combustibles on the lands was as sure to destroy in one case as the other. It was held that the question of proximity was one of fact peculiarly for the jury. "How near or remote each fact is to its next succeeding fact in the concatenation of circumstances from the prime cause to the end of the succession of facts, which is immediately linked to the injury, necessarily must be determined by the jury. These facts or circumstances constitute the case, and depend upon the evidence. The jury must determine, therefore, whether the facts constitute a continuous succession of events so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause—the negligence of the defendant. The rule concerning involuntary negligence, as distinguished from wanton or intentional injury, is expressed in the maxim *causa proxima non remota spectatur*. . . . In all, or nearly all, cases, the rule for determining what is a proximate cause is, that the injury must be the natural and probable consequence of the negligence, and that this might and ought to have been foreseen under the surrounding circumstances. These are the circumstances of the particular case, and, from the nature of the thing, must be referred to the jury." Per AGNEW, C. J.

The portion of the charge alleged to be erroneous in the ninth assignment immediately preceded the reading of the matter set forth in the fifth assignment. Placed in proper order, the instruction to the jury accords with the doctrine in Hope's case, and is nearly in the words there used. To have affirmed defendant's eighth point would have annulled that decision. The facts were not agreed upon nor admitted, and their finding was exclusively for the jury. Had the defendant added to those stated in the point another fact, namely, that the fire was transmitted by a continuous burning of the leaves and brush from the point of its origin to the lumber, the natural and probable consequence of defendant's negligence, the jury might properly have been told that upon such facts the cause was proximate, and plaintiff could recover. Or, instead, had it been added that there was no continuous burning, and the destruction of the lumber was not a natural result of setting fire to the leaves and brush, then upon such facts it could well have been affirmed that the maxim applied, and the verdict must be for the defendant. A jury of the vicinage would understand the witnesses, and know quite as well how that fire would run in the dry leaves and brush, on a windy day, as a judge learned in the law. Probably not one would hesitate in believing there was no real break in the fire from its starting-point to the lumber, or that, if it got within eighteen or twenty feet of the lumber, the latter would burn. They could also determine whether dry weather and high winds in the spring-

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time are extraordinary, and whether, under these conditions, the continuous succession of events was such that the cause was naturally linked to the injury, and within the probable foresight of him whose negligence ran through from the beginning to the end.

It is contended that Hoag & Alger *v.* L. S. & M. S. R. R. Co. (4 Norris, 293) in effect overrules the doctrine in Railroad *v.* Hope, and fully sustains and approves the ruling in Penna. Railroad Co. *v.* Kerr (12 P. F. Smith, 353). The opinion of the late Chief Justice in Hope's case shows the marked distinction between that and Kerr's, and that the latter, upon its own facts, was unshaken. If the case of Hoag & Alger seems to support the one rather than the other, it is because of the greater similarity of facts.

In Hoag & Alger *v.* The Railroad, the plaintiffs adduced the evidence upon which they framed their third point, praying instructions that, if the jury believed the facts as therein stated, they were entitled to recover. The defendant conceded the facts; and the jury were told that, upon the facts in evidence, or as assumed in the plaintiffs' third point, their verdict should be for the defendant. Had the facts not been virtually admitted, the instruction would have been bald error; and so held this Court. PAXSON, J., after referring to, and quoting at some length from, Railroad *v.* Hope, without a word of qualification of its force, says: "But it has never been held that, when the facts of a case have been ascertained, the Court may not apply the law to the facts. This is done daily upon special verdicts and reserved points. Thus in the Railroad Co. *v.* Kerr (12 P. F. S. 353)—a case bearing a striking analogy to this—the Court submitted the question of negligence to the jury, but reserved the question of proximate cause upon the undisputed facts of the case. Of course this could not have been done if the facts were in dispute. A reserved point must be based upon facts admitted in the cause or found by the jury. In questions of negligence, it has been repeatedly held that certain facts when established amount to negligence *per se*. . . . We may, therefore, regard the plaintiffs' third point as a prayer for instructions upon the undisputed facts of the case." It there appears that the authority of The Railroad *v.* Hope is in nowise shaken by the decision in a case where the plaintiffs complained that the facts were not submitted which they themselves assumed to be true. Had the opposite party denied they were a full and fair statement, and the case had come up on his complaint, the situation would have been altogether different. Or had the assumed facts been in dispute, and the point refused therefor, neither party could complain.

In that case the ignited oil ran down the bank into the river, and was carried down the current, on top of the water, till consumed. On its way it set fire to the plaintiff's property. The water bearing it was an intervening agent, as would be the hand bearing a lighted torch. This Court stated the rule for determining what is proximate cause, and said: "It would be unreasonable to hold that the engineer of the train could have anticipated the burning of the plaintiff's property as a consequence likely to flow from his negligence in not looking out and seeing the landslide." "It is manifest that the negligence was the remote and not the proximate cause of burning the plaintiff's building." Not so was it held where the fire was negligently communicated to dry grass and fences, in which the fire spread as it consumed, and was speeded in its progress by a strong wind. In the latter, the question of proximity was one of fact for the jury, who must determine whether the injury was the natural and probable consequence of the negligence—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act. What would be more quickly apprehended by one setting fire to dry leaves and brush, than that it would run before the wind and consume property in its pathway?

There is no error in the answer to the defendant's fourth point; besides, in the general charge on this matter, the Court called attention to the testimony in a manner which ought to be entirely satisfactory. An examination of the testimony has convinced us that the defendant's tenth and eleventh points were rightly refused. The plaintiff's testimony, if believed, standing alone, would justify a verdict in his favor, and consequently the Court was bound to submit the questions of fact to the jury, no matter how strong the defendant's counter-proofs. It would be idle to refer to the testimony of each witness in detail. The third, fourth, sixth, and tenth assignments were not pressed, for the declared reason that it is now settled that it is not contributory negligence in the owner to leave combustible material on his land near a railway track. (Phila. & Read. Railroad Co. *v.* Hendrickson, 30 P. F. Smith, 182.)

The numerous points were fully answered and the instructions so full that there is no complaint of omission to charge on any question which was raised at the trial.

Judgment affirmed.

Opinion by TRUNKEY, J.

[See Penna. and N. Y. Canal and R. R. Co. *v.* Lacey, *ante*, 368.]

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Jan. '78, 221. March 7, 1878.

Bennethum v. Eckert et al.

Assessment—Taxation—Act of July 11, 1842—Land lying both in borough and adjoining township—Tracts successively purchased, but used as a single farm—Situation of mansion house determines place of assessment.

The Act of July 11, 1842 (P. L. 331), provided that where township lines divided a tract of land, assessments for taxes should be made in the township in which the mansion house was situated. E. purchased successively four tracts of land; two being situated within a township and two within the limits of a borough. The borough line separated the tracts. The mansion house was situated upon one of the township tracts, and all the parcels were used by E. as a single farm:

Held, that the assessment for taxes should be made in the township only.

Error to the Common Pleas of Berks County.

Trespass on the case, *de bonis asportatis*, by Henry S. Eckert *et al.* Executors of Isaac Eckert, deceased, against Levi Bennethum, the tax collector of the borough of Womelsdorf, to recover the value of a top buggy belonging to Isaac Eckert, and levied upon and sold for taxes by the said defendant.

The case was referred to a referee (John B. Dampman), under the Act of May 14, 1874 (P. L. 166), who reported substantially the following facts, as to which there was no dispute. Isaac Eckert was owner of a farm of about 115 acres, of which 59 acres were situated in Heidelberg Township, Berks County, and 55 acres in the borough of Womelsdorf, the mansion house being in the Heidelberg Township portion. The entire estate was used as a farm by tenants of the owner up to the time of bringing this action.

Isaac Eckert had acquired the property in the following manner: On April 1st, 1860, he purchased tract No. 1 on which the mansion house is situated, containing 33 acres, entirely in Heidelberg Township. In April, 1865, he purchased another tract immediately adjoining the last, containing 22 acres, also entirely in Heidelberg Township. The third and fourth tracts, containing about 33 acres each, and both, with the exception of 5 acres, situated entirely in the borough of Womelsdorf, he purchased in 1866 and 1869 respectively; the borough line ran between these and the two first-named tracts. The three last-mentioned tracts never had houses erected upon them, but at the time of the incorporation of Womelsdorf in 1833 were parts of a larger tract, the mansion houses of which were and still are within the borough limits. School and borough taxes had been assessed and collected upon the tracts within the borough limits by the school directors of Womelsdorf and by the borough authorities—school taxes since the passage of the Act establishing common schools, and borough tax since the incorporation of the borough. Payment thereof was never refused until demand was made by the defendant, tax collector of the borough, for $25 school tax and $12.50 borough tax assessed in 1871. Payment of this was refused on the ground that the whole farm was taxed in Heidelberg Township. The defendant, as tax collector, then levied upon a top buggy of the plaintiff; for making which levy this action of trespass on the case was brought.

Upon the question of the legality of this assessment, thus raised, the referee reported as follows:—

The 59th section of the Act of 11th July, 1842, says: "The assessors of the several counties within this Commonwealth, shall on seated lands make the assessment in the township in which the mansion house is situated, where township lines divide a tract of land." The words seem to admit of but one construction, viz.: that the location of the mansion house shall determine the place of assessment. There was some doubt at first as to whether the Act extended to cases where borough or city lines divided a tract, but in the case of Bausman *v.* The County of Lancaster (14 Wr. 208), it was decided that a township line was none the less a township line because it happened to be also a borough or city line. The only question then in determining the legality of the assessment is, whether this is such a tract of land as is contemplated by the Act of Assembly. If it is, no circumstance however peculiar or unforeseen can withdraw it from its operation. It is contended that this farm consists of several tracts, some of which are wholly within and some wholly without the borough limits, and that no tract has been divided by a township line. A tract of land is a term well known and often used in the nomenclature of the law. It means a contiguous piece of land every part of which has something in common with every other part, as a common ownership, or a common character with reference to use, or adaptability to particular purposes. With reference to ownership a tract may embrace a whole township; but with reference to character and use, it may be divided into marsh, meadow, arable, and woodland tracts. The use of the phrase "tract of land" in the statute has reference to ownership, and means a contiguous piece of land owned by the same person and having a common mansion house. Contiguity and ownership make it a tract within the meaning of the Act, and there is nothing to prevent the making of many tracts out of one or one tract out of many, as was done in this case.

If there could be any doubt as to the correctness of this construction, the language of the 15th section of the Act of 25th of April, 1850,

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which treats of the same subject matter and limits the construction of the Act in question, removes it. It says: "The 59th section of the Act of 11th July, 1842, shall be construed to extend to *lands lying in different townships*, the mansion house of which is in an incorporated city or borough," using instead of the phrase, "tract of land," the more comprehensive one, "lands lying in different townships," negativing clearly any intention of the Legislature to restrict the operation of the statute to tracts formed before the making of the line which divided them, and showing that the word "tract" in the Act of 1842, is to be taken in its widest and most comprehensive sense.

The Act operates as well upon tracts formed before the making of a township line, and divided by it, as upon those formed afterwards and made up of smaller tracts from both sides of a line, and however and whensoever formed, the location of the mansion house determines the place of assessment. This being the case, this assessment was illegal, and the defendant is liable in this action of trespass.

The referee thereupon entered judgment for the plaintiff for $5, with the costs of suit. The defendant took this writ, assigning for error the entry of judgment for the plaintiff by the referee.

William H. Livingood and *D. and J. N. Ermentrout*, for the plaintiff in error.

The Act of 1842 did not contemplate a case like this. Its purpose was to prevent the necessity of making measurements of lands divided by township lines, and to guard against low valuations. But here the tracts were divided and separate, and no measurement was necessary. In Bausman *v.* Lancaster County (14 Wr. 208), the whole of the farm had been assessed in Lancaster Township, while here the properties in dispute had been assessed in the borough of Womelsdorf.

The defendant in error was indirectly if not directly benefited by the borough improvements.

Kelly *v.* City of Pittsburgh, 5 WEEKLY NOTES, 324.

Geo. F. Baer, contra, presented no paperbook, but contended that the character of land as a single tract was not affected by its being composed of several parcels, but if all were used for a single purpose, that fact determined its character as a single tract for assessments of taxes.

March 18, 1878. THE COURT. The opinion of the referee expresses so plainly the law of this case, it is unnecessary to say more than that we affirm his judgment.

Judgment affirmed.

PER CURIAM.

[See Nippenose Township *v.* Bastress Township, *ante*, 245.]

Jan. '79, 152. March 26, 1879.

Malany v. Entriken.

Attachment execution—Defendant's claim for exemption—Must be made before plaintiff has incurred costs—Practice.

The claim for the benefit of the exemption laws by a defendant who is served in an attachment execution, must be made at the term to which the process is returnable, and before the plaintiff has taken any step to his detriment.

A claim not made until after the plaintiff has filed interrogatories and proof of service of a rule to answer, is too late.

Bittenger's Appeal, 26 Sm. 105, followed.

Error to the Court of Common Pleas of Chester County.

In the Court below, Entriken & McLain having obtained a judgment against S. P. Malany, issued attachments sur judgment, in which Oliver Sidwell, administrator of Rachel Malany, and Reuben Barnard, administrator of Wm. S. Malany, were made garnishees.

The attachments were issued October 10, 1877, and served the following day on both the garnishees and defendant. They were returnable October 29, 1877, the return day of the October term. On November 1st interrogatories were filed and a rule to answer granted. On November 27th the defendant filed his claim for the benefit of the $300 exemption. On December 4th the Court granted a rule *nisi* to strike off the defendant's claim, which was afterward made absolute by the Court. Whereupon defendant took this writ, assigning as error this action of the Court.

Oliver Sidwell, for plaintiff in error.

The Act of April 9, 1849 (P. L. 533) fixes no time within which exemption must be claimed; it is a beneficial Act, and must be construed liberally. The rule is that the claim is in time if done before the plaintiff has suffered any detriment.

Landis *v.* Lyon, 21 Sm. 475.
Yost *v.* Heffner, 19 Id. 68.

R. Jones Monaghan, for defendant in error.

The claim must be made at or about the time of service, to save the cost and trouble of farther proceedings; the costs to be prevented are not merely record costs, but the trouble and expense of counsel.

Strouse *v.* Becker, 8 Wr. 208.
Bancord *v.* Parker, 15 Sm. 338.

It has been expressly ruled that a claim made after the return day is too late.

Bittinger's Appeal, 26 Sm. 106.

May 5, 1879. THE COURT. This case is ruled by Bittenger's Appeal (26 P. F. Smith, 105),

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in which it was distinctly decided that the claim of the defendant in the attachment execution for exemption must be made at the term to which the process is returnable, and before the plaintiff has taken any step in the cause to his detriment. Here the claim was not made until after interrogatories filed, and proof of service of the rule on the garnishees to answer. It is evident that the plaintiff had incurred costs, which an earlier claim would have prevented.

Order affirmed.

PER CURIAM.

Common Pleas—Law.

C. P. No. 1. May, 1879.

Moore et al. v. Juvenal.

Negligence—Attorney-at-law—Statute of limitations—Where an attorney neglects to bring a suit, until his client's right is barred by statute, the latter's right of action against the attorney will be barred in six years from the time of such neglect—Ignoratio legis neminem excusat.

Rule for judgment *non obstante veredicto.*

In this case a verdict was obtained against an attorney-at-law for neglect of his client's business, and the present motion was made on behalf of the defendant, on the point reserved, that the action was barred by the statute of limitations. The material facts were stated in the opinion of PEIRCE, J., as follows:—The defendant was employed as counsel by plaintiffs in an equity proceeding and claim which they had against the Green and Coates Streets Passenger Railway Company. In that proceeding the Court of Common Pleas for the City and County of Philadelphia, on the 23d of May, 1859, decreed in favor of the plaintiffs for the sum of $24,797.20, the amount of the award of the appraisers in their favor, without prejudice to the right of the defendants to contest the same; and *inter alia* ordered that an amicable action be entered forthwith by and between the plaintiffs and defendants to determine the legal and binding effect of the award.

On May 26, 1859, this decree was modified by agreement of the parties, and $15,000 was paid to the plaintiffs; and defendants agreed to pay a further sum upon said award as soon as approved. On the 6th of June, 1866, the plaintiffs moved for a final injunction, which was refused, and a decree was made in accordance with that of May 23, 1859, as modified by the agreement of May 26, 1859. From this decree the plaintiffs appealed to the Supreme Court. The decree was there affirmed.

No action was brought on behalf of the plaintiffs, as ordered by the Court, until February 27, 1867. To this the defendants therein, the Green and Coates Streets Passenger Railway Company, *inter alia*, pleaded the statute of limitations, and the Supreme Court gave judgment on this plea in favor of the defendants (14 P. F. Smith, 79). The defendant in this action, believing that the appraisement made in favor of the plaintiffs was in the nature of a legal award, and that the plaintiffs had twenty years in which to bring their action, delayed bringing it, although frequently urged by the plaintiffs to do so, and was not made fully aware of the consequences of his negligent delay until the judgment of the Supreme Court above referred to was given, January 24, 1870. That Court held that the cause of action against the Green and Coates Streets Passenger Railway Company accrued November 23, 1858, and was barred by the statute six years thereafter.

The action against the defendant in this suit was brought December Term, 1874, and the defendant pleaded the statute. Under the instruction of the Court the verdict was for plaintiffs, the point as to the statute barring the action being reserved.

G. W. Thorn and *T. J. Diehl*, for the motion.

The actual date of the breach of duty, or negligence, and not the time when the consequences of such negligence or deficiency begin to manifest themselves, is the period at which the statute begins running in favor of an attorney-at-law, against whom suit is brought, for breach of duty, etc., in his office as an attorney.

Howell *v.* Young, 8 D. & R. 14.
Smith *v.* Fox, 6 Hare, 386.
Campbell *v.* Boggs, 12 Wr. 525.
Rhines *v.* Evans, 16 Sm. 192.
Miller *v.* Wilson, 12 H. 121.
Fleming *v.* Culbert, 10 Wr. 498.
Derrickson *v.* Cady, 7 Barr, 31.
Short *v.* McCarthy, 3 B. & A. 626.
Argall *v.* Bryant, 1 Sandf. 98.
Van Tassel *v.* Van Tassel, 31 Barb. 439.
Downey *v.* Garard, 12 H. 52.

J. W. Coulston, contra.

When there has been no fraud the statute does not begin to run against an attorney until the relation of attorney and client has been dissolved.

Foster *v.* Jack, 4 Watts, 334.
Hale *v.* Ard, 12 Wr. 22.

June 7, 1879. THE COURT (after stating the facts as above). The counsel for the plaintiff contend that the statute does not begin to run until the relation of attorney and client has been

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dissolved. This is partially true. Thus the statute will not run against an attorney for services rendered in a particular cause until that cause is ended, though it will for other services not connected with that cause (Foster *v.* Jack, 4 Watts, 334; Hale *v.* Ard, 12 Wright, 22). But where an attorney collects money for his client, the statute begins to run in his favor from the time of its receipt without regard to notice to the client. But fraudulent concealment has been held to modify this rule in Pennsylvania (Campbell *v.* Boggs, 12 Wright, 524; Morgan *v.* Tener; 2 Norris, 305).

In an action against an attorney for a failure to collect it, the statute begins to run from the time he first became liable. It is the duty of the client to notice the neglect of the attorney after a reasonable time has elapsed (Rhines *v.* Evans, 16 P. F. Smith, 192). In Wilcox *v.* Plummer (4 Peters, 172) the action was assumpsit, and it was held that when the attorney was chargeable with negligence or unskilfulness his contract was violated, and the action might have been sustained immediately, and as a consequence that the statute ran from the time that the action accrued and not from the time that the damage was developed or became definite. And this principle is carried so far in England that in the case of the East India Company *v.* Paul (1 Eng. Law and Eq. R. 49), Lord CAMPBELL said: "The rule is firmly established that in assumpsit the breach of contract is the cause of action, and that the statute of limitations runs from the time of the breach, even where there is fraud on the part of the defendant." In Pennsylvania, as above stated, the doctrine has not been carried so far as to be unaffected by fraud or fraudulent concealment.

The facts in this case appear to bring it within the rulings in Campbell *v.* Boggs (12 Wright, 525), and Rhines *v.* Evans (16 P. F. Smith, 192). But it is said that the plaintiffs were put off their guard by the defendant repeatedly saying to them that there was plenty of time in which to bring their action against the railroad company. This is not shown to have been an act of fraud on the part of the defendant. At most it seems to have been a mistake of judgment or a misunderstanding of the law. It did not conceal from the plaintiffs that he was neglecting their business, for they were frequently urging him to bring action against the company, and if it was mistake of the law on his part, it did not excuse him from his duty and a liability to the plaintiffs for a breach of it, any more than a mistake of the law on their part excused the plaintiffs for not having brought their action against the railroad company in time, for ignorance of the law excuseth no man, whether he be layman or lawyer.

It follows that, whether the right of action against the defendants accrued in 1859, when he failed in his duty to bring an action against the railway company, as ordered by the Court and his client, or in 1865, when the action against the railway company was fully barred by the statute, the action against the defendant is fully barred by the failure of the plaintiffs to bring their action against him in the one case for fifteen years, and in the other for nine years after their cause of action accrued.

It matters not that the plaintiffs did not know that their action against the railway company was barred by the statute of limitations until the decisions of the Supreme Court in 1870. The rights of parties do not depend on their knowledge or want of knowledge of the law, or their opinion respecting it—the basis would be too uncertain—but upon the law itself, which is applied equally to all men, the learned and the unlearned.

The verdict is set aside, and the judgment is entered for the defendant on the point reserved, *non obstante veredicto.*

Opinion by PEIRCE, J.

C. P. No. 2. Sept. 15, 1879.

Sharpless v. Weigle.

Landlord and tenant—Surrender of term by tenant—Acceptance thereof by landlord.

Rule for judgment for want of a sufficient affidavit of defence.

Covenant for rent.

The affidavit set forth that during the year 1878, the roof of the demised premises became leaky, and that deponent complained; plaintiff, however, refused to repair and said, "Why don't you move?" That finally on Jan. 31, 1879, he paid the rent which fell due the following day and told the plaintiff that he was about to move; the plaintiff said, "All right," and subsequently asked for and obtained the key of the premises, and put up a notice, "To let."

Wireman, for the rule.

The expression "all right" is indefinite; it may have meant, "You can move if you choose, but I will hold you for the rent."

Goldbeck, contra.

If the landlord used an equivocal expression, knowing the sense in which the tenant was likely to construe it, it was his duty to explain his meaning, or he must take the consequences. The facts set out in the affidavit amount to a surrender and acceptance.

Bradley *v.* Brown, 6 WEEKLY NOTES, 282.
Greider's Ap., 5 Barr, 422.
Kiester *v.* Miller, 1 C. 481.

THE COURT. Rule discharged.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, OCT. 9, 1879.* [No. 24.

Supreme Court.

Jan. '79, 249. March 21, 1879.

Wayne County v. Waller & Seely.

Criminal law—Assignment of counsel for the defence of a pauper prisoner—Non-liability of the county for professional fees and expense of counsel in preparing for trial.

Counsel appointed by the Court to defend a pauper prisoner cannot recover from the county compensation for professional services, nor for expenses incurred in preparation for trial.

It is an incident of the office of counsel, who, like other officers of the Court, hold office *cum onere*, to render gratuitous services in such cases.

In Pennsylvania the Courts have always proceeded on the safe principle of requiring statutory authority, either in express terms or by necessary implication, for all claims upon the public treasury.

Error to the Common Pleas of Wayne County.

Case stated, in which George G. Waller and Henry M. Seely were plaintiffs, and the county of Wayne was defendant.

The facts were these: Mary E. Van Alstine was arrested and committed to the county jail of Wayne County in August, 1878, on the charge of having murdered her husband, and at the September sessions of the Court of Oyer and Terminer was indicted for murder. On Nov. 8, 1878, she presented a petition to the Judges of the Court, setting forth her poverty and innocence, and praying that the Court would assign counsel to defend her, and provide some means of paying the necessary expenses of preparing her case for trial. The plaintiffs, who are attorneys-at-law, were thereupon appointed by the Court to defend her; the Court, at the same time, recommending that the county of Wayne should furnish her with one hundred and fifty dollars to meet her expenses and pay her counsel. On Dec. 9, 1878, the trial of Mrs. Van Alstine having been continued at the request of the Commonwealth, and no funds having been appropriated by the county under the recommendation of the Court for her benefit, Henry M. Seely, one of the plaintiffs, presented to the Court a petition, setting forth Mrs. Van Alstine's confinement in prison, her poverty, the necessity of incurring expense in properly preparing the defence, and praying the Court to direct the County Commissioners to appropriate and pay over to Mrs. Van Alstine's counsel the sum of one hundred and fifty dollars for the purpose of defraying the expense. This petition was granted by the Court, who ordered the Commissioners to pay over to the plaintiffs the sum of one hundred and fifty dollars. The Commissioners replied that it would be impossible for them to comply with this order. On January 13, 1879, a new Board of Commissioners having come into office, a new order of Court was made, directing the Commissioners to appropriate and pay over to the plaintiffs the sum of one hundred and fifty dollars to defray the necessary expenses of preparing Mrs. Van Alstine's defence, or show cause why an attachment should not issue. In their answer to this order the Commissioners denied that the order of the Court would protect them in the payment of money for such a purpose, or that they had the right to pay such money, setting forth that the county was largely in debt, and the treasury empty, and that they were of opinion that they would render themselves personally liable for any moneys which they might appropriate for the purpose mentioned. This answer the Court held to be insufficient, and the matter was continued to Jan. 24, 1879, with the order that the attachment should then issue if the money was not paid. Upon that day the matter was left open by consent of counsel in order that a case stated might be prepared and presented to the Court to determine the question of the obligation of the county. In the absence of any appropriation by the County Commissioners, Mrs. Van Alstine being confined in jail without money or property, the plaintiffs proceeded, at their private expense, to prepare her defence, and expended in the investigation of the case, necessary to its proper presentation in Court, the sum of one hundred and fifty dollars. At the February Session, 1879, of the Court of Oyer and Terminer, Mrs. Van Alstine was tried upon the charge of murder, defended by the plaintiffs under appointment by the Court, and acquitted. The case stated concluded as follows: "If the Court shall be of the opinion that it was the duty of the county of Wayne, under the direction of the Court, to furnish necessary means to enable the counsel assigned by the Court to properly investigate the case and prepare the defence of Mrs. Van Alstine, it is agreed that such necessary expense actually incurred was one hundred and fifty dollars, and the Court shall direct judgment in favor of the plaintiffs against the defendant for that sum.

"If the Court shall be of the opinion that the counsel undertaking and conducting, under assignment by the Court, the defence of Mrs. Van Alstine, indicted for murder by poisoning, are entitled to compensation from the county for ser-

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vices so rendered, they shall receive the sum of two hundred dollars, and the Court shall direct judgment for the plaintiffs against the defendant for that sum in addition to the sum of one hundred and fifty dollars for expenses above stated.

"If the Court shall be of the opinion that the county of Wayne is not liable to pay, either for the expenses incurred or services rendered by counsel in the preparation and conduct of the defence of Mrs. Van Alstine, then judgment to be awarded to the defendant. Either party to have the right to sue out a writ of error."

After argument, the Court entered judgment for the plaintiffs in the sum of three hundred and fifty dollars, of which two hundred dollars were for services for preparing and conducting the defence of the prisoner, under assignment by the Court, and one hundred and fifty dollars for expenses necessarily incurred in the preparation of the defence.

The defendant took this writ of error, assigning for error the action of the Court.

George S. Purdy, for the plaintiff in error.

Is the county bound to furnish money to enable a pauper prisoner to procure witnesses in his defence, and when counsel are assigned for his defence, is the county liable for counsel fees? By the common law the public pay no costs, and the liability of the public, being created by statute, cannot be extended beyond the legislative limit.

Berks County *v.* Pile, 6 Harris, 493.

Neither the Court, nor the County Commissioners, nor any other functionary, has the power to bind the county for costs in any way not prescribed by statute.

Commonwealth *v.* Horner, 10 C. 440.

The Act of 1860 (Purd. Dig. 391) authorizes the payment by the county of the costs of prosecution only. But the costs of a defendant in resisting an indictment are no part of the costs of prosecution, and do not accrue upon the bill of indictment. The order of the Court, if obeyed, would not discharge the Commissioners from personal liability to the county for the money so misappropriated, and it would be the duty of the County Auditor, upon settlement of the Commissioners' account to surcharge them.

Commissioners of Lycoming *v.* County of Lycoming, 10 Wr. 496.

The case is ruled by—

Huntingdon County *v.* The Commonwealth, 22 Sm. 80.

County of Franklin *v.* Conrad, 12 C. 317.

Counsel assigned by the Court to defend impecunious prisoners have been held in other States not to be entitled to compensation for their services.

Vise *v.* Hamilton, 19 Ills. 78.
Rowe *v.* Yuba, 17 Cal. 61.

H. M. Seely and *George G. Waller*, for the defendants in error.

The Court, under the Act of March 31, 1718 (Purd. Dig. 1098, pl. 2), imposed upon two of its officers the specific duty of defending a pauper prisoner, a duty essential to the proper administration of justice, particularly in a case involving the life of a citizen. The question is not one of costs as contended for on the other side. It is admitted that there is no statutory provision for compensation to counsel, or for their expenses in such a case. But it is submitted that such an order is within *the implied powers* of a court of general criminal jurisdiction. Without such power justice cannot be properly administered. The Court may impose upon the county the expense of boarding and lodging a jury kept together by order of Court in a capital case.

Commissioners *v.* Hall, 7 W. 290.

The Coroner may direct a *post-mortem* examination, and the county must pay for the services of a physician employed as an expert.

Allegheny County *v.* Watt, 3 Barr, 462.

The county is liable for the incidental expenses of the Court.

M'Calmont *v.* Allegheny County, 5 C. 417.

The county is liable for the expense of fuel to keep the prisoners comfortable in jail.

Richardson *v.* Clarion County, 2 Harris, 200.

In none of these cases is there statutory warrant to charge the county with the expense. But they are, as we contend for, within the Court's implied powers. Our claim is based upon the ground that when the Court of general criminal jurisdiction has determined that the payment of certain expenses by the county is necessary to enable the Court to perform its legitimate function of administering justice, and the Court has ordered the county to pay such expense, a legal obligation is imposed upon the county which will sustain the action.

Counsel assigned for the defence of poor defendants in criminal courts have a right of action against the county for their fees.

Regina *v.* Fogarty, 5 Cox, C. C. 161.
Blythe *v.* The State, 4 Ind. 525.
Dane *v.* Smith, 13 Wis. 585.
Hall *v.* Washingtone, 2 Greene's Iowa, 473.
Davis *v.* Linn County, 24 Iowa, 508.

May 5, 1879. THE COURT. This contention arises upon the facts submitted to the Court below in the nature of a case stated. The plaintiffs below, attorneys-at-law, were appointed by the Court of Oyer and Terminer to defend a woman who was indicted for murder. On her petition the Court first recommended and subsequently ordered the payment by the county of one hundred and fifty dollars, to enable her to secure the attendance of witnesses and prepare for trial. The Commissioners of the county refused to comply with the request, or to obey the peremptory

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order, claiming that the Court had no authority to make it; and that if they acquiesced, they would render themselves personally responsible to the county for the amount so paid. The facts, as fully presented in the case stated, were presented to the Court in the following terms, viz.:—

"If the Court shall be of opinion that it was the duty of the county of Wayne, under the direction of the Court, to furnish necessary means to enable the counsel assigned by the Court to properly investigate the case and prepare the defence of Mrs. Van Alstine, it is agreed that such necessary expense actually incurred was one hundred and fifty dollars, and the Court shall direct judgment in favor of the plaintiffs against the defendant for that sum.

"If the Court shall be of the opinion that the counsel, undertaking and conducting, under assignment by the Court, the defence of Mrs. Van Alstine, indicted for murder by poisoning, are entitled to compensation from the county for services so rendered, they shall receive the sum of two hundred dollars, and the Court shall direct judgment for the plaintiffs against the defendant for that sum in addition to the sum of one hundred and fifty dollars for expenses above stated.

"If the Court shall be of opinion that the county is not liable to pay either for the expense incurred or services rendered by counsel in the preparation and conduct of the defence of Mrs. Van Alstine, then judgment to be awarded to the defendant. Either party to have the right to sue out a writ of error."

The learned Judge held that the county was liable for both sums, and entered judgment accordingly, and this is assigned for error.

By the common law no costs are paid out of the public treasury. In The County of Franklin *v.* Conrad (12 Casey, 317), it is said the recovery and payment of costs in criminal cases are so entirely dependent on statutory regulations in Pennsylvania that it is indispensable for every claimant to be able to point to the statute which entitles him to receive what he claims. We are not aware of any law, common or statute, that requires the county to pay a defendant's costs in a criminal case, or authorizes the Court to call upon the county to advance money to be expended by a prisoner or his counsel in subpœnaing witnesses, and otherwise preparing for trial. The claim of the plaintiff below derives no additional strength whatever from the fact that the Court first requested and afterwards commanded the Commissioners to pay the money. No authority can be found for either a request or peremptory order in such a case. If the County Commissioners had drawn a warrant for the amount ordered by the Court, they would have rendered themselves personally liable for the same, as in the case of The Commissioners *v.* The County of Lycoming (10 Wright, 496).

The ninth section of the Declaration of Rights gives to the accused, in all criminal prosecutions, the right "to have compulsory process for obtaining witnesses in his behalf." The practice which has obtained, and, so far as we know, is recognized in every criminal court, of awarding process and directing the service thereof at the instance of parties accused of crime, rests upon this sufficient foundation, and no Court will turn a deaf ear to the appeal of an impecunious prisoner who makes timely application for process to bring in his witnesses. It will always be awarded on proper application; the Court will see that it is served, and compel the attendance of witnesses. As to the compensation of the clerk who issues and the officer who serves the process, and the witnesses who obey it, that is another matter.

They cannot be paid out of the public treasury unless statutory warrant can be found for so doing. In many cases this may be a great hardship; but the remedy, if any is needed, rests with the Legislature, not in the courts. As to the officers, such service must be regarded as an incident of official position. They take and hold office *cum onere*. The hardship is greatest on witnesses, especially such as are too poor to pay their expenses while attending court in obedience to its process, on behalf of an insolvent prisoner. Until otherwise provided for, it must be set to the account of that service which every one at times owes to the government under which he lives and whose protection he enjoys. In Huntingdon Co. *v.* The Commonwealth (22 P. F. Smith, 80), Chief Justice THOMPSON, speaking of the hardship referred to, expresses regret that suitable legislative provision for such cases does not exist. It is very clear to us that the county was neither bound to furnish money nor reimburse the defendants in error for the amount expended by them in behalf of the prisoner, and we think it is equally manifest that it was under no legal obligation to compensate them for their professional services. They were officers of the Court, and, like others, took their offices *cum onere*. One of these burthens, which custom has recognized, is the gratuitous service rendered to a poor prisoner at the suggestion of the Court. There are, however, some respectable authorities sustaining on plausible grounds the opposite view. (Hall *v.* Washington County, 2 Greene's Iowa, 473; County of Dane *v.* Smith, 13 Wisconsin, 585.)

In the first of these it was held, in an opinion delivered by Chief Justice WILLIAMS, that—inasmuch as the Constitution of Iowa guaranteed to the prisoner a speedy trial and "the assistance of counsel for his defence," and as the Court

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acted in obedience to the express mandate of a statute in assigning counsel, and the latter, as an officer of the Court, was bound to serve—an obligation arose to pay a reasonable compensation for the services thus rendered, and consequently the county was liable. In the other case a somewhat similar view was taken, the Court remarking that the liability of the county resulted from the exercise of the power and duty of the Court to appoint counsel, not because the Court was authorized to contract for the county or its officers.

In other States it has been decided differently. In Rowe *v.* Yuba County (17 Cal. 63), Chief Justice FIELD says: "We are clear that the action cannot be maintained. The Court of Quarter Sessions is not authorized to create any charge against the county except in certain special cases, of which the employment of counsel for parties under indictment is not one. Besides it is a part of the general duty of counsel to render their professional services to persons accused of crime who are destitute of means, upon the appointment of the Court, when not inconsistent with their obligations to others, and for compensation they must trust to the future ability of the parties. Counsel are not considered at liberty to reject, under circumstances of this character, the cause of the defenceless because no provision for their compensation is made by law."

To the same effect is Vise *et al. v.* The County of Hamilton (19 Ill. 78), in which it is said—"The law confers on licensed attorneys rights and privileges, and with them imposes duties and obligations which must be reciprocally enjoyed and performed. The plaintiffs but performed an official duty for which no compensation is provided." While there is some force in the reasoning of the Iowa and Wisconsin Courts, we adhere to the opposite view as according better with a practice which has been almost universal and of such long standing as to have acquired the force of law. In this State we have always proceeded on the safe principle of requiring statutory authority—either in express terms or by necessary implication—for all such claims upon the public treasury. To hold that counsel appointed to defend insolvent prisoners may demand compensation from the county would be a departure from a time-honored custom to the contrary, and it is not difficult to foresee the mischief to which it would lead. It is far better to let such cases rest on the foundation which has hitherto sustained them — human sympathy and a just sense of professional obligation. No poverty-stricken prisoner is ever likely to suffer for want of necessary professional or pecuniary aid. It is but simple justice to the learned gentlemen who defend against this suit to say that, in their brief as well as orally, they disclaimed any desire for remuneration beyond an amount sufficient to reimburse them for their actual cash outlay, but we find no warrant for sustaining their claim even to this extent.

The judgment of the Common Pleas is reversed and set aside, and judgment is now entered in favor of the defendant and against the plaintiffs below.

Opinion by STERRETT, J.

Jan. '78, 91. May, 1878; Jan. 8, 1879.

Overman's Appeal.

Trust—Spendthrift Trust—Negligent trustee—Sequestration—When the income of a faithless trustee indebted to the estate, who is also an annuitant under the terms of a spendthrift trust, will not be sequestrated.

R., one of the annuitants under a will, and a co-executor and trustee of a spendthrift trust, was surcharged by the auditor with a sum of which the interest was largely in excess of his annuity. The will provided that "the trustees shall not be personally liable or responsible for any moneys except such as shall be actually received by them individually; nor shall either of them be responsible or liable for the acts of their co-executors or co-trustees to which they do not consent, but each of them shall be liable only for their individual acts or deeds, and for such moneys as shall come into their hands." The will further provided that the income of the annuitants was to be free from their "own control, contracts, debts, liabilities, or engagements," and gave to the executors large powers of investment and control over the trust funds. The auditor found that the estate had been loosely and carelessly managed, that all three of the trustees were equally blamable, although, in the absence of evidence, he assumed that they acted honestly, and he did not charge any of them with taking and using the trust funds:

Held (sustaining the auditor and the Court below), that the income of R. could not be sequestrated in the hands of the acting trustee to meet the indebtedness of R. to the estate.

Appeal from the Orphans' Court of Philadelphia County.

William Richardson died in 1866, leaving a will, of which the following are the material clauses:—

Item Ninth.— . . . The said income so directed to be paid by my said executors shall be paid to my said children and grandchild in such way and manner that the same shall be free from the control, contracts, debts, liabilities, or engagements of either or any of my said children or grandchild, or the debts, liabilities, or engagements of either of the husbands of my said daughters.

Item Tenth.—It is my will, and I do hereby direct, that my executors hereinafter named, and the trustees of any portion of my estate, shall not be personally liable or responsible for any moneys, except such as shall be actually received by them individually; nor shall either of them be responsible or liable for the acts of their co-executors or co-trustees to which they do not consent, but each of them liable only for their own individual acts

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and deeds, and for such moneys as shall come into their hands.

The eleventh clause of the will authorized the executors to make partition of lands in Schuylkill and other counties; to purchase the moieties or interests of co-tenants, and to raise the means of purchase by mortgage or otherwise on the lands; and, if deemed expedient in their opinion, to create a joint stock company to manage the lands; or "in any way or manner to take action with regard to them" which they should "deem to be manifestly to the interest of the estate."

Of the five appointed, the three surviving and acting executors, being George J. Richardson, a son of the testator, and one of the annuitants under the will, and two sons-in-law, filed several accounts, all of which were referred to Charles Gilpin, Esq., as auditor. After a protracted series of meetings, the auditor found, in an amended report, that the executors had unlawfully loaned to the firm of Lucas & Co. the sum of $271,759.40, which, owing to the insolvency of that firm, was totally lost; that such books of accounts as had been kept, were claimed to have been lost or mislaid; that further difficulty was offered to the investigation by the prolonged absence of George J. Richardson in North Carolina, on business of his own; "that after Lucas & Co. became embarrassed and loans were made to them, the business of the estate was loosely and carelessly managed by the accountants. Harmony did not prevail between them at all times. Sometimes two acted for the three, and at other times the money affairs were largely under the control of one of them, George J. Richardson. It is impossible to say how far the moneys of the estate were mixed with his own, as there were no regular books of the estate or his own to enable any one to decide that question.

"Your auditor is of opinion that all three are equally blamable for acts of commission and omission, which should not be tolerated in trustees. He does not mean to charge any one of them with taking and using the funds of the estate. He assumes, in the absence of evidence, that they acted honestly in this respect; but he does say and decide, that trustees who act so inharmoniously and carelessly, and by want of proper care of the trust fund cause such losses to the estate, cannot be considered as having earned commissions. . . ."

The auditor found an over-payment to the life interest of income, or what was supposed by them to be income, and surcharged them with the sum of $579,120.40.

At this stage of the proceedings, the Philadelphia Life, Trust, and Insurance Company was appointed executor, and their account was referred to the same auditor. Thereupon, Mary B. Overman, one of the annuitants, claimed the right to have sequestrated in the hands of the accountant the income of George J. Richardson, to meet over-payments of the income or any other indebtedness to the estate incurred by him. The auditor, deciding against this claim, held that: "The case of George J. Richardson, one of the annuitants or life interests, presents features not found in the cases of the other children and grandchild. He was co-executor and trustee, first, with four others, and afterwards with two others. It was contended that neither the trust nor the law applicable to voluntary payments protected him. It was argued that the trust did not protect him, because he was payee with others and receiver himself, and overpaid himself, and became otherwise largely indebted to the estate. There is, in the opinion of your auditor, a full answer to this line of argument.

"The trust is, within the authorities in Pennsylvania, what is called a *spendthrift trust.*

Fisher *v.* Taylor, 2 R. 33.
Holdship *v.* Patterson, 7 W. 547.
Rees *v.* Livingston, 5 Wr. 113.
Ashhurst *v.* Given, 5 W. & S. 323.
Vaux *v.* Parke, 7 W. & S. 19.
Rife *v.* Geyer, 9 Sm. 393.
Keyser *v.* Mitchell, 17 Id. 473.

"This trust is sustained by these authorities. The trust is good against all strangers to the estate. It was not contended that it was not good against all strangers, and the authorities fully sustain this view. If so, why not good against a debt due to the estate or to other life interests or parties in remainder?

"He was not indebted to the testator or his estate at the death; the trust was created by the testator; after his death the indebtedness to the estate originated; how can this new debt rise any higher, occupy any higher plane for any purpose, than any old or new debt of George J. Richardson, as to its effect on the trust created by the testator? The opportunity was afforded to incur a debt to the estate, and whether this was foreseen or unexpected by the testator it gave no power to the debt to the estate, greater than any other debt, to impugn and overthrow the trust.

"Your auditor is, therefore, of the opinion that the income of George J. Richardson in the hands of the present trustee cannot be sequestrated to meet over-payments to income or any other indebtedness to the estate incurred by him, and so decides.

"He therefore decides that all income received and receivable by the new trustee is payable to and divisable among the annuitants named in the will in the proportion therein specified."

The Orphans' Court dismissed the exceptions to this ruling, whereupon Mrs. Overman took

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this appeal, assigning for error the action of the Court in sustaining the decision of the auditor on her claim.

The case was first argued at Harrisburg, at the May Term, 1878.

E. Spencer Miller (with whom was *P. F. Rothermel*), for the appellant.

An executor or administrator, who owed a debt to his testator, or intestate in his lifetime, and omits to pay it, is surcharged with it on settlement of his account as if it had been collected.

Bull's Ap., 12 H. 286.

It would follow that if a legacy or distributive share be payable to him he will be treated as having collected the debt from himself and therewith paid his own legacy or distributive share, if it become necessary to adopt that theory to do justice, as in a case where the executor was insolvent, and what remained of the estate was only enough for others.

A court of equity will treat the debt of the trustees as producing income as against George J. Richardson. By not paying the interest upon it to the estate he merely anticipates his own share of the income. Had Mr. Richardson needed and been allowed an anticipation of his income, it could be regarded only as a debt to the estate, and would have been subsequently equalized. Had he taken and spent commissions to which he was not entitled, he certainly could be charged with them as against any income coming to him. Unless the claim in this case be allowed, an avenue will be opened to the grossest fraud in the management of such trusts.

Samuel Dickson (with whom was *J. C. Bullit*), for the appellee.

Looking, indeed, at the whole will, and seeking to discover the intent of the testator in respect to a question of this character, it must be apparent that any purpose on his part to make such discrimination in favor of his estate, would be wholly repugnant to the general scope and intent of this instrument. When, then, the testator has declared that he considers the maintenance of the object of his bounty of greater importance than the discharge of any obligation he may incur to strangers, it is incredible that he should not also have intended to exempt him from obligations incurred to his estate, and it is very doubtful if the policy of the law would permit a trust of the kind to be created, which should be good as against general creditors, but invalid as against other members of the testator's family.

The directions of the will would make the trust an active one, without more (Earp's Appeal, 25 S. 119): but it goes further than this, and the language used is that ordinarily selected in creating "a spendthrift-son-trust." The law upon this subject has become a rule of property, and can only now be changed by the Legislature. From Fisher *v.* Taylor (2 Rawle, 33), down to Keyser *v.* Mitchell (17 P. F. S. 473), there has been no break in the current. The result of the cases is to make the beneficiary, though *sui juris* as to his own property, incapable of binding himself by contract, or becoming bound by acquiescence or estoppel in respect to the property held for his benefit. This is not by way of maintaining his rights, but in order to protect the property and to preserve the bounty of the donor. In the extreme case of Ashhurst *v.* Given (5 W. & S. 323), where the *cestui que trust* was his own trustee, Mr. Justice KENNEDY said: "Whoever has the right to give has the right to dispose of the same as he pleases. *Cujus est dare ejus est disponere*, is the maxim which governs in such cases." It is not the right or ownership or title of the beneficiary which is considered, but the very object of the rule is to protect the improvident, the reckless, the unfortunate, or the dishonest, against his own folly or crime, so as to insure him and his family a support in spite of any attempt by way of anticipation or contract or assignment to take his own bread and butter out of his own mouth. In short, the *cestui que trust* must be treated as to the trust estate as one under disability, like an infant or married woman, and incapable of impairing the provisions made for him in any way, or the purpose of the donor must be defeated. The contest has always before arisen with meritorious creditors, deceived by the apparent possession of means, and having every claim to the consideration of the Court.

The opinion of the Supreme Court was delivered June 24, 1878, by AGNEW, C. J., as follows:—

We must take the facts of this case as found by the auditor. They exhibit a *devastavit* by George J. Richardson, one of the executors and trustees, of a gross kind. Want of harmony in the execution of the trust, loose and careless management, failure to keep proper accounts of their doings, great delay, absence from the trust, improvident loans of very large sums of money, and gross mismanagement seem to have characterized their transactions. It is upon such a case the question arises, whether under the will of William Richardson (his father), George J. Richardson, one of the trustees guilty of this gross mismanagement, is entitled, as a legatee, to his portion of the income set apart to himself and the other children of the testator; or whether it, or so much as is necessary, should be retained to answer the portions of his co-legatees. It was held in the Court below that he was entitled to his share of the income, notwithstanding his *devastavit*, on the ground that the trust for him and them was a spendthrift trust. This was a mistake resulting

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from two errors—one giving to such a trust a scope unsupported by equity, the other overlooking the plain intent of the testator.

That a trust for a spendthrift, as it is termed, will be upheld in equity is a settled doctrine of this State, and rests on the donor's right of dominion over his own property for a reasonable time. But it is exceptional in its very nature, because it contravenes that general policy which forbids restraints on alienation and the non-payment of honest debts. In order to support it resort is had to a *trust*, which equity will enforce; and equity necessarily regards its reasonableness, and the clearly-defined intent of the donor. Without such a trust upheld in equity, title in the devisee or legatee claims to itself control and liability to creditors. As this is a trust resting in equity, it is clear that equity will support it only so long as it rests on the well-defined intention of the donor. When that is gone the trust falls with the loss of this, the only true basis. A trust to pay income for life may last for the longest period of human existence, and may run for seventy or eighty years. While the law simply tolerates such a trust, it cannot approve of it as contributing to the general public interest. Property tied up for half a century contributes nothing to the general wealth, while it is a great stretch of liberality to the ownership of it to suffer it to remain in this anomalous state for so many years after its owner has left it behind him. Clearly it is against public interest that the property of an after generation shall be controlled by the deed of a former period, or that the non-payment of debts should be encouraged.

The argument of the appellee attributes to a spendthrift trust an inviolability which transcends all proper notions of equity, in holding that a trustee, because he is also a legatee of a single share, shall be exempt from that valuable rule of equity which requires a strict performance of duty as essential to the interest of his trust. Indeed, it is a rule of morality as well. Besides, it elevates a single special intent of the testator above the general interests of his estate, and subordinates the welfare of others, equal objects of his bounty, to that of the faithless trustee, the object of the single intent. On what principle of equity, which guards this trust for others as well as for him, shall the control of the fund by the defaulting trustee enable him to enjoy his own portion at their expense without accountability? Shall five others go a-begging to enable him to enjoy that which the testator gave him free from creditors only *when it accrues* to him, as we shall see was the special intent of the testator? There is neither good law nor sound morals in such a proposition.

The express will of the testator in this instance coincides with the general intent. Two things of equal strength are declared in the tenth item. *First.* That the executors or trustees shall not be liable for each other, or one for money received by the other. *Second.* But each shall be liable only for his own individual acts and deeds, and for such moneys as shall come into his hands. After this declaration, can it be doubted that the testator intended that each should be liable for his own breach of trust? If not, on what principle can it be held he meant that his liability should be less than the loss he has caused? His portion is a part of the estate, and how shall it be exempt from a *devastavit* which affects the portions of others, equally the objects of the testator's bounty, and who have no part in the fault which causes the loss? If the *whole* estate is lost by the fault of the trustee, what becomes of his own portion? It is gone with that of the others, and that is the result of the act of the testator, who made him a trustee for himself as well as others. Now, did the testator, in thus clothing him with a power over his whole estate, intend he should not be responsible to any one? If, as trustee, he shall have spent it for his individual use, and thus had its benefit, because of his control as trustee, can it be said that the testator meant that he should enjoy his own wholly, while the others should get nothing? The will itself distinguishes between the trustees and the legatees in the very clause conferring protection over the shares given to the latter. Item 9th: "The said income so directed to be *paid* by my said *executors, shall be paid* to my said *children and grandchild* in such way and manner that the same shall be free from the control, contracts, debts, liabilities, or engagements of either or any of my said children or grandchild," etc. Thus the trustees are to secure the payment to the legatees in such way that neither creditors nor they shall control the testator's bounty. Thus it is the thing paid, or ready to be paid over, which is to be protected, and it is the trustee who must perform the duty of protection when he pays over, and the protection is to be against others. The will presupposes that the executor has performed his duty and is ready to pay over the legacy. Then comes in the idea of protection against creditors and the legatee himself. But what warrant of intention on the part of the testator is there that this protection is to be carried backward to protect the trustee who fails to produce the legacy? Clearly he stands before, and if he fails to produce the things to be protected, he must answer for it both in equity and according to the intent of this testator. If the trustee, having it in his own hands, has squandered his own legacy, it is gone; if that of others, his own must share in the loss, if partial, or make it up if entire. Neither reason nor the intent of the testator relieves it from the effect of a *devastavit.* But if the trustee may squander the shares

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of others and yet save his own, it will carry the doctrine of a spendthrift trust beyond all our notions of equity and honesty, and fasten upon the testator a speeial intent in favor of a faithless trustee, and in violation of the same protection he intends for the benefit of the other objects of his bounty. This is unjust. The decree of the Orphans' Court is therefore reversed, and the record ordered to be remitted, to carry out the views expressed in the foregoing opinion.

SHARSWOOD, MERCUR, and PAXSON, JJ., dissented.

The Court, on motion, ordered a re-argument before a full bench.

On the re-argument *S. Dickson* submitted an additional brief:—

The limitation in the opinion of the Chief Justice of the scope of a spendthrift trust would destroy such trusts altogether, and neither the ninth nor tenth item expresses a general intent with sufficient clearness to override the special intent of the other. The will, like any other writing, must, if possible, be so construed as to give effect to every part. The ninth section makes no distinction, in terms, between debts to the estate and to third persons, and the tenth section relates to all five executors of whom only one was a beneficiary, and clearly they were intended to respond out of their own estates. To infer that the fifth was to be held answerable in the same way, and in that only, satisfies the language used and harmonizes both clauses.

The tenth section is intended to limit and restrict responsibility, and not to enlarge it; and confessedly, had it not been inserted, the share could not have been withheld. Why should a clause inserted for his exoneration from liability for the acts of his co-trustees be taken to import an intention to destroy a provision for his maintenance which otherwise would have been left secure? It does not create any other liability than such as the law would create without it. It does not even impose a responsibility in terms. It only confines that of each to his own acts.

Under the facts, as found in this case, George J. Richardson is not responsible because of the tenth section. Had it been omitted, his liability to the estate would have been what it is now—neither more nor less. If the ninth section, therefore, is to be nullified, it cannot be done but by the help of the tenth section, because that not only does not give rise to any new or peculiar liability, but it cannot be made the foundation of any liability whatever, except by implication. All contracts, debts, liabilities, or engagements are embraced in the ninth section; a surcharge under the tenth section is still only a debt or liability; therefore it is included in the ninth section.

Though the rule as to the general intent overruling the particular intent is still recognized (Sheetz's Appeal, 1 Norris, 213; Jenkins *v.* Hughes, 8 H. L. C. 571) no attempt is made in any case to define precisely what they mean, nor any rule given whereby it may be determined, in the special case, which is the general and which the particular intent; and Lord DENMAN observes that the doctrine "has been justly objected to, of late, as incorrect and vague, and likely to lead to erroneous results. (Doe *v.* Gallini, 5 B. & Ad. 27 E. C. L. R. 621–640; see also 2 Jarman on Wills, 400–407.) If it means anything it must mean the principal purpose of the will,—that to which the testator attached the greatest importance,—and if so, the chief end this testator had in view was to secure to all of his children, including the appellee, a sure income for life; while the tenth section is only "the given formula of city scriveners." (Williams's Appeal, 2 Norris, 388.) No new exception should be engrafted upon a system like that of spendthrift trusts, which is peculiar to Pennsylvania and itself an exception.

May 5, 1879. THE COURT. Notwithstanding the fact stated by the auditor in his first report that one hundred and thirty-three meetings were held before him, and the fact that in the final decree surcharges were made against the trustees under Mr. Richardson's will amounting to the sum of $579,000, only a single point is in issue in this appeal. That is raised by the assignments of error in which the appellant complains that her exceptions to the report were overruled by the Orphans' Court. The first of these exceptions covers the whole field of this controversy. It was in these words: "she excepts because said auditor has reported in effect that George J. Richardson is entitled to receive from time to time, equally or ratably with the other children of said William Richardson, deceased, a full share of the income of said estate from the said trustees."

By the ninth section of the will of Mr. Richardson, the residue of his estate was vested in his executors in trust, to collect and pay over the income to his wife, children, and a grandchild, during their lives. This provision was made in the concluding clause of the section: "The said income so directed to be paid by my executors shall be paid to my said children and grandchild in such way and manner that the same shall be free from the control, contracts, liabilities or engagements of either or any of my said children or grandchild, or debts, liabilities or engagements of either of the husbands of my said daughters." Five gentlemen, including George J. Richardson, his son, and two of his sons-in-law, were appointed executors and trus-

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tees, no one of whom, it was directed by the tenth section of the will, should be liable for any moneys received or any acts done by either or any of his co-executors or co-trustees, but only for moneys received or acts done by himself. After the first account was confirmed, Mr. Sparks, one of the trustees, resigned, and Mr. Smethurst, another of them, died, and the estate was thenceforth left under the management of the testator's son and sons-in-law.

Mr. Richardson died on the 24th of January. 1866, and soon afterwards the trustees undertook the development and improvement of the coal lands belonging to the estate in the county of Schuylkill. A lease was made to John Lucas & Co., and the advances made to the lessees by the trustees began about the 25th of March, 1867, and were continued until they amounted to $271,759.40, with which sum the trustees were surcharged by the auditor. The enterprise was ruinous from the outset. Lucas & Co. finally failed. The report found that the trustees "had no power under the will to make such loans," and that no law existed "to sustain such use of trust funds." It found also that "after Lucas & Co. became embarrassed and loans were made to them, the business of the estate was loosely and carelessly managed by the accountants; that sometimes two acted for the three, and at other times the money affairs were largely under the control of George J. Richardson," and that it was "impossible to say how far the moneys of the estate were mixed with his own, as there were no regular books of the estate or his own to enable any one to decide that question."

Under these facts, it has been strongly urged on behalf of the appellant, that the right of George J. Richardson to receive his share of the current and prospective income of the estate has become forfeit. The allegation was that he joined with the other trustees in a negligent or fraudulent waste of a sum, the interest on which would largely exceed the income of what remained.

The argument was pressed with some feeling and much force. Analogies that were more or less apt were suggested. But analogies are as likely to misguide as to guide safely. Just the facts as they stand in this record are to be fairly met. The auditor said that while there had been carelessness, mismanagement and mistake on the part of the trustees, he did "not mean to charge any of them with taking and using the funds of the estate," and he assumed in the absence of evidence that they acted honestly in this respect, and disastrous as the results of the effort to develop the Schuylkill lands proved to be, the general powers conferred by the will on the trustees were very large. By the eleventh section they were authorized to make partition of lands in Schuylkill or other counties, to purchase the moieties or interest of co-tenants, and to raise the means of purchase by mortgage or otherwise on the lands. They were authorized also, if expedient in their opinion, to create a joint stock company to manage the lands, "or in any way or manner to take action with regard to them" which they should "deem to be manifestly to the interest" of the estate. Under a charter so broad as this they entered into the Lucas lease, and made advance after advance upon assurances of certain and near success that are always given, and with the glowing hopes and firm faith which often unhinge or cloud the judgment of very prudent men when they are searching for sources of wealth that are hidden in the earth. Besides, the income to be paid to George J. Richardson was to be free from his own "control, contracts, debts, liabilities, or engagements." He has not anticipated his income, for the auditor found that no charge of "taking and using the funds of the estate" was made out against him. It is true that the tenth section of the will made him, as well as each of the other trustees, responsible for his own acts. But as was said in the very able argument of his counsel, that section "did not create any other liability than such as the law would create without it. Had it been omitted, his liability to the estate would have been what it is now—neither more or less." It happens that he has become liable to his father's estate, and not to a stranger. But it was from "liabilities" of all kinds that the income given him was to be protected.

Nothing is better settled than the rule which sustains such trusts as this. It has produced beneficent and just results. And it ought not to be evaded or infringed in any case that is fairly within its scope.

Decree affirmed at the costs of the appellants, and appeal dismissed.

Opinion by WOODWARD, J.

Jan. '79, 163. March 4, 1879.

Shaffer v. Mutual Fire Insurance Co.

Contracts — Mutuality — Fire insurance — Mutual companies — Nature of contract — When binding.

A contract of insurance with a "mutual" company being an agreement that the company will insure in consideration of the insured's agreement to contribute toward the payment of losses, no contract is binding upon the former until the latter's liability has become fixed.

S., an agent of the plaintiff, called at the office of the defendant company on Saturday, April 8th, to effect an insurance for the plaintiff. The by-laws of the company required the policy to be signed by the insured, and cer-

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tain premiums to be prepaid. S. said he would pay the premium when he got the policy. A policy was filled up and executed by the company, though not by the insured, and the latter duly enrolled as a member. On the following day the premises were destroyed by fire. In an action against the company:

Held, that there was no contract of insurance, and that the Court below properly directed a nonsuit.

Error to the Common Pleas of Lehigh County.

Debt, by Thomas Shaffer, against the Mutual Fire Insurance Company of Lehigh County, upon a policy of insurance.

There was an additional count upon a contract to insure. Plea: The general issue.

Upon the trial, before HARVEY, P. J., the following facts appeared: On April 8th, 1868, one David Sheirer, as agent for the plaintiff, called at the office of the defendant company for the purpose of effecting an insurance of $1500 upon a certain house belonging to the plaintiff. The company, through their secretary, John Koch, accepted the risk, and a policy was executed by the company the same day, but was not signed by the insured. The company is a mutual company, and insurers are required to pay a premium, a fee for membership, and such assessments as the board of directors determine. In this case the premium was $1.65, the fee for membership, $1.95.

Sheirer had at the same time a policy upon other premises to be transferred, and he said, therefore, both could be paid for at the same time. On the same day Shaffer was enrolled upon the books of the company as a member, denoting the amount insured. On the following morning (Sunday, April 9th), in Shaffer's absence, the insured premises were entirely destroyed by fire. On Monday morning Sheirer went to the office of the company and asked for the policy. It was handed him; but before he handed the money to the secretary, he informed him of the fire. Koch declined then to deliver the policy, saying the matter must be submitted to the company.

The plaintiff testified that on a subsequent day, when he had an interview with Koch about the insurance on his house, the latter said, "It was insured, but now it is not, because it was burned off."

On May 13th the following indorsement was made on the policy:—

"Not satisfied by the time of filling out the policy, and burned, therefore not insured, and cancelled.

"JOHN KOCH, Jr., Secretary."

On the same day Shaffer's name was erased from the books of the company, and a similar indorsement made in the margin.

The material provisions of the by-laws (which were printed on the back of the policy, and by its terms made part thereof), were as follows:—

ARTICLE XX.—Every person, on application for membership, shall pay the authorized agent $1.95 for defraying the incidental expenses of the company.

ARTICLE XXII.—All policies issued by this company shall bear the company's seal, be signed by the president and the insured, and attested by the secretary.

The plaintiff offered to prove the custom of the company to issue policies without requiring prepayment of premiums and fees. Objection. Objection sustained. Exceptions (third, fourth, and fifth assignments). Defendant moved for a nonsuit, which was granted, and which the Court subsequently refused to take off (first and second assignments) in the following opinion: ". . . Ordinarily the acceptance of a proposal to insure for the premium offered is a completion of the negotiation. (Hallock *v.* Commercial Insurance Co., 2 Dutch, 268.) The applicant must have done all on his part that is required to be done before he can assert that the contract is consummated. And when payment is the consideration that gives life to the contract, it must be shown. (Marland *et al.* *v.* The Royal Insurance Co., 21 P. F. S. 393.) The corporation defendant is a mutual fire insurance company chartered January 14, 1874, within the General Insurance Act of April 2, 1856. (P. L. 211.) Its charter enabled it to insure all kinds of buildings, merchandise, and other property against loss by fire on the mutual principle exclusively, and it was provided that all persons insuring therein 'shall be members thereof during the period they remain so insured and no longer.'

"It was required by the by-laws that any person on application for membership shall pay the authorized agent a stipulated fee for incidental expenses; that all policies shall be signed by the president and the insured; and that the charter and by-laws are a part of the contract of insurance. The plaintiff did not make a personal application for insurance; he sent David Sheirer, secretary of the building association that was a creditor of his. In the conversation between Sheirer and the secretary of the company nothing was said about the duration of the policy—how much premium was to be paid—when the policy was to be signed by Shaffer. It was nowhere said by the secretary that the property was insured from that time on. . . . Shaffer must have known that he was no member of the company, for he neither paid, offered to pay, or authorized any one to pay one cent to that company on April 8, 1876. No policy was held in trust for him. He could not have understood that he was entitled, as a matter of right, to the undelivered policy. It was because of this want of mutuality in the alleged contract as set up by the plaintiff that the Court directed a nonsuit; what was done was inchoate and not complete; it needed the payment of the consideration to

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vitalize the contract. Viewing the alleged contract in this light, we attach no importance to what the secretary did and said after April 8, 1876. So that the application would grow into a consummated contract, it was necessary to have a policy, to enroll it on the record of the company, and to present it for the signature of the assured. When Koch said Shaffer was insured, but now that there was a fire he was not insured, he merely meant that if no fire had occurred he would have paid the premium according to and concluded the contract. This evidence gave to what was said between Koch and Sheirer no greater force than the words employed at that meeting. If they failed to consummate the contract, no act of Koch subsequently done could operate to consummate it. Payment of the premium was required of Shaffer to constitute him a member.

"This conclusion is regretfully reached. Insurance companies should be held to a very strict rule of accountability. The tendency of these companies to invoke legal technicalities to escape liability should not be encouraged by the Courts. But while this rule may produce salutary results, and may give stability to this class of contracts, it does not follow that insurance companies can have no legal defence to a suit upon a policy. When one is made to appear it is the duty of the Court to see that it be sustained. Any other course would be unjust. We have been forced to the conclusion that there is no merit in the plaintiff's contention, and that he has offered no evidence which entitles him to a verdict."

Plaintiff took this writ, assigning as error the exclusion of the testimony as above, and the refusal of the Court to take off the nonsuit.

W. H. Snowden (*A. B. Longaker* with him), for plaintiff in error.

The action of the company in filling the policy and enrolling the name of the plaintiff among its members, led the plaintiff to believe that he was insured. Moreover, they were acts inconsistent with any other belief on the part of the company. They cannot now relieve themselves from responsibility.

Bodine *v.* Ins. Co., 51 N. Y. 117.

The company could waive the prepayment of the premium and fees, and the conduct of the secretary amounted to a waiver.

Hotchkiss *v.* Ins. Co., 5 Bennet Ins. Cases, 776.
Ins. Co. *v.* Taylor, 23 Sm. 354.

C. J. Erdman (*Evan Holben* with him), for defendant in error.

The plaintiff was certainly not a member of the company until he had complied with Articles XX. and XXII. of the by-laws.

Marland *v.* Ins. Co., 21 Sm. 393.

May 5, 1879. THE COURT. The company defendant in error was incorporated under the Act of 1856, "for the purpose of insuring all kinds of buildings, merchandise, and other property against loss by fire, on the mutual principle exclusively." Mutuality of obligation is of course the very essence of the principle. While the company on the one hand undertakes to pay or make good the losses, the insured on the other agrees to contribute his proportional share of current expenses and losses happening during the life of his policy. Their respective promises are mutually dependent upon each other. The undertaking of one is the only consideration for that of the other. It would be unreasonable, therefore, to contend that there could be any liability on the part of the company to the insured for the loss of his property, unless he at the same time had paid or assumed to pay his proportionate share of expenses and the losses sustained by other members. The principle upon which the system of mutual insurance rests is utterly inconsistent with any such proposition. The plaintiff in error had neither paid nor agreed to pay any premium or fees, nor had he in any manner assumed the payment of his share of expenses and losses. In fact he had entered into no contract whatever. There was nothing on which the company could have sustained an action against him on an assessment to pay losses or anything else. At most he had merely made application, not in person, but through Sheirer, for insurance and membership in the company, without as yet having complied with any of the prerequisites of membership. The charter and by-laws form an essential part of the contract of insurance, and these require the payment of a stipulated amount to defray incidental expenses. They also provide that all policies shall be issued in duplicate, and be signed by the insured as well as by the president of the company. Sheirer was not furnished with funds to pay the premium and fees, nor had he any authority to sign Shaffer's name, or in manner bind him to discharge the obligations of membership, nor did he undertake to do so. At most the evidence shows that there was a proposition to insure, which the company was ready and willing to accept; and all that was wanting to consummate the contract was the payment of the money by the plaintiff in error, and his signature to the policy, both of which were essential and neither of which was waived. Perhaps the secretary might have agreed to postpone the payment of the premium and fees, but there is no sufficient evidence that he did, nor does it appear that he had any authority whatever to dispense with the signing of the policy by the insured. The substance of Sheirer's testimony is that he had another policy to be transferred to the building association; that he requested the secretary to prepare both policies, make out a bill of amount

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to be paid, and he would pay it when he called for the policies. There is nothing in the testimony that would have justified the jury in finding that at the time of the fire there was any contract to insure, and if the fire had not occurred no such thing would have been claimed. The correct and natural explanation is that they did not anticipate that a fire would take place so soon, and thought they would have ample time to close the transaction. While the negotiation was thus pending, the property was destroyed, and the company, as it had the right to do, refused to deliver the policy and assume payment of the loss. The questions involved are so fully and ably discussed by the learned President of the Common Pleas, in his opinion refusing to take off the nonsuit, that it is unnecessary to add anything to what he has so well said.

The assignments of error are not sustained, and the judgment is therefore affirmed.

Opinion by STERRETT, J. PAXSON, J., absent.

Common Pleas—Law.

C. P. No. 1. May 24, 1879.

Williams v. Williams.

Affidavit of defence—Sufficiency of—Promissory note—Allegation of fraud—An affidavit alleging that the holder paid no consideration for the note, and that it was taken with knowledge that it was in fraud of maker's rights, is sufficient.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note, by endorsee against the maker.

The affidavit of defence set forth: that the note was made to the order of one Bowden, who was an employé of the maker, for the purpose of discount, the proceeds to be paid to the maker; that afterwards while the note was yet in Bowden's hands, the maker demanded its return, but failed to obtain it, whereupon he advertised the note in a newspaper, to which the holder was then a subscriber, which paper the deponent believes was read by the holder before the note came into his hands. The affidavit further set forth, "That deponent believes there was fraud on the part of Bowden in the retention and subsequent transfer of the note, and believes and expects to be able to prove on the trial of the case that the plaintiff paid no consideration to Bowden or to any one else, but is acting in Bowden's interest in his attempt to collect it."

C. F. Corson, for the rule.

Nothing but clear evidence of knowledge or notice of fraud or *mala fides* can impeach the *prima facie* title of the holder of negotiable paper taken before maturity.

Phelan *v.* Moss, 17 Sm. 59.
Moorehead *v.* Gilmore, 27 Ibid. 118.

Fraud in the transaction between the maker and the payee constitutes no defence as against a *bona fide* holder.

Mackey *v.* Richardson, 2 WEEKLY NOTES, 226.

Where the fraud consists in the misapplication of the proceeds received for negotiable paper, it will not affect it in the hands of the holder, as he is not in any manner bound to look to their application nor responsible for this misappropriation.

Gray *v.* Bank, 5 C. 365.

The note was placed by the maker in the hands of the payee for the purpose of sale, and in the absence of a positive allegation of knowledge on the part of the endorsee at the time of the transfer, of the alleged fraud of Bowden, the presumption is that the sale was *bona fide* and the plaintiff is entitled to judgment.

W. H. Browne, contra.

Where the affidavit of defence sets forth that the note was put in circulation by fraud the holder must prove consideration.

Gordon *v.* Stilz, 5 WEEKLY NOTES, 169.
Gorman *v.* Gillen, 5 Ibid. 127.
Bank *v.* Matthews, 3 Ibid. 158.
Lobb *v.* Welsh, 2 Ibid. 96.
Bank *v.* Thomas, 2 Ibid. 408.
Falconer *v.* Witzman, 2 Ibid. 225.
Graphic Co. *v.* Marcy, 4 Ibid. 239.
Bardsley *v.* Delp, 6 Ibid. 539.

Where the affidavit discloses a good defence between the maker and payee of a note, and that deponent expects to be able to prove on the trial of the case that the plaintiff is not the owner and holder for value, but that the same was handed over to him for the purpose of debarring the maker from setting up a defence to the same the case should go to a jury.

Moeck *v.* Littell, 1 N. 354.
Delp *v.* Sowers, 5 WEEKLY NOTES, 167.

THE COURT. We think there is enough in the affidavit to send the case to a jury.

Rule discharged.

Per ALLISON, P. J.

C. P. No. 3. June 16, 1879.

Murtland v. Wright.

Sheriff—His liability for insufficiency of bail—Act 13 June, 1836—Notice of bail under that Act—Waiver of notice—Verdict against weight of evidence—Judgment not impeachable collaterally.

Rule for a new trial.

Case, for negligence of the defendant, as sheriff,

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in taking insufficient bail, on a *capias ad respondendum.*

Upon the trial, the plaintiff offered in evidence the record in the original suit of Murtland *v.* Groom, showing the sheriff's return, "C. C. et B. B.," the bail bond signed by Groom with Frank Gordon and Joseph Nolen as sureties, a verdict of $1000 against the defendant, judgment thereon, and a *fi. fa.* and *ca. sa.* which were returned *nulla bona* and *non est inventus* respectively. The plaintiffs further offered the record in Commonwealth to use of Murtland *v.* Gordon and Nolen, the sureties in the bail-bond annexed to the capias, showing the issuing of a writ against them, and a return of *nihil habet* as to the defendants. It was admitted that the addresses on the back of the summons against Gordon and Nolen, as given to the sheriff for service were taken from the bail-bond. The plaintiff testified that she went to the sheriff's office at the time of the arrest of Groom on the capias and saw the deputy who had the writ in charge. He told her the bail was all right; that she need not fear; that she went to see if the bail was good, and was told the names of the sureties. Went a second time, with Mr. Haviland (a man employed in her counsel's office at the time), and was told again the bail was good. "Haviland did not write down the names of the bail that I recollect. I asked Haviland to go with me. Did not see Mr. Hirst (her counsel) before I went with Haviland. I did not write the names of the bail down nor did Haviland. We returned to Mr. Hirst's office and told him." After some further testimony by the plaintiff as to the value of the diamonds stolen, and for which the judgment was recovered against Groom, the plaintiff closed. Defendant moved for a nonsuit, which was refused. The defendant then called John Gallagher, who testified: "I am clerk to deputy-sheriff Lloyd; I took the bail in the capias. The sureties came and qualified before me. The plaintiff came with Haviland and took a memorandum; I offered to write names of sureties for him; no notice of exception to the bail was ever received by us. We gave no other notice of the taking of bail except this to plaintiff and Haviland. Let defendant go upon the execution of the bond" (bond identified).

Fielder Dorset testified that he recollected the plaintiff and Haviland coming to the sheriff's office, and that Gallagher told Haviland he would write down the names of the sureties for him, and that Haviland wrote them, but on cross-examination said he did not see what Haviland wrote.

Haviland being called by the plaintiff in rebuttal could not recollect whether he wrote down the names of the bail or not, and did not remember whether he had told Hirst or not. That the deputy told the plaintiff the bail was all right, that the sheriff was particular about taking bail.

The Court (FINLETTER, J.) refused to affirm the following points presented by the defendants, viz.: (1) If the jury find from the evidence that the plaintiff or her attorney had notice of the names and residences of the bail, and that no exception was filed within the time required by law, then the defendant is discharged from all liability, and the verdict should be for the defendant, and (2) That the plaintiff having begun proceedings against the sureties in the bail-bond, and having filed her narr. in the case against Groom, has thereby waived her right to except to the bail, and the verdict should be for the defendant; but left it to the jury to say whether or not under the evidence there had been a waiver by the plaintiff of the notice required to be given to her, her agent or attorney, by the Act of 1836; instructing them, if there had been such a waiver, to find for the defendant, otherwise for the plaintiff in the amount of the judgment in Murtland *v.* Groom with interest.

Verdict for the plaintiff, $1047.25, whereupon the defendant took this rule. Depositions were taken in support of the rule on the ground of after-discovered evidence, tending to show that the jewelry alleged to have been stolen by Groom, and for which the judgment in the original suit had been rendered against him, had been given to him by the plaintiff; that the verdict against him had been taken in his absence and that the value of the jewelry was much less than that fixed by the verdict.

Thomas J. Barger (with whom was *R. C. Winship*), for the rule.

This case is governed by the rule in Commonwealth *v.* Heilman (4 Barr, 555), affirmed in White *v.* Fitler (7 Barr, 533), that filing a declaration in the original suit and going to trial is a waiver of the right to file exceptions to bail, and a discharge of the sheriff from liability for the sufficiency of the bail, and a nonsuit should have been entered.

The verdict, upon the question of a waiver by the plaintiff of the notice required to be given by the sheriff under the Act of 1836, was against the weight of the evidence. The testimony of Gallagher and Dorset is positive that an offer to write down the names of the bail was made by the deputy, and that Haviland did write them.

[FINLETTER, J. The jury did run away with the case.]

The suit against the sureties has not been proceeded with sufficiently far to show their inability to pay this judgment. There is only a return of *nihil habet* as to them. They should have been served and prosecuted to judgment and insolvency before this suit was brought.

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George Biddle (with him *John J. Wilkinson*), contra.

The Act of 16 June, 1836 (Purd. Dig. 46, pl. 27), is explicit, and requires notice *in writing* to the plaintiff, her agent or attorney, of the names and residences of the bail. The testimony is clear that no such notice was given. It is a rule of law that when a statute directs notice to be given written notice alone will suffice.

St. Michael's Church *v.* The County, Brightly's Rep. 121.

No waiver can be legally implied from the offer to write the names for Haviland. Haviland was in no sense the agent or attorney of the plaintiff, but merely went with her to the sheriff's office for protection. The question of whether or not there was a waiver by the plaintiff herself, was fairly submitted to the jury who have determined the question in her favor.

Commonwealth *v.* Heilman, White *v.* Fitler (*supra*), and Fitler *v.* Bryson (6 W. & S. 566), are all distinguishable from this case, in this that the sheriff had given the notice required by the Act, and the plaintiffs had failed to except, or, having excepted, afterwards proceeded against the defendant in the capias to judgment and execution.

The testimony discovered since the trial cannot be admitted to attack the judgment in Murtland *v.* Groom, in the absence of any allegation of fraud.

[YERKES, J. You need not dwell upon that point. The law is with you there.]

June 21, 1879. THE COURT. Rule absolute.

C. P. No. 4. Dec. 10, 1878.

Thomas v. Smith, Executor.

Stock gambling—Recovery of differences paid by broker employed as defendant's agent in transactions where no delivery was intended, not legally distinguishable from enforcement of wagering contracts between principals, and not within the province of the Court—Fareira v. *Gabell, 6* WEEKLY NOTES, *490, followed.*

Rule for a new trial.

This was an action to recover money paid as the difference in market price of Pennsylvania Railroad stock at the time of selling short and of taking in, upon the alleged order of the decedent. The Court (THAYER, P. J.) instructed the jury that if they found there was any contract at all between the parties, they were to inquire whether they had dealt with each other as principals or as principal and agent. If as principals whether there was to be an actual transfer of stock or only a settlement of the difference in the price. If the latter the plaintiff could not recover. If they had dealt with each other as principal and agent, if the decedent had employed Thomas as his agent, and the latter in pursuance of decedent's directions had bought the stocks for him, and settled for them by paying the differences out of his own pocket, the plaintiff could recover.

Verdict for plaintiff. The defendant moved for a new trial on the ground of misdirection.

B. H. Brewster, for the rule, cited—

Smith *v.* Bouvier, 20 Sm. 325.
Maxton *v.* Gheen, 25 Id. 166.
Brua's Appeal, 5 Id. 294.
Moss *v.* Kay, 2 WEEKLY NOTES, 336.
Fareira *v.* Gabell, 4 Id. 572, and 6 Id. 490.

Diehl, contra.

There being no express prohibition of wagering transactions in stocks, only that the contract is not enforceable at law, the broker should be allowed his remuneration.

Wynkoop *v.* Seal, 14 Sm. 361.

In England, the plea that the money paid for defendant was on account of such transactions, has been held bad.

Rosewarne *v.* Billing, 10 Jurist. N. S. 496,
Lyne *v.* Siesfield, 1 Hurl. & Norm. 278.
Knight *v.* Cambers, 15 Com. B. 562.

C. A. V.

July 12, 1879. THE COURT. It is well settled that mere wagering contracts on the prices of stocks cannot be enforced by legal proceedings, nor damages recovered for their breach, and that a contract to buy or sell stocks when the parties contemplate nothing but a mere settlement of the difference of price on a particular day is a wagering contract. But until lately it might well have been doubted whether an agent, a broker, or other person, who is employed to make such a contract for another, and who, at the request of that person, advances his own money to settle such differences for him, could not recover the money so advanced. *Ex turpi causa non oritur actio. Ex maleficio non oritur contractus.* But wagers in general are not forbidden by any law, and so are not obnoxious to the condemnation of either of these maxims. They were (with certain exceptions) recoverable at common law, nor are they (with certain exceptions) prohibited by any statute. Wagers about the prices of stocks are not in any sense agreements forbidden by law. They are frequently spoken of as gambling contracts, and so indeed they are in a certain popular sense, but they are neither unlawful at common law nor within any of the statutes against gaming. In England even money won at play, or lent for the purpose of gambling, in a country where the games in question were not illegal, might formerly be recovered. (Quarrier *v.* Colston, 1 Phill. Chan. 147; Pellecat *v.* Angell, 2 C. M. & R. 313; Spence *v.* Chadwick, 16 L. J., Q. B. 313; Benham *v.* Earl of Mornington, 3 C. B. 133.) In Pennsylvania no action will lie upon a

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wager, but the grounds upon which this has been determined are not that wagers are contrary to law, but rather that such contracts are of an idle and frivolous nature, and that it is inexpedient, unbecoming, and beneath the dignity of courts of justice that the time of public tribunals should be consumed in the settlement of such controversies. (Edgell *v.* McLaughlin, 6 Wh. 176.) If then a wager upon stocks be not in itself contrary to any law, if it be neither *malum prohibitum* nor *malum in se*, there would seem to be good reason for holding that although such a wager, being an idle and frivolous contract, cannot be recovered on as between the parties to the contract, yet that one who at the instance and request of another has lent him money to enable him to pay the wager, should, in an action for money lent and advanced, be permitted to recover that money back. In such a case the action is not between the parties to the wager, and what is recovered is not the wager, but the money lent, nor does the fact that the plaintiff was the defendant's agent in making the wager for him make any difference, because the making of such contracts is not prohibited and the transaction is not contaminated by any violation of law.

In England, as in Pennsylvania, all contracts founded on wagers are now null and void. The Stat. 8 and 9 Victoria, c. 109, expressly enacts that "all contracts or agreements, whether by parol or writing, by way of gaming or wagering shall be null and void, and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager." Yet it is held by the English Courts that it is no answer to an action for money paid by the plaintiff for the defendant's use at his request, that the money was paid in respect of losses on wagering contracts made void by this statute, and that a broker who at the request of his customer, advances money for him in discharge of stock contracts, which are void between the principals as wagering contracts by reason of the 8 and 9 Victoria, c. 109, may nevertheless recover the money so advanced. (Rosewarne *v.* Billing, 10 Jur. N. S. 496; s. c. 15 C. B., N. S., 316; 9 L. T., N. S., 441; Knight *v.* Cambers, 15 C. B. 562; Knight *v.* Fitch, Ib. 566; Jessopp *v.* Lutwyche, 24 L. J. Exch. 65.) By the previous statute, 7 Geo. II., c. 8, all stock jobbing contracts and settling of differences relating to *public* stocks or securities, were prohibited under a penalty, and being prohibited, and therefore unlawful, money lent for the purpose could not be recovered back; but the law was different with regard to stocks and shares not expressly embraced in the prohibitory statute. (Hewitt *v.* Price, 4 M. & Gr. 355; Wells *v.* Porter, 3 Scott. 141; Oakley *v.* Rigby, Ib. 194; Robson *v.* Fallowes, 4 Ib. 43; Morgan *v.* Pebree, Ib. 230; Henderson *v.* Bise, 3 Stark. 158.)

When the cause now under consideration was tried the question here discussed seemed to the Judge before whom it was tried to be an open one in Pennsylvania. Neither in Brua's Appeal (5 Sm. 294), nor in Smith *v.* Bouvier (20 Ib. 325), was the distinction adverted to between an action between principals, brought to recover the differences on a wagering contract relative to the price of stocks, and an action by a broker or other agent in the transaction, for the recovery of money loaned to pay those differences. When the point was distinctly raised at the trial in the present case, the Judge, conceiving the distinction between the two cases to be well taken, followed the English decisions. But the decision of the Supreme Court, since the trial of this case, in Fareira *v.* Gabell (6 WEEKLY NOTES, 490), must be regarded as settling the law, in this State at least, in a different manner. Fareira *v.* Gabell was an action by a broker upon notes given by the defendant for money advanced by the broker to cover the defendant's losses upon wagering contracts in stocks which the broker had made for the defendant at his request, and for commissions. The learned and distinguished Judge before whom the case was tried charged the jury as follows:—

"If the jury find that the transaction was a gambling one on Gabell's part, and known to be such by Fareira, and that the services and advances which constitute the cause of action were rendered and made in carrying it into effect, their verdict should be for the defendant." And further: "It is however contended by the plaintiff's counsel that even if these were gambling operations on Gabell's part, and so understood by Fareira, he should in equity and in good faith be paid for the services which he rendered as Gabell's agent, and Gabell cannot rely on a fault which was common to both, as a defence; and it is said in support of this proposition that one who lends money, knowing that the borrower intends to gamble with it, may recover it back. This may perhaps be true as between such a borrower and lender, but I am clearly of opinion that one who should undertake to make a bet or wager for another, and advance the money staked, would have no right of action against his principal in the event of loss, and I can see no difference between such a case and that of the agent who renders services and expends money in conducting any other gambling operation."

This was an instruction therefore upon the very point which arises in the present case, and the two cases are as nearly alike as possible. It was excepted to by the plaintiff's counsel, and upon argument in the Supreme Court, was

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affirmed. Fareira *v.* Gabell therefore governs the present case, and while it stands it must rule all such cases in this State.

Rule absolute.

Opinion by THAYER, P. J.

C. P. No. 4. March 3 & 8, 1879.

Bradley v. Forepaugh et al.

Practice—Mechanics' liens—Construction of Act of April 16, 1836, § 17—Sheriff's return—When general return is insufficient—Rule to open judgment; when made absolute on terms.

Sur rule to open judgment.

Apportioned mechanics' liens were filed November 23, 1878, on six houses, against Forepaugh, owner, and Culbertson, contractor. *Sci. fas.* were issued, on which the following return was made:—

"Made known, by posting Nov. 25, 1878, a true and attested copy of the within writ on the premises herein described, in accordance with the provisions of the Act of Assembly in such case made and provided, and Nihil Habent as to Adam Forepaugh and Jacob L. Culbertson.

So answers JOHN J. MCDEVITT, Dep'y Sh'ff.

WM. H. WRIGHT, Sheriff."

Judgment was taken for want of an appearance, and execution duly issued. The rule came on to be argued March 3, 1879.

H. G. Harris, for the rule, having read depositions to show that the owner and contractor could have been found, that the houses were occupied as places of residence, that no notice was given to the occupants, and that there was no posting, argued that the return did not show a service in compliance with the terms of the Act of June 16, 1836, § 17 (Purd. Dig. 1035).

[BRIGGS, J. The sheriff should state facts; the return is manifestly argumentative.]

Winship, for the sheriff, desired that the rule should be continued in order that the sheriff might amend his return.

The Court accordingly ordered that the rule be continued, and that all proceedings be stayed until the rule shall have been disposed of.

March 8, 1879, it appearing that the sheriff declined to amend his return,

Booth, for the plaintiff, showed cause.

If the sheriff chooses to take the responsibility of a general return, he may do so.

[THAYER, P. J. Can the sheriff say to any writ, "served according to law?"]

The sheriff says that he complied with the Act of Assembly. If this is false, there is a remedy against him for a false return.

H. G. Harris, for the rule.

The Act requires that the writ shall be served as a summons. The depositions show that the parties could have been found, that the houses were occupied, that the tenants were not served, and that there was no posting.

The sheriff should state those facts which would justify him in posting.

Winship, for the sheriff, justified the return by the previous practice of the sheriff's office, but admitted that the form of a return in such cases had since been amended, in conformity with the suggestion of the Court.

THE COURT. Rule absolute, on condition that an appearance be entered for the defendants within one week.

[*Cf.* Bradley *v.* Totten, *ante*, 16.]

C. P. No. 4. May 24, 1879.

Bank v. Emerson.

Interpleader—Costs.

Rule to set aside *fi. fa.* for costs.

In this case a feigned issue, under the Sheriff's Interpleader Act, had been tried, and a verdict rendered for the plaintiff in the issue, judgment entered, and execution issued for costs.

Allen H. Gangewer, for the rule.

Where the execution plaintiff has not been guilty of oppression, it would be a hardship to compel him to pay costs.

Mansley *v.* Moore, and Same *v.* Same, 1 WEEKLY NOTES, 268.

Henry C. Terry, contra.

June 2, 1879. THE COURT. Costs against an unsuccessful defendant in a sheriff's interpleader under the Act of 1848, are not of course, but are in the discretion of the Court. The rule which we have adopted is to allow costs to a successful claimant where it is apparent that the defendant in the issue—the plaintiff in the execution—has proceeded upon insufficient grounds, where he has caused the goods to be levied on and persisted in the seizure under circumstances which afforded no adequate presumption that the title was in the defendant; where his conduct has been characterized by oppression or indifference to the rights of third persons. (Mansley *v.* Moore, 1 WEEKLY NOTES, 268.) Where, on the contrary, the facts developed on the trial show that the creditor had good reason to believe that the goods were the goods of the defendant in the execution; as, for example, when they are found in his possession, under circumstances which give rise to a presumptive title of ownership, costs are not awarded against the defendant. On the other hand costs are usually given against an unsuccessful claimant because he has hindered and delayed the creditor by an unfounded claim. It is possible, however, that under some circumstances they might be refused. In the present case we are of opinion that the facts did not justify the defendant in persisting in the seizure after notice, the debtor not being in possession of the goods, and there being no other indications of ownership which warranted the defendant in putting the plaintiff to the expense of a trial.

Rule discharged.

Opinion by THAYER, P. J.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, OCT. 16, 1879.* [No. 25.

Supreme Court.

June, '77, 223. Feb. 19, 1879.

The American Steamship Company v. Young.

Shipping Commissioners—Shipment of Seamen—Demand for, and payment of, illegal fees—When recoverable in assumpsit—Jurisdiction of State Courts.

A seaman who, on the return of any vessel to a port of the United States, reships and sails on the same vessel on another voyage, may do so, and for any number of successive subsequent voyages, without the payment of additional fees to the shipping commissioner, either by himself or by the master.

Fees collected for such reshipment, in violation of the Act of Congress, and under an erroneous construction thereof, may be recovered back in an action of assumpsit.

The State Courts may entertain such an action against the shipping commissioner.

Error to the Common Pleas No. 1 of Philadelphia County.

Case, by The American Steamship Company against John H. Young.

The following facts were agreed upon as a case stated: Within six years of the bringing of the suit, six thousand one hundred and thirty six seamen had been shipped on board vessels of the plaintiff company before the defendant as United States Shipping Commissioner at Philadelphia. Of this number, two thousand four hundred and thirty-nine were seamen who reshipped before the defendant as Shipping Commissioner, and sailed from Philadelphia on the next succeeding voyage of the same steamship in which they each had returned to Philadelphia from a voyage for which they each had previously shipped before him; the defendant demanded and received from the plaintiffs $4878, being the fee of $2 mentioned in Table C, attached to Title LIII., c. 7, Revised Statutes of the United States,* for each of the members of the crews so reshipped and sailing on a succeeding voyage of the same vessel, in addition to the same sum on each of the other members of the crews.

These payments were made from time to time by the plaintiffs to defendant, as bills were presented by the said defendant for the same, which bills were rendered by the defendant for the shipment of the crews of each vessel immediately after the shipment of the men, and in which bills a claim of $2 was made by defendant for each and every member of a crew of plaintiffs' vessels, including such members of the crew so reshipped as aforesaid.

The plaintiff seeks to recover from the defendant the sum of $4478, being the fee of $2 charged and collected for each seaman reshipping.

The Court, per BIDDLE, J. (after holding that the question of the illegality of the fee was not necessarily involved in the decision of the case), delivered the following opinion:—

"The case stated admits that the fees were claimed in good faith, under a clause in the Shipping Act, and that they were paid without protest or remonstrance. The question, therefore, which is raised for our adjudication is, Can these fees be reclaimed in a suit instituted in our Court under the laws of Pennsylvania?

* Section 4511 of the Revised Statutes of the United States (Act of Congress of June 7, 1872) provides that the master of every vessel bound to a foreign port (other than of vessels engaged in the trade with the British North American possessions or the West India Islands and Mexico, or of any vessel of seventy five tons burthen or upwards, bound from a port on the Atlantic to a port on the Pacific), shall, before he proceeds on such voyage, make a contract in writing with seamen in a particular form.

Section 4512 provides that such agreement shall be signed by each seaman in the presence of a shipping commissioner.

Section 4513 provides as follows: "The preceding section shall not apply to masters of vessels where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise or voyage, nor to masters of coastwise nor to masters of lake going vessels that touch at foreign ports; but *seamen may, by agreement, serve on such vessels a definite time, or on the return of any vessel to a port in the United States may reship and sail in the same vessel on another voyage without the payment of additional fees to the shipping commissioner by either the seaman or the master.*"

Sections 4514 and 4515 impose a penalty of $200 on the vessel and master for every person carried to sea without such an agreement.

Section 4592 provides for fees to the shipping commissioner, and that he may refuse to proceed with any engagement or discharge of seamen unless the fees payable thereon are duly paid.

Section 4593 provides that the owner shall pay the fees (which are two dollars on the shipment of each seaman and fifty cents for each discharge), and may reimburse himself in part to the extent of twenty-five cents for shipment and twenty-five cents for discharge, out of the seaman's wages. Table C, page 902, Revised Statutes United States.

Section 4592 provides that for the compensation of the shipping commissioner he shall be entitled to certain specified fees, but in no case shall such emoluments exceed $5000 per annum.

Section 4594 provides that any additional fees shall be paid into the Treasury of the United States.

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"The general principle, that a voluntary payment, made with a full knowledge of the facts, but in ignorance of the law, cannot be recovered by the party making it, is not controverted, but it is contended that fees paid in consequence of a demand by a public officer *virtute officii*, are not to be treated as voluntary payments.

"In regard to this there seems to be a well-marked distinction between exactions by a public officer, as in Ogden *v.* Maxwell (3 Blatchford, 319), which are wilful wrongs, and demands under a mistaken view of the law—between money corruptly obtained under color of office, and that improperly levied under color of law. To the first class of cases the one now submitted does not belong. It is not alleged that the money was obtained by deceit or unfair practices. In regard to the latter, the two cases of The Borough of Allentown *v.* Saeger (8 Harris 421), and Taylor *v.* The Board of Health, seem very much in point. In the Borough of Allentown *v.* Saeger, a borough tax, part of which was legal and part illegal, was paid by the person assessed to the tax collector, without protest, or notice at the time that he would reclaim the part illegally assessed, and it was held that he could not recover it. Here, it will be observed, the suit was against the borough, who actually held the money, and not against the tax collector, who might or might not have paid it over. Judge LOWRIE says, in delivering the judgment of the Court: 'The taxing officers performed their duty as well as they knew how, and the tax was submitted to by one who was interested in the purpose for which it was raised, though it might have been resisted in legal form.' In Taylor *v.* The Board of Health, the action was against the Board of Health, the executive officer of the State, who collected the tax and expended it for the purposes designated by law, as in the present case; the Court there decided: 'That the plaintiff paid without dispute, and thus assented to the collection of the tax for public purposes, and of course to the application of it, and he has no shadow of equity against the collecting functionary.' And they further say expressly: 'We state the case as one of a voluntary payment of taxes, because there is no pretence that the defendant's officers did any more than demand the tax under a supposed authority of the law, and this is no more a compulsion than where an individual demands a supposed right. The threat that is supposed to underlie such a demand is a legally harmless one—that in case of refusal the appropriate legal remedy will be resorted to.'

"In the case submitted to us, the plaintiffs, from the nature of their business, would be quite as likely to understand the provisions of the law as the defendant, and their paying for three years, without objection, what they now allege to be illegal charges, was calculated to induce the defendant to persist in the construction of the law which they acquiesced in, and to collect the same tax from others.

"We think, therefore, that the payments made in this case were 'voluntary payments' which, under the Pennsylvania decisions, cannot be recovered. Judgment is therefore entered for the defendant on the case stated, with costs."

The plaintiffs took this writ, assigning for error the entry of judgment in favor of the defendant.

Morton P. Henry, for the plaintiffs in error.

In suits to recover taxes or public dues illegally collected, and paid without protest, the right to recover is refused because the officer pays them into the public treasury for public purposes; the distinction between that case and this is well marked in Taylor *v.* The Board of Health (7 C. 73).

Excessive or illegal fees charged by public officers are not paid voluntarily, but may be recovered back.

American Fire Ins. Co. *v.* Britton, 8 Bosw. 148.
Ogden *v.* Maxwell, 3 Bl. C. C. U. S. Rep. 319.
Steele *v.* Williams, 20 E. & L. Rep. Eq. 319.
Morgan *v.* Palmer, 2 Barw. & Cres 729.
Baker *v.* City of Cincinnati, 11 Ohio St. 534.
Dew *v.* Parsons, 2 Barn. & Ald. 562.
Walker *v.* Ham, 2 N. H. 238.
Lasalle Co. *v.* Simmons, 5 Gilman, 513.

It is only on an indictment that corrupt intent must be shown.

Coates *v.* Wallace, 17 S. & R. 75.
Miller *v.* Lockwood, 5 H. 248.

The State Courts have jurisdiction to recover excessive fees exacted by officers of the United States by color of office.

Ripley *v.* Gelston, 9 Johns. 201.
Clinton *v.* Strong, Ibid. 370.
Slocum *v.* Mayberry, 2 Wheat. 1.

Henry Flanders, for the defendant in error.

The exception in the Act applies to that numerous class of cases when a vessel is chartered for two successive voyages, and where the two voyages are regarded as an entirety.

If an officer take money *mala fide*, he is liable; but when there is no fraud or imposition, actual or legal, there is no ground either in law or equity to reclaim money paid voluntarily under a claim of right.

Good *v.* Herr, 7 W. & S. 253.
Ege *v.* Koontz, 3 B. 109.
Taylor *v.* Board of Health, 7 C. 73.
Finnel *v.* Brew, 31 Sm. 362.
Federal Ins. Co. *v.* Robinson, 1 N. 357.

All the cases cited by the plaintiff in error are cases of payment under protest, or compulsory payment. Money paid without objection or protest cannot be recovered back.

May *v.* Cincinnati, 1 Ohio St. R. 268.

Instead of extortion, or fraudulent exaction in this case, there was submission by both parties during three years to what both believed to be the law.

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May 5, 1879. THE COURT.—The case stated in the nature of a special verdict fully presents the facts upon which the judgment of the Court below was based. The questions submitted for determination were: whether upon the admitted facts, the defendant as shipping commissioner under the Act of Congress was entitled to demand and receive from the company plaintiff a fee of two dollars for reshipping members of the crew of its vessel for the next voyage after the return of the same vessel to the port of Philadelphia, and, if not, whether the plaintiff was entitled to recover, in this suit, the fees so demanded and paid. The learned Judge deemed it unnecessary to express any opinion as to the first, for the reason that the law of the case, as he viewed it, was conclusively against the plaintiff on the second question. It was his opinion that the payments in question were *voluntary*, made with a full knowledge of the facts, and therefore assuming that they were made in ignorance of the law, there could be no recovery.

The United States Shipping Act of June 7, 1872, passed for the protection and benefit of merchant seamen, provides for the appointment of a shipping commissioner, who before entering on the duties of his office is required to give bond with sureties in not less than $5000, take and subscribe an oath to support the constitution and discharge his duties to the best of his ability and according to law. The powers with which he is clothed are commensurate with the important duties he is required to perform. Section 4511 Revised Statutes provides that "the master of every vessel bound from a port in the United States to any foreign port, other than vessels engaged in trade between the West India Islands or the Republic of Mexico or any vessel of the burthen of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or *vice versâ*, shall before he proceeds on such voyage, make an agreement in writing or print with every seamen whom he carries to sea as one of the crew," in the form specifically prescribed by the statute. The next section requires every such agreement to be signed in duplicate by each seaman in the presence of the commissioner, who shall retain one part and the other shall be delivered to the master of the vessel. The next section declares that section 4511 above quoted "shall not apply where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise or voyage nor to the masters of coastwise, nor to the masters of lake going vessels that touch at foreign ports; *but seamen may by agreement, serve on board such vessels a definite time, or, on return of a vessel to a port in the United States, may reship and sail in the same vessel on another voyage, without the payment of additional fees to the shipping commissioner, by either the seamen or the master.*" The statute also provides that the commissioner shall be entitled to receive a fee of $2.00 each for engaging and 50 cents each for discharging the crew, to be paid by the owner, consignee, agent, or master of the vessel who is authorized to reimburse himself in part by afterwards deducting from the wages of each seaman 25 cents for each fee so paid. It is also required that the commissioner "shall cause a scale of the fees payable to be prepared, and to be conspicuously placed in the shipping office, and may refuse to proceed with any engagement or discharge unless the fees payable thereon are first paid." If the fees and emoluments exceed $5000 per annum, such excess is required to be paid into the treasury of the United States. As to the right of the commissioner to the shipping fees in dispute, the question arises under the last clause of section 4511, above quoted and italicized. There appears to be little if any room for doubt as to the meaning of the statute. It provides in express terms that a seaman who, on the return of any vessel to a port in the United States, reships and sails in the same vessel on another voyage may do so "without the payment of additional fees to the shipping commissioner, by either the seaman or the master," and we have no doubt this provision applies as often as he may reship on successive, subsequent voyages. It appears that the right of the commissioner to demand the shipping fee is thus limited to new members of a crew who are procured through the agency of his office, thus exempting those who voluntarily continue in the ship's service. This discrimination in favor of the latter class, may have been made for the purpose of encouraging a more steady and continuous service, and at the same time making it to the interest of masters so to treat their crews as to induce them to remain in the service of the vessel; but if the language of the statute, fairly construed, means what we think it does, it is not necessary that a satisfactory motive for the distinction should appear. Nor is it any objection to this construction, that it deprives the commissioner of compensation for reshipping the favored class. He is clearly entitled to the fee for the first shipment and every reshipment that does not come within the exemption of the Act, and to the discharge fee in every case. Congress doubtless considered that this would afford ample remuneration for all services required. Without pausing to notice the construction contended for by the defendant, we are of opinion that, on the first question, the law is with the plaintiff that no warrant can be found for demanding the fees in question, and, therefore, they were illegally demanded.

As to the second question, the right of the

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plaintiff to recover in this action for the fees so improperly demanded and paid, it is perhaps not quite so clear; but we think that sound public policy requires us to hold that a public officer, who *virtute officii* demands and takes as fees for his services, what is not authorized or more than is allowed by law, should be compelled to make restitution. He and the public who have business to transact with him do not stand upon an equal footing. It is his special business to be conversant with the law under which he acts, and to know precisely how much he is authorized to demand for his services, but with them it is different. They have neither the time nor the opportunity of acquiring the information necessary to enable them to know whether he is claiming too much or not, and as a general rule, relying on his honesty and integrity, they acquiesce in his demands. Hence it is that for the official wrong of taking illegal fees, a statutory penalty is provided in favor of the party aggrieved. Nearly all the precedents we have in this State are cases of this nature, and while much that has been said in deciding cases of this class must be regarded as mere *dicta*, it still indicates the personal views of distinguished judges on the subject. In Prior *v.* Craig (5 S. & R. 44), Justice GIBSON, says: "It is true an action of assumpsit to recover back fees illegally taken may be sustained against a justice of the peace, without giving him notice, for the plaintiff thereby waives the official tort, as he may well do, and goes only for the money extorted." To the same effect is Walker *v.* Ham (2 New Hampshire, 238). Again, in Reed's Admr. *v.* Cist (7 S. & R. 183), in which the action was by the personal representative of the injured party for the statutory penalty, the Court remarked "The plaintiff could recover back anything beyond the legal fees, but not for the forfeiture or penalty."

In an action by a sheriff for fees, the defendant was allowed to set off former fees illegally demanded and paid to the plaintiff; and in so ruling the Court said, that if the defendant paid more money to the sheriff than he was entitled to demand he cannot upon any ground of either law or equity retain it. (Dew *v.* Parsons, 2 Barn. & Ald. 562.) In Steele *v.* Williams (8 Exch. Rep. 625), it is said by one of the Judges that "any person who illegally takes money under color of an Act of Parliament is liable to be sued for it, though the money is not to go into his own pocket." The language of Judge WOODRUFF in The Ins. Co. *v.* Britton (8 Bosw. 148), is in point. He says in sustaining an action against a public officer for money illegally demanded and paid: "It should be deemed sufficient that the officer takes advantage of his official position to make the exaction; due protection to those whose necessities require them to deal with persons exercising official powers, or discharging duties in their nature official, requires that moneys so paid should be the subject of reclamation." The case of Ogden *v.* Maxwell (3 Blatch. 319) is perhaps more nearly in point than any to which we have been referred. It was a suit against the collector of the port of New York, to recover excessive fees charged by him for issuing landing permits for passengers' baggage. One ground of defence set up was that the collector was required to pay the government any excess of fees over a certain sum, and it was held that was no defence, even if such excess had been paid over. The following extract from the opinion of Judge BETTS indicates the principle on which the action was sustained: "The high character of the collector takes away every color of suspicion that in these cases he was actuated by any wrongful motives. He administered his office as he found his predecessor had done . . . . And it is not necessary to the maintenance of a civil action for the recovery of money wrongfully collected, that any turpitude should be proved against the officer. The suit rests on no illegal purpose of the defendant in exacting the payment. It is well sustained if his official power was exercised in the collection without warrant of law."

There is nothing in the suggestion that the State Courts have no right to entertain suits against officers of the general government for acts done by virtue of their office. This right has been repeatedly recognized. It is scarcely necessary to add that our own cases in which taxes voluntarily paid to the public collector have not been permitted to be recovered, stand on a different basis.

Judgment reversed, and judgment is now entered in favor of the plaintiff and against the defendant, for four thousand eight hundred and seventy-eight dollars with interest, to be ascertained as provided for in the case stated.

Opinion by STERRETT, J.

July '78, 33. March 14, 1879.

Pa[illegible]i v. The Commonwealth.

Criminal law—Forgery—What amounts to—Burden of proof—Comments by Court on evidence—Erroneous representations of testimony—Sufficiency of evidence.

In crimnal cases, the burden of proof is on the Commonwealth; it is error to charge the jury that they "must find a theory that will lead to a verdict of not guilty, conclusively, and that will have substance to it, not a mere shadow."

If a lease be executed and at the time there is an un-

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derstanding between the parties varying the terms of the lease, it is not forgery for a party to alter the lease so as to conform to the understanding of the parties.

Where the Court charged the jury erroneously as to the evidence parties had given, representing it as more damaging to the defendant than it really was, judgment will be reversed.

Per PAXSON, J. In commenting upon evidence, too great care cannot be exercised.

Error to the Quarter Sessions of Luzerne County.

F. S. Pauli was indicted for forgery. Plea: Not guilty. The bill charged the defendant with fraudulently altering, etc., a lease by adding the words: "Save the outside for improvements, not to be restricted by second party and in removing porches on the outside."

On the trial, before STANTON, J., the following facts appeared: The defendant had leased to one A. Johnson the upper stories of the building in which he kept his store. On March 30, 1877, during the negotiations leading to the lease the parties met together, Pauli bringing with him a lease and a copy, both already signed by him. Johnson asked to have inserted the words, "with the privilege of renting second floor to other parties;" this was acceded to and the words inserted in both lease and copy. Immediately following these words in the lease, which was put in evidence by the Commonwealth as the original, were the words "save the outside," etc., as *supra*. These words did not appear in the copy of the lease which was also put in evidence by the Commonwealth, and the charge was that they had been inserted by Pauli after the execution of the lease. The defence denied this, and claimed (1) that the words were in the lease with Johnson's knowledge at the time he signed it, Pauli having insisted on their insertion, as he wanted to make certain improvements to his store which would necessitate the removal of two small balconies from the second story; and (2) that if they were not at the time in the lease, there had been a clear understanding between the parties to the effect implied by the words. The evidence of the defence was further to the effect that at the meeting above referred to, after the stipulation as to subletting the second story had been inserted, Johnson, without himself signing the lease or copy, asked leave to take the copy away to show it to some one; during his absence, Pauli being advised so to do, put in the lease the words "save the outside," etc.; that Johnson returned without the copy of the lease he had taken away, and that then, after the insertion of the above words was explained to Johnson, the latter signed the lease.

The points presented and the material portions of the charge are fully set forth in the opinion of the Court, *infra*. Verdict, guilty. The defendant took this writ, assigning for error the answer to his second point and the portions of the charge as set forth in the opinion of the Supreme Court, *infra*.

Daniel Dougherty, for plaintiff in error.

The charge of the Court below was erroneous in representing witnesses as testifying to facts which they did not testify to. It was also error to charge the jury that they must find a theory that will lead to a verdict of not guilty.

H. W. Palmer, Attorney-General, stated that he did not here represent the prosecution; for in the Court below he had withdrawn from the case as soon as he heard the evidence, regarding the prosecution as entirely unfounded.

Rice, District Attorney, for the Commonwealth.

March 24, 1879. THE COURT. It is fortunate for the administration of criminal law in Pennsylvania that a case seldom comes before us containing such serious errors as are disclosed in this record. The vice of it runs all through the charge of the Court. The jury were not only erroneously instructed upon the law, but were palpably misled by the comments of the Court upon the evidence. The learned Judge might well have declined the defendant's second point, for the reason that it assumed the facts. Instead of merely declining it, he answered it in a way that was calculated to mislead the jury. The defendant was indicted for forgery; the alleged forgery consisting in the interlineation of the words "save the outside for improvements, not to be restricted by the second party and in removing porches on the outside" in a lease for certain real estate in the city of Scranton between F. S. Pauli, the defendant below, and one Andrew Johnson. The defence was that the words were interlined before the lease was signed by Johnson, the lessee, and his attention called thereto at the time he executed it. There was evidence of an understanding that the porches should be removed. The defendant's second point asked the Court to instruct the jury that in view of this agreement to remove the porches the alteration, even if made after the lease had been signed by Johnson, was not made fraudulently, and to the prejudice of the lessee's rights. The Court said: "Well, we can scarcely affirm that, because this statute makes it a misdemeanor if it be done to the prejudice of another's right. If it has been done as alleged by the Commonwealth, if it has been done it certainly has been done to the prejudice of the rights of this man Johnson, and we cannot affirm this point." This was not an adequate instruction. The concluding sentence of it was positive error, as it practically took from the jury the question of the existence of

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the parol agreement. The jury should have been told that if the lease had merely been interlined to make it conform to what was in truth the understanding and agreement of the parties at the time it was executed, such alteration was not made fraudulently, or to the prejudice of the rights of the lessee. The next error (second assignment) was more serious. The jury were told by the Court that Mr. Johnson, his wife, and Mr. De Long, had all testified that the alteration had been made after the lease was signed by Johnson and Mr. Pauli, and that if they believe the testimony of these parties it was sufficient to convict the defendant.

An examination of the evidence shows that this instruction was clearly erroneous. Neither Mr. De Long nor Mrs. Johnson testified that the lease was interlined after its execution. Mr. Johnson is the only one of the three who does say so, and even he admitted upon his cross-examination that the removal of the porches was referred to at the time. He says: "I don't know whether he (Pauli) told me at that time; he never said anything about it only at the time the lease was signed; then he did say something about moving them; he mentioned to me about this before I signed the copy; it was at the time I signed the original." The gravity of this error is apparent. It opened a way to the jury to convict the defendant when such an event would not have been possible under any other correct view of the case. A Judge cannot exercise too much care in commenting upon evidence, especially in cases where a man's liberty and reputation are involved in the issue. Mistakes will sometimes occur in the hurry of trial, and when they do they may and ought to be corrected upon a motion for a new trial. The Court below must have taken a view of this evidence which is concealed from our vision, as the motion for a new trial was overruled, and sentence imposed upon the defendant. The portions of the charge embraced in the third and fourth assignments are equally erroneous, but not quite so damaging. The learned Judge, assuming the testimony of the three witnesses above referred to to be as he understood it, told the jury that it was impossible to reconcile it with the evidence of Pauli, Goodrich, and Porter, witnesses for the defendant. The Judge erred here both in his premises and his conclusion. Under the view which we take of the evidence there was no serious conflict upon any material fact in the cause.

The vice of the instruction contained in the fifth assignment is that it does not give proper weight to the defence. It does not adequately present it to the jury. The Court said: "Mr. Pauli himself takes the stand and denies that this insertion of the words I have read to you was made after the lease was signed by himself and Mr. Johnson. He is supported in this in a measure by two or three other witnesses whom he alleges were present, but who Mr. Johnson thinks were not present."

The defendant called two witnesses, Henry Porter and C. F. Goodrich, who were present in Pauli's store when Johnson signed the lease. Porter said: "I was present when Mr. Johnson came in; I think it was on the 30th of March, before noon, at Mr. Pauli's store. Mr. Johnson said he was ready to sign that lease, and Pauli says to him, 'Johnson I have put in these leases about those porches; now if you want to sign this lease with this in it, you can do it or let it alone.'" Mr. Goodrich was equally distinct, and to the same effect. It was conceded that these were both intelligent and respectable men. They were the only disinterested witnesses who testified upon this point with knowledge of the facts. Opposed to their testimony there was really nothing but the denial of Johnson that the words were in when he signed the lease, qualified by his admission that Pauli did tell him at the time that he was going to take down the porches. The portion of the charge referred to was modified to some extent by what followed immediately after. But with this qualification there was a failure to present the case of the defendant to the jury in the clear and impartial manner in which he was entitled to have it considered. The sixth assignment alleges error in the instruction of the Court upon the question of character. I quote the language especially objected to: "Witnesses have been produced by the other side, who say that they have heard certain things alleged against Mr. Pauli, for instance, the one allegation that he is a bad man. Now this is testimony that you are to give due consideration to." General evidence that a defendant is a bad man is not admissible in any civilized country upon a trial for forgery, by any recognized rule of evidence. If admitted by an oversight upon the trial, it was certainly error in the Court to submit it to the jury as an element for their consideration in disposing of the question of character. Equally erroneous were the rulings referred to in the seventh and ninth assignments. The jury were told: "You must not say that he may not be guilty, but you must find a theory that will lead to a verdict of not guilty conclusively, and that will have substance to it, not a mere shadow." While there is some obscurity in this portion of the charge, the jury could not have failed to understand that unless they could find a theory that conclusively established the innocence of the defendant they must convict him. There is no authority for such a rule as this. It was laying too heavy a burden upon the defendant. The assignments from ten

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to eighteen inclusive may be passed without comment. The nineteenth assignment is based upon the defendant's third point, and alleges that the Court erred in not distinctly instructing the jury that the testimony produced by the Commonwealth was insufficient under the law to convict the defendant of forgery as indicted. This is not a question of the weight of the evidence, but of its sufficiency. We have no doubt that in favor of the liberty of the citizen, the Court may and in a proper case should declare the evidence insufficient to convict. We think the defendant's point was justified under all the facts of the case, and it should have been affirmed. There was no evidence to justify the jury in rendering a verdict of guilty, or the Court in sustaining it.

The judgment is reversed and the plaintiff in error is discharged from his recognizance.

Opinion by PAXSON, J.

Oct. & Nov. '78, 314. Nov. 28, 1878.

Hogeboom's Ex'r v. Gibbs, Sterrett & Co.

Evidence—Interest—Incompetency of surviving partner—Acts March 27, 1865, and April 15, 1869.

In an action upon a firm debt against the executor of a deceased partner, a surviving partner is, on the ground of interest, incompetent as a witness to prove the partnership.

Error to the Common Pleas of Crawford County.

Assumpsit, by Gibbs, Sterrett & Co., against John C. Hogeboom, executor of the estate of Henry Hogeboom, deceased, impleaded with M. H. Philip and George J. Sherman. The defendant executor pleaded non-assumpsit, payment, with leave, and that his testator was not a partner with the other defendants.

The claim was for balance of an account for goods furnished in putting down or pumping oil wells, while, as alleged by plaintiff, Henry Hogeboom was a partner with Philip and Sherman in the venture for which the articles were used. Upon the trial, before CHURCH, P. J., plaintiff offered in evidence the deposition of Philip to prove the partnership. Objection by defendant overruled and testimony admitted. Exception. There was no other evidence of partnership or of the claim.

Verdict and judgment for plaintiff ($246.28). Defendant took this writ, assigning for error, *inter alia*, the admission of Philip's testimony.

Roger Sherman, for plaintiff in error.

On the ground of interest Philip would not have been competent to prove the partnership before the Act of March 27, 1865.

Loomis *v.* Reutter, 9 Watts, 516.
Bellas *v.* Fagely, 7 Harris, 273.
Meason *v.* Kaine, 13 Sm. 335.
Hayes *v.* Gudykunst, 1 Jones, 221.
Hanna *v.* Wray, 27 Sm. 27.

He was not made competent by that Act, because he is not an adverse party upon the record, nor a person for whose immediate benefit the action was proceeding. He was not made competent by the Act of April 15, 1869, because this action, being against an executor is within the exceptions to the application of that Act.

Philip was interested, for, confessedly, he owed the whole debt. If plaintiff failed the whole could be recovered of Philip. If plaintiff succeeded Philip would be liable to contribution for one-half only.

Guthrie (with whom was *Byles*), contra.

The witness was competent before the Act of April 15, 1869.

Brewster, Admr. *v.* Sterrett, 8 Casey, 115.

This case is later than Bellas *v.* Fagely (*supra*), and the opinion was delivered by the same Justice. If there is inconsistency, which we do not concede, the later case is to be followed.

The Act of April 15, 1869, was an enabling and enlarging statute. No person competent before was thereby rendered incompetent.

Sheetz *v.* Hanbest's Exr. 31 Sm. 100.
Pratt *v.* Patterson, 31 Sm. 114.
McFerren *v.* Mt. A. Iron Co., 26 Sm. 180.

January 6, 1879. THE COURT. It has been repeatedly held that the Act of 15 April, 1869, is an enabling not a restraining statute, and that it makes no witness incompetent, who would have been competent prior to its passage. (McFerren *v.* Mont Alto Iron Co., 26 P. F. S. 180; Sheetz *v.* Hanbest's Executor, 31 Id. 100; Pratt *v.* Patterson, Id. 114). The witness, Martin H. Philip, would have been incompetent under the law as it stood prior to 1869. He might not have been incompetent for all purposes upon the mere ground of his being a partner. He was called, however, for the purpose of showing the partnership. The effect of his evidence if received would be to shift a portion of his responsibility upon some one else. He was thus directly interested, and for that reason incompetent, under the authority of Bellas *v.* Fagely (7 Harris, 277); Purviance *v.* Dryden (3 S. & R. 402); Heckert *v.* Fegely (6 W. & S. 142); Meason *v.* Kaine (13 P. F. S. 335). The Case of Brewster's Administratrix *v.* Sterrett (8 Casey, 115) was relied upon by the defendant in error as sustaining the opposite view. A careful examination of this case, however, shows that it is not seriously in conflict with the authorities above cited. It is true Mr. Justice WOODWARD, in the concluding paragraph of his opinion, does say that the witness, Mehaffy, would be competent for whatever purpose called. He was not called to

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prove the partnership, and it is quite possible this point did not suggest itself to the mind of the learned Justice who wrote the opinion.

There is nothing in the report of the case to indicate that it did. The testimony of Mehaffy was not furnished in the paper-books. Justice Woodward supposed that the witness had been called to sustain an issue that had been withheld from the jury, which of course was not an essential error.

The witness, Philip, being incompetent on the ground of interest, he was not made competent by the Act of 27th March, 1865 (P. L. 38, Purdon, 624, pl. 13), for the reason that he is neither an adverse party on the record, nor a person for whose immediate and adverse benefit such action was instituted, prosecuted, and defended; nor was the witness rendered competent by the Act of 15 April, 1869, because the suit in which he was called to testify was brought against an executor. Said Act by its express terms does not apply to actions brought by or against executors or administrators.

What has been said covers the first and second assignments of error. The remaining assignments need not be discussed as the questions involved may not arise upon a new trial.

Judgment reversed and a *venire facias de novo* awarded.

Opinion by PAXSON, J. WOODWARD and MERCUR, JJ., absent.

Jan. '79, 210. April 1, 1879.

In the Matter of the Vacation of Osage Street.

Road law—Boroughs—Vacation of streets in incorporated boroughs, how effected—Acts of June 13, 1836, P. L. 558; April 21, 1846, P. L. 416; April 3, 1851, P. L. 326; May 3, 1855, P. L. 422, construed.

The Courts of Quarter Sessions have no power to vacate streets, laid out and dedicated to public use in incorporated boroughs; such power is confined to the municipal authorities.

Certiorari to the Quarter Sessions of Northampton County.

This was a petition of certain inhabitants of the borough of South Bethlehem, dated June 3, 1878, praying the Court to vacate a certain road in the petition described. An order was thereupon issued for viewers, who reported on February 12, 1879, that the road should be vacated. It was mutually admitted by counsel, that the road was Osage Street, in South Bethlehem, an incorporated borough, and that it had been dedicated to public use by C. Hacker, by deed of November 21, 1864, and adopted as one of the streets of South Bethlehem, by a resolution of the town council dated September 20, 1875.

To the viewer's report the borough of South Bethlehem filed exceptions, which were substantially as follows: (1) Because the Court had no jurisdiction to vacate streets in an incorporated borough; (2) Because the Court had no jurisdiction to vacate streets, dedicated to public use, in a borough.

The viewer's report was, nevertheless, on February 19, 1879, confirmed, and the exceptant took this writ, assigning the overruling of its exceptions for error.

W. E. Doster, for the appellant.

The Court of Quarter Sessions was without jurisdiction in this case. The Act of June 13, 1836 (P. L. 558), from which it is claimed that this jurisdiction originates, provides "that nothing in this Act shall be construed to give authority to any of the Courts of this Commonwealth to vacate any lane, street, or highway, within any city or borough, town plot, or village, laid out by the late proprietaries, or by any other person, and dedicated to the public use."

Allentown Road, 5 Wh. 442.

It is contended that the Act of April 21, 1846 (P. L. 416), repeals this proviso, and enlarges the jurisdiction of the Courts. It is an unwarranted assumption that the proviso is repealed by implication, and in 1854, in a case like the present, the law of 1836 was recognized as unchanged.

Petition of Antes, 1 Pearson, 87.

And the Act of May 3, 1855 (P. L. 422), reiterates the provision of the Act of 1836. The power necessary in such case is given to the borough authorities by the Act of April 3, 1851 (P. L. 326).

W. W. Schuyler, contra.

The Act of 1846 extends the jurisdiction of the Quarter Sessions to the vacation of all roads except private roads. The term *roads* has been held to comprehend *streets*.

Sharett's Road, 8 Barr, 92.

The Act of 1846 was not mentioned, and was probably overlooked by the learned Judge who decided the case in Pearson's Reports.

The enacting part of the Act of 1855 gives to the Quarter Sessions jurisdiction in the vacation of partly opened roads, where jurisdiction had been denied under the decision of—

Road in Greenwich Township, 1 Jones, 186.

The Act was passed to meet that decision; the proviso cannot be broader than the Act itself.

May 5, 1879. THE COURT. For the purposes of this litigation, the two material facts out of which the controverted legal point arose

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were agreed upon by counsel in the Court below. Osage Street was dedicated to the use of the public by Charles Hacker, by deed executed on the 21st of November, 1864, and duly recorded, and was adopted as one of the streets of South Bethlehem by a resolution of the town council on the 20th of September, 1875. On the 3d of June, 1878, a petition to vacate the street was presented to the Court of Quarter Sessions. Viewers were appointed, who reported in favor of the vacation prayed for, and on the 19th of February, 1879, their report was confirmed. The complainants sued out this writ, and have brought up the proceedings for review, upon the allegation that they were not within the jurisdiction of the Court.

By the 18th, 19th, 20th, and 21st sections of the Act of the 13th of June, 1836, authority was given to the Courts of Quarter Sessions of the Commonwealth within their respective counties "to change or vacate the whole or any part of any private or public road laid out by authority of law," to vacate roads laid out and confirmed, but not opened, on the petition of a majority of the original petitioners to change or supply by a new road the route of any State road laid out by direction of any Act of Assembly, and vacate any part of the State road thus supplied, and to vacate any part of any State road supplied by a substantial and permanent turnpike. The 22d section embodied a proviso that nothing contained in the Act should give authority to any Court to vacate any lane, street, or highway within any city, borough, town plot, or any town or village laid out by the late proprietaries, or by any other person, and dedicated to the public use. The Act of 21st of April, 1846, extended the powers of the Courts in the vacation of public and private roads, to all roads, whether laid out by authority of law, or existing by presumption or lapse of time; "and generally to all roads, except private roads, resting upon express grant," the evidence of which being still in existence. The Act of the 3d of May, 1855, increased the powers of the Courts still further by authorizing them to change or vacate the whole or any part of any public or private road laid out by authority of law, and opened in part, subject to the proviso that it should not apply to State roads authorized by a special law, or to any street, lane, or road within any incorporated city or borough.

Under this legislation, and notwithstanding the Act regulating boroughs, passed the 3d of April, 1851, it was insisted upon, at the argument on behalf of the petitioners, that the Courts of Quarter Sessions may proceed in the forms prescribed by the Act of 1836, to vacate any street in any city, town, or borough, in regard to which special statutory provision has not been made. It was said that the Act of 1855 was passed to meet the decision of this Court in the Road in Greenwich Township (1 Jones, 186), where it was held that the Quarter Sessions could not vacate a road partly opened, and that the proviso excepting streets in cities and boroughs from its operation, extended only to cases for which it was intended to provide. This is undoubtedly true, but the fact that the proviso was inserted indicates that the 22d section of the Act of 1836 was in the legislative view, and that the legislature of 1855 did not regard that section as having been repealed or supplied by a former legislature. The Act of 1846 was "A supplement to the Act entitled 'An Act relating to roads, highways, and bridges.'" It extended the powers of the Courts "to vacate public and private roads," to "all roads," to those "existing by presumption," as well as to those specified in the Act of 1836 as roads "laid out by authority of law," "and generally to all roads, except private roads, resting on express grant." But jurisdiction over the highways of cities and boroughs, and over dedicated streets in town plots, towns, and villages, had been expressly withheld by the Act of 1836. The subjects of that Act, by the introduction of the 22d section, were confined to country roads. Is it possible that the Act of 1846 was designed to act upon a new class of subjects, to repeal the 22d section of the Act of 1836 by implication, and without reference or specification, to add to the jurisdiction over country roads, jurisdiction over city and borough streets? This would be a very comprehensive implication to be drawn from the language of a statute, the natural and apparent purpose of which was merely to enlarge the members of a class to which a former statute had been applied. The word "road" in a proper connection may be fitly used to designate a city or borough street. (Moyamensing Road, 4 S. & R. 106; Sharett's Road, 8 Barr, 89.) Regarding the Acts of 1836 and 1855 as *in pari materia* with the Act of 1846, it seems incredible that the word could have been used in a sense or for a purpose that would embrace a class of subjects of such vast importance as the highways of the municipalities of the Commonwealth. The adjustment of a city or borough plan requires scientific knowledge, a pervading system thoroughly understood by official agents, and familiarity with diversified and minute details. The vacation of a single street could be at a point so vital as to derange the graduation, drainage, and sewerage of an entire borough. Legislation should be very clear indeed to require that the health, convenience, and comfort of a whole community should be put to the hazard of the action of six gentlemen casually selected from country townships, adjacent to a

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town, to deal with an isolated detail of a system which they could touch only to injure and perhaps destroy.

That the Courts of Quarter Sessions have no original jurisdiction in the vacation of borough streets, appears manifest from the terms of the Act of the 3d of April, 1851. It is true that in the 2d section, enumerating the powers of borough officers, the second clause authorizes them only to survey, lay out, and ordain roads, streets, lanes, alleys, courts, and common sewers, and to provide for widening and straightening them. The word "vacate" does not occur. But all the provisions of the Act are to be considered. The fourth clause of the 2d section declares that those officers "shall regulate the roads, streets, lanes, alleys, courts, common sewers, public squares, common grounds, foot-walls, pavements, gutters, culverts, and drains, and the heighths, grades, widths, slopes, and forms thereof; *and they shall have all other needful jurisdiction over the same.*" The 27th section fixes the time when, and the terms and forms on and in which, the Court shall have the right to intervene. By the third clause of that section, complaint may be made to the Quarter Sessions by any person or persons aggrieved by any regulation in relation to the laying out, widening, or straightening of highways, or to "the opening, grading, *or other regulations*," and thereupon the Court are required to take such order as may be just and reasonable. The first proviso to this third clause directs that the same proceedings shall be had as those provided for the laying out and opening of the public roads of the Commonwealth. The terms of the second proviso are: "That every jury appointed to view, review, lay out, widen, or straighten, or *vacate* any road or part of a road in any borough of this Commonwealth, shall have due reference to the town plot therein authorized and directed, and to the general arrangement, plan, convenience, and advantage of the borough, and shall set forth the facts fully in their report." No jury can have existence until, upon the complaint of a citizen, the action taken by the town council shall be brought into the Court for review. The words "to vacate," in the second clause of the proviso, are to be read in connection with the rest of the third clause of the 27th section, as well as in connection with the second and fourth clauses of the 2d section. The vacation of a street was as much in contemplation as the laying out and opening of a street, when the legislature made provision of means by which the proceedings of the council should be revised. The words cannot be relegated to the Act of 1846 and read into that, in order to give them efficiency, nor can they be stricken out. As they stand they are aids to indicate the scope and purpose of the Act of 1851 in an unmistakable way.

Proceedings reversed, and petition dismissed.

Opinion by WOODWARD, J.

May, '79, 25. May 26, 1879.

Bryan v. Trout, Administrator, etc.

Foreign attachment—Act of June 13, 1836—Service where real estate is attached in the hands of one holding under defendant—How sheriff's return to be made.

A writ of foreign attachment under the Act of June 13, 1836, was issued against real estate, whereupon the sheriff returned that he had attached the same by serving the writ on A B, garnishee, and *nihil* as to defendant:

Held, That this return was insufficient to warrant a judgment for the plaintiff, as it failed to show that A B held under the defendant.

Error to the Common Pleas of Blair County.

On January 3, 1876, a writ of foreign attachment in assumpsit was issued by Thomas A. Trout, Administrator of Richard Bryan, against John M. Bryan, directing the sheriff to attach certain real estate in the village of East Freedom, and to summon the defendant and the said Trout as garnishee. Trout was described in the præcipe for this writ as the occupier of the premises. The sheriff returned that he had attached the said real estate "by service of this writ on Thomas A. Trout (garnishee), and as to John M. Bryan, *nihil*." There was no publication of this writ, but judgment was entered, on motion, for the plaintiff on October 9, 1876, for want of an appearance and damages assessed by the prothonotary.

The real estate attached was afterwards taken in execution under this judgment, and sold to the plaintiff, and the sheriff's deed to him was duly acknowledged October 15, 1877.

Defendant afterwards took this writ, assigning for error the entry of judgment for the plaintiff.

Samuel S. Blair, for plaintiff in error.

The Act of June 13, 1836, Sect. 49 (P. L. 580), requires the sheriff to attach houses and lands "by leaving a copy of the writ with the tenant or other person in actual possession, *holding under the defendant* in the attachment."

The sheriff's return does not show that the garnishee held under the defendant, and is, therefore, insufficient.

Hayes *v.* Gillespie, 11 Casey, 155, and note.
Sterrett *v.* Howarth, 26 P. F. Smith, 440.

The writ should not name the garnishee, and so limit the sheriff in ascertaining the occupant.

H. M. Baldridge (with him *Frederick Jaekel*), for defendant in error.

All the proceedings followed the strict sense

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and spirit of the Act of Assembly. The writ was served on a garnishee, a party in possession.

Applications to set aside proceedings for irregularity should be made as early as possible. The plaintiff in error has by his inaction waived this right.

June 23, 1879. THE COURT. The mode of serving the writ of foreign attachment is prescribed by the Act of 13 June, 1836 (P. L. 580, Purdon, 118). Where real estate is attached it is as follows: "It shall be the duty of the sheriff to leave a copy of the writ with the tenant, or other person in actual possession holding under the defendant in the attachment, and to summon him as garnishee." The Act further provides that if there be no person in actual possession, service shall be made by publication. In this case the sheriff made return that he attached the real estate described in the writ by serving it "on Thomas A. Trout, garnishee," and nihil as to the defendant. That this return is insufficient is settled by Hayes *v.* Gillespie (11 Casey, 155). It was there held that the return must conform to the Act of Assembly, and that where the writ is served on a tenant, or other person holding under the defendant, the fact that the tenant does so hold must appear by the return. See, also, Lambert *v.* Challis, cited in note to Hayes *v.* Gillespie, where the same point was decided by the present Chief Justice when President Judge of the District Court of Philadelphia. To the same point is Sterrett *v.* Howarth (26 P. F. S. 438). It follows that neither the person of the defendant, nor his property was before the Court by the return of the sheriff, and the entry of judgment against him, for want of an appearance was erroneous.

Judgment reversed.

Opinion by PAXSON, J. STERRETT, J., absent.

Common Pleas—Law.

C. P. No. 1. June 12, 1879.

Sheetz v. Whitaker et al.

Wills and testaments—Caveat—Devisavit vel non—Issue—Act of March 15, 1832—Practice—In an issue directed by the Register of Wills to the Common Pleas to test the validity of the will, the nominal parties to the record cannot consent to a verdict so as to bind the interest of parties who have not agreed—In such a case a new trial will be granted on application of the parties interested.

Rule to show cause why a verdict should not be set aside and a new trial be granted. The material facts of the case were as follows:—

Shortly after the decease of one Robert Whitaker, a paper purporting to be his last will and testament was offered for probate at the office of the Register of Wills. In said writing Daniel Sheetz was named as an executor, and William R. Dickerson and Mary E. Service were legatees. After other devises and bequests the will provided that the remainder of the estate should vest in the executors therein named, in trust, to found an institution to be called The Whitaker Practical Institute for the Rearing and Educating of Orphan Girls. To this will a caveat was filed by the widow and heirs. A large volume of testimony having been taken before the Register, Sheetz, the executor named, presented a petition for an issue setting forth that the validity of the proposed will was contested on the ground of forgery; that a material question of fact had thus appeared upon the record, to wit, whether the said will was executed by Robert Whitaker as is alleged by the petitioner, or whether the same was a forgery, and praying an issue to determine the same. The Register thereupon directed a precept to the Court of Common Pleas No. 1 for an issue to try the question of fact as to whether the alleged will was the will of Robert Whitaker or not. On April 9, 1879, the day for the trial of the case as it appeared on the trial list, a verdict was taken by consent against the alleged will, the Court (PEIRCE, J.), upon inquiry, being assured by counsel in the case that all parties in interest had consented thereto. On the same day the jury fee was paid, judgment was entered on the verdict, and the Prothonotary, without applying to the Court, certified the result to the Register of Wills.

Subsequently the petition of Wm. R. Dickerson and Mary E. Service was presented, setting forth, *inter alia*, that they were legatees under the alleged will, that they had not consented to the verdict, and that the parties interested in the bequest found that the "Whitaker Practical Institute" were not and could not be represented before the Court, and praying that the verdict be set aside, and a new trial granted.

From the depositions taken in support of the rule, it appeared that some time previous to the day of trial a conversation had taken place between Wm. R. Dickerson and his counsel, and also the counsel for the executor, Sheetz, relative to a compromise. That previous to April 9 an agreement had been made whereby a verdict was to be taken against the alleged will, the contestants to pay to the plaintiffs the sum of $15,000 for counsel fees and expenses; that after

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the verdict said sum was paid and divided between the executor and counsel for the will; that the petitioners were not informed of said agreement; that certain influence had been brought to bear upon Wm. R. Dickerson, the party most actively interested in establishing the will, to keep him from Court on the morning of April 9, and in consequence thereof he did not leave his house until after the verdict had been taken; that shortly afterwards, upon being offered $900 in settlement of his claim, he at first refused, but subsequently took it, with the understanding that such acceptance should not compromise his position in any way; and further, that he had afterwards offered to return the said sum of $900, and take back the acceptance therefor.

H. McMiller and *F. Sheppard*, for the rule.

A verdict by consent, without a trial, is repugnant to the nature of the requirements of a feigned issue.

Werkheiser *v.* Werkheiser, 6 W. & S. 184.
Hoxworth *v.* Miller, 7 Barr, 458.
Dotts *v.* Fetzer, 9 Id. 89.
Royer's Appeal, 1 Har. 574.
Wickersham's Appeal, 25 Sm. 337.
Vansant *v.* Boileau, 1 Binn. 448.
Redmond *v.* Collins, 4 Dev. 437.
St. John's Lodge *v.* Callender, 4 Ired. 335.
Wikoff's Appeal, 3 Har. 289.
Ottinger *v.* Ottinger, 17 S. & R. 142.
Montgomery *v.* Grant, 7 Sm. 243.

The proceedings upon the issue are *in rem*, and consent of the nominal parties is immaterial and insufficient.

2 Smith's Lead. Cas. (7 Am. ed.) 809, 814.
Woodruff *v.* Taylor, 20 Vt. 65.
Patton *v.* Allison, 7 Humph. (Tenn.) 320.
Deslonde *v.* Darrington, 29 Ala. 92.
Price *v.* Taylor, 21 Md. 356.
Price *v.* Moore, Id. 366.
Sawyer *v.* Dozier, 5 Ired. 97.
Smith *v.* Harrison, 2 Heisk. (Tenn.) 230.

Neither the precept of the Register, nor the issue raised thereunder, nor the certificate of the proceedings sent to the Register after the verdict are in conformity with the Act of Assembly or the decisions of the Supreme Court.

Act of March 15, 1832, Purd. Dig. 406, § 8.
Bitner *v.* Bitner, 15 Sm. 360, 362.
Ingersoll *v.* Bradford, 4 Yeates, 175.
Commonwealth *v.* Tack, 8 Phila. 463.
McCarter's Estate, Id. 595.

The evidence shows collusion between the plaintiffs and the defendants; that some parties in interest were not represented in taking the verdict; that deception was practised upon another party having a material interest under the alleged will, and the parties whose rights have thereby been injured are entitled to be relieved by the Court. The doctrine of *res adjudicata* does not apply to a judgment entered under such circumstances as these, even in a proceeding *inter partes*, and *à fortiori*, when the proceeding is *in rem*.

Carmony *v.* Hoober 5 Barr, 305.
Duchess of Kingston's Case, 20 Howett's State Trials, 478–9.
Broom's Leg. Maxims, * p. 331, 342.

S. Dickson and *J. C. Bullitt*, contra.

A new trial ought not to be granted, unless the Court is satisfied that the application is made by a party in interest who had no notice of what was intended, and had not forfeited or lost his rights by his own conduct, nor unless the Court would allow a verdict in favor of the will to stand.

C. A. V.

September 15, 1879. THE COURT. By examination of the Act of 15th of March, 1832, which directs an issue from the Register to the Court of Common Pleas to try the validity of any testamentary writing, it will appear that the issue is not to inform the conscience of the Register, as is an issue out of Chancery to inform the conscience of the Chancellor, which he may regard or disregard, at his discretion, but is conclusive and binding on him, for the Act directs that the facts established by the trial, and certified to the Register, shall not be re-examined by him, nor upon any appeal from his decision.

The awarding of the issue removes the proceedings for proof of the will from the jurisdiction of the Register to that of the Court, and thenceforth the Court gains control of the issue directed to it in like manner that it has control of any other issue of fact before it. It may enter judgment on the issue, and a writ of error lies to the judgment. (Vansant *v.* Boileau, 1 Binney, 444.) The Common Pleas may grant a new trial on such an issue. (Vanlear *v.* Vanlear, 4 Yeates, 3.) A Register, after awarding an issue, cannot withdraw it from the consideration of the Court. (Mintzer *v.* Baker, 5 Phila. Rep. 483.) When the issue is in the Common Pleas the Supreme Court will not examine any fact connected with the validity of the will until after the determination of that issue. (Per THOMPSON, C. J., in McCarter's Appeal, 28 P. F. Smith, 401.) The refusal of a new trial on the issue by the Court below is not inquirable into on a writ of error. (Werkheiser *v.* Werkheiser, 6 W. & S. 184.)

The next point of inquiry is: Have the parties named as plaintiff and defendants in the issue such direction of the proceedings that they can control the trial, or consent to a verdict for or against the will, without the consent of other parties having an interest in it? The decision of a court of probate upon a will is a proceeding *in rem*. (2 Smith's Leading Cases, 809.) It acts directly on the will itself, determining its validity as a testamentary writing. On a *caveat* against admitting a will to probate, the proceedings are not strictly between parties, because the decree is conclusive on all the world. The *caveat* en-

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tered by one party inures to the benefit of every other party in interest. (Ottinger *v.* Ottinger, 17 S. & R. 142.)

The name of the executor is not essential to the framing of a feigned issue. It may be made with the same legal effect between any other parties having an interest. It is not required of him to become a party to such a contest unless those interested in the disputed paper will indemnify him against the costs of the investigation, or he may call upon them to assume the responsibility of carrying it on. (Royer's Appeal, 1 Harris, 574.) The fixing on parties to give form to the issue is a matter of arbitrary arrangement, and those who have not an interest in the question to be tried pay no costs. The real parties, those who have taken an active part in the contest, are sought out and compelled to pay by a writ of attachment. (Dotts *v.* Fetzer, 9 Barr, 88.) A feigned issue is merely a contrivance to take the verdict of a jury; the courts have an unlimited discretion in directing the use of it. (Hoxworth *v.* Miller, 7 Barr, 458.)

From these cases it appears that the parties in interest, whether they be parties of record or not, have, under the direction of the Court, the control of the issue, and not the mere nominal or record parties in the suit. And this is further shown by the Act of 15th of March, 1832, which directs the issue to be sent from the Register of Wills into the Court of Common Pleas for trial. It gives the form of the precept, which, after reciting the issue to be tried, proceeds: "And further, that you cause all other persons who may be interested in the estate of the said —— as heirs, relations, or next of kin, devisees, legatees, or executors, to be warned, so that they may come into our said court, and become party to the said action, if they shall see cause, and that you certify the result of the trial so had in the premises into the office of our said Register."

It follows that as long as there is a party in interest not represented in the agreement to submit the case to a jury without evidence, it has no binding effect on that party and vitiates the verdict so taken, and he may move to set it aside and vacate the judgment entered on it.

It is contended on behalf of the defendants that a new trial ought not to be granted, unless the Court would allow a verdict in favor of the will to stand. This proposition is based on the presumption that the evidence which was taken before the Register touching the validity of the alleged will is before us. But it is not; we have no right to look into it. If it had been submitted at the trial of the issue, then the case would have stood as any other case would where there had been a trial on the merits, and if, on examination of the evidence, we found it in harmony or conflict with the verdict, the Court would have acted as the law and justice of the case would have required. The only evidence before us is that which was taken on this motion for a new trial, and then, so far only as it is applicable to the grounds on which the motion is made, to wit, the alleged want of consent to the verdict taken, and the imposition said to have been made on Wm. R. Dickerson, one of the petitioners, to prevent him from being present at the trial. On the facts involved in the contest as to the validity of the paper alleged to be the last will of Robert Whitaker, we are not called on to give any opinion. They are not before us for any purpose. To express an opinion on them, as the case now stands would be extra-judicial.

The evidence applicable to this motion shows that one of the petitioners, Mary E. Service, was not informed of, and did not consent to, the submission of the alleged will to the jury without evidence. Without entering on the conflict of testimony relative to the other petitioner, William R. Dickerson, this is sufficient to require us to grant the motion prayed for by the petitioners.

Relative to the devise and bequest in trust to found a charity to be called The Whitaker Practical Institute for the Rearing and Education of Orphan Girls, it is due to Mr. Sheetz, the executor, and to the counsel engaged in the cause, to state, that in a letter to his counsel, Mr. Sheetz stated: "Upon reflection, based upon my examination of the inventory and appraisement, I have concluded that there will be, after paying the widow and the heirs, positively nothing for charities. Such being the case, I do not feel authorized or required to contend any further for the will."

There were some irregularities connected with the proceedings in this case which we ought not to pass without remark. One of these was the entering of judgment on the verdict on the day of the trial without applying to the Court, and without waiting the four days required by rule of court to give opportunity for a motion for a new trial. This cannot have been an oversight. The rule is too well known to admit of such a supposition. It was a wilful violation of the rule, in itself sufficient to justify the Court in declaring the judgment void. Such a judgment is not the judgment of the Court. It is an entry on the records of the court of a judgment which had not been awarded. Another was the certifying by the Prothonotary, under the seal of the court, the result of the trial to the Register of Wills on the day on which the verdict was taken, without leave of the Court, or any application made to it respecting it. By Act of Assembly it is made the duty of the Court to certify the result of the trial to the Register. This was not only unauthorized, but was an invasion of the province of

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the Court; the more marked, because it was done on the very day of the trial, without waiting the four days allowed for a motion for a new trial. If the Court had been applied to it would have refused the certificate until the four days had expired, and might have felt it to be its duty to certify to the Register that the verdict was taken without evidence, that he might proceed with due caution, if he should feel it his duty to do so, before proceeding further in the administration of the estate of the decedent.

And now, September 15, 1879, this matter having been heard, argued by counsel for plaintiffs and respondents, and duly considered, it is ordered and decreed that the verdict in this case be set aside, and the judgment entered thereon be vacated and a new trial granted; and it is further ordered that this decree be certified, under the seal of the court, to the Register of Wills for the city and county of Philadelphia.

Opinion by PEIRCE, J.

C. P. No. 1. Sept. 15, 1879.

Payne v. Grant.

Practice—Discontinuance—It is within the discretion of the Court whether to allow a discontinuance or not—It will not be allowed where the result would subject the defendant to inconvenience and expense.

Rule to strike off a discontinuance.

The plaintiff, who was a resident of Williamsport, brought the present suit against the defendant, a resident of this city. An appearance was entered, and upon a copy of the instrument being filed, an affidavit of defence was put in. Afterwards the defendant having occasion to go to Williamsport on business, he was served with process in a suit instituted there for the same cause of action. This suit was then discontinued by the plaintiff. The defendant then obtained the present rule.

J. De F. Junkin, for the rule.

Discontinuances are only by leave of Court, and when not approved by the Court may be stricken off.

Pollock *v.* Hall, 3 Yeates, 42.
Cooper *v.* Cooper, 1 Phila. 129.
Bank *v.* Macalester, 6 W. & S. 147.
Lowry *v.* McMillan, 8 Barr, 157.

A plaintiff will not be permitted to discontinue where it will give him an advantage, *or tend to vex and oppress the defendant.*

Mechanics' Bank *v.* Fisher, 1 Rawle, 34.

The depositions show that it would put the defendant to great expense to go to Williamsport and defend the case, and the plaintiff, therefore, should not be allowed to discontinue.

Joseph B. Townsend, contra.

The case was discontinued by order of the plaintiff, and as of course, it always having been the rule to discontinue any suit at the request of the plaintiff or his attorney on his payment of the costs.

Rule absolute.

C. P. No. 1. July 12, 1879.

Kensington Bank v. Little.

Practice—New trial—After-discovered evidence—Application must be made within proper limits—It is too late to move for a new trial after the lapse of two months—The Court will, however, retain control of the execution to enforce equities.

Rule to open judgment and let the defendant into a defence.

The defendant deposited with the plaintiffs a check of C. T. Yerkes & Co., drawn in favor of the defendant for $1004, upon the First National Bank. He then drew for an amount greater than the sum of his deposit, exclusive of this check. The check being presented payment was refused on the ground of want of funds. The plaintiff then brought suit for the over-draft.

On Jan. 9, 1878, a verdict was rendered for plaintiff for $971.68. On Jan. 12, 1878, there was a motion for a new trial, which was subsequently refused and judgment entered April 11, on the verdict. On June 8, 1878, the present rule was taken, the affidavit filed setting forth that the said Chas. T. Yerkes & Co. had been adjudicated a bankrupt, and that the plaintiffs had proved this check before the register; that pending the settlement of the bankrupt estate the assignees in bankruptcy had filed a bill in equity to compel the delivery of certain property of the bankrupt alleged to be in plaintiff's possession, and that the bill was finally disposed of by the payment to the assignees of a sum of money and a release of the assignees, and of the fund in Court, from all claims against the bankrupt estate. And, further, that these facts had come to defendant's knowledge after the rule for a new trial had been refused.

G. Northrop, for rule.

A. D. Campbell, contra.

C. A. V.

July 19, 1879. THE COURT. This application is practically a motion for a new trial. Upon the making the rule absolute the case would have, again, to go to a jury to decide the facts alleged, and to the Court to determine the legal effect of the release, if it exists. We are free to say that had this application been made at the proper time, we would have felt bound to grant a new trial; but under the authorities we are clearly of opinion that it is made too late. The rule must, therefore, be discharged. But we still have control of the judgment and the

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execution thereon, and if this case should reach the point of issuing a writ of execution, we will, upon a proper application, exercise such control, whether to the extent of a refusal to allow any execution whatever, it is not necessary now to determine, but we would, at least, so restrict it as to compel credit for the amount actually received from the bankrupt estate.

Rule discharged.

Oral opinion by ALLISON, P. J.

C. P. No. 4. June 28, 1879.

Stewart, Administrator, v. Swaim, Executrix.

Annuity—Not generally apportionable—"An annuity of $1500 per annum from the date of my decease during all the period of her natural life, to be paid by my wife out of the proceeds and profits of the business," not within any exception to the old rule—McKeen's Appeal (6 Wr. 479) followed.

Case stated, in which Franklin Stewart, administrator of Amelia Stewart, was plaintiff, and Louisa Swaim, executrix of William Swaim, was defendant, showing the following facts:—

William Swaim died April 7, 1877. His will contained the following item:—

"I give and bequeath unto Amelia Stewart, wife of Franklin Stewart, M.D., an annuity of fifteen hundred dollars per annum from the date of my decease, during all the period of her natural life, to be paid by my wife out of the proceeds and profits of the business of compounding and selling the aforesaid medicines, to be carried on by her my said wife; in case, however, the said business should so depreciate as to produce less clear profits than four thousand dollars per annum, then the said annuity to Amelia Stewart shall be reduced to the sum of five hundred dollars per annum."

Mrs. Stewart died Dec. 7, 1877, and the clear profits for the first year after testator's death were over $4000. If the Court should be of opinion that Mrs. Stewart's representative is entitled to an apportioned part of the said annuity, then judgment for $1000 with interest from Dec. 7, 1877, or from April 7, 1878, as the Court may be of opinion; but if not, then judgment for the defendant.

W. H. Washington and *C. S. Patterson* (with them *Cuyler*), for plaintiff.

Where an annuity is payable out of a fund that accrues at certain periods, it is not apportionable; but out of a fund accruing *de die in diem*, it is apportionable.

McKeen's Appeal was where testator had an interest in a wire factory, of which the books were balanced, an account of stock taken, and the profits divided on the first day of each year; and the testator spoke of it as "the yearly dividend." In the case stated, there is no time when balances are to be struck, or anything to show that the profits are to be paid at fixed times.

Edw. Hopkinson, contra.

"An annuity of £100 per annum is the gift of an annual sum of £100, that is of as many sums of £100 as the donee lives years." There is a condition precedent that the donee live the year out.

2 Roper on Legacies, 1481.
Tracy *v.* Strong, 2 Conn. 659.
Howell *v* Cornell, 2 Vroom, 374.

A distinction has been taken between an annuity and the accruing interest on a given sum which produces the same amount; but profits and dividends are not apportionable.

2 Redf. on Wills, 475.
3 Id. 184.
Foote's Appeal, 22 Pick. 299.
McKeen's Appeal, 6 Wr. 479.

As a general rule a legacy does not carry interest until the time it becomes payable by the terms of the bequest.

Laporte *v.* Bishop, 11 H. 154.
Bowman's Appeal, 10 Casey, 19.
Cooper *v.* Scott, 12 Sm. 141.

C. A. V.

July 12, 1879. THE COURT. The rigor of the common law rule against the apportionment of rents, annuities, and other periodical payments in respect of time has frequently been the subject of comment by legal writers, and its hardships have been to some extent ameliorated in modern times by the recognition of certain well-defined exceptions, as in cases where an annuity is given in lieu of dower, or for the separate maintenance of married women, or for the support of children, or where it consists of interest or of other sums accruing *de die in diem*. In England the rule has been cut up and abrogated by the Statute of Apportionment, 4 Will. IV. Ch. 22, which enacts that all rents, annuities, pensions, dividends, moduses, compositions, and all other payments due at a fixed period, shall be apportioned, so that on the death of the person interested therein his executor shall be entitled to his proportion of such payments. We have no similar statute in Pennsylvania, so that the rule remains as at common law, modified only by the exceptions which have been referred to.

The case before us is clearly not within any of the exceptions, unless it can be regarded as a case in which the annuity bequeathed is of a sum accruing *de die in diem*. It has been frequently ruled that dividends are not an exception, and I am not aware that any case has been brought within the exception where the payment is of a sum which *in rerum natura* cannot be ascertained until the end of the year. In McKeen's Appeal (6 Wr. 479), the bequest was of the testator's yearly dividend arising from a partnership in which he was interested as copartner, that

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is, it was the testator's share of the profits made and declared in any particular year, and it was held that this was not apportionable, because at no time in the year preceding the time when the profits were declared could it be determined how much of it had been earned. Whether the business of any particular year is to result in a profit or a loss cannot be determined at any time before the end of the year, for even if large profits should be made up to a particular date within the year, yet it is obvious that they may all be swept away by losses which may happen in the remainder of the year. Where, therefore, the contingency upon which the annuity depends can only be ascertained at the end of the year, there can be no presumption of an intention to give profits *de die in diem*. McKeen's Appeal does not seem to be distinguishable in principle from the present case.

Here the bequest to Amelia Stewart was in express words, of "an annuity of $1500 per annum from the date of my decease, during all the period of her natural life, to be paid by my wife out of the proceeds and profits of the business to be carried on by her." "In case, however, the said business should so depreciate as to produce less clear profit than $4000 per annum, then the said annuity shall be reduced to the sum of $500." Now it is quite plain that whether the annuitant should receive $1500 or $500 per annum could only be determined by an examination of accounts at the end of the year to ascertain whether the clear profit of $4000 had been made. The testator could not, therefore, have intended that any sum should become due to the annuitant until the end of the year. When the testator says "$1500 per annum from the date of my decease," he evidently means nothing else than to designate the time when each annual payment shall become due, and this is fully confirmed by the subsequent provision that unless the clear profits of his wife's business shall reach in any one year the sum of $4000, the annuitant at the end of that year shall receive only $500. The profits out of which the larger sum is to be payable are not the profits which may be made *de die in diem*, but the profits which, at the end of the year, may appear to have been made within the whole year. Indeed, the profits, as such, were not bequeathed to Amelia Stewart. The business was to be carried on by the widow of the testator. What was bequeathed to the annuitant was a yearly sum of $1500 or $500, as the case might be, to be derived from the *annual* profits of the business to be carried on by the widow. There is no indication of an intention on the part of the testator that any portion of the profits accruing *de die in diem* should belong to the annuitant.

Upon the law as stated in this State the case is with the defendant. If it should seem to be in any respect harsh or illiberal, let it be remembered that those rules of the common law which by original adoption and long recognition have become a part of the substance of our own laws can only be eradicated or remoulded into more convenient forms by an exercise of legislative power. *Judicis est jus dicere non dare.*

Judgment for the defendant on the case stated.

Opinion by THAYER, P. J.

C. P. No. 4. Sept. 16, 1879.

Sloan and Wife v. Green.

Practice—Process—Service of summons—Set aside where party decoyed into the jurisdiction of the Court—Costs for depositions.

Rule to set aside service of summons in an action of trespass.

The depositions showed that Green, a constable of Delaware County, Pa., having made distraint against Mrs. Sloan, was induced to come to Philadelphia to receive from her attorney the amount due, her husband assuring Green that "no writ of any kind would be served on him." As he was leaving the attorney's office, however, he was served with this writ, Sloan pointing him out to the deputy sheriff.

H. Pleasants, Jr., for the rule.

The policy of the law privileges public officers from being harassed by legal procedure while in the discharge of their duties.

Morgan *v.* Bower, 1 Dallas, 295.
Bolton *v.* Martin, Id. 296.
Miles *v.* McCullough, 1 Binn. 71.
Huddeson *v.* Prizer, 9 Phila. 65.

A party should not be served where he has been decoyed into the jurisdiction of the Court by the plaintiff or plaintiff's agent.

Reed *v.* Williams, 5 Dutch. 385.
Sugar Refinery *v.* Mathieson, 2 Cliff. 304.
Carpenter *v.* Spooner, 2 Sanf. 717.
Metcalf *v.* Clark, 41 Barb. 45.
Hevener *v.* Heist, 9 Phila. 274.

Having accepted the benefits of her husband's fraud, the plaintiff cannot escape liability by denying his agency.

Horter *v.* Silliman, 3 WEEKLY NOTES, 405.
Wright *v.* Burbank, 14 Sm. 251.
Musser *v.* Hyde, 2 W. & S. 317.
Wharton on Agency, § 89, 477.

THE COURT. On the authority of Hevener *v.* Heist (9 Phila. Rep. 274), we will make this rule absolute; but having turned the plaintiff out of Court, we cannot, as requested by defendant's counsel, tax the cost of taking depositions as costs to be recovered as in the case of a judgment for defendant.

Rule absolute.

[*Cf.* King *v.* Embrey, 5 WEEKLY NOTES, 97.]

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, OCT. 23, 1879.* [No. 26.

Supreme Court.

Oct. & Nov. '78, 92. Nov. 11, 1878.

Commonwealth ex rel. Whelen v. Select and Common Councils of the City of Pittsburgh.

Municipal corporations — City of Pittsburgh — Penn Avenue bonds — Funded debt — Act of April 2, 1870 and supplements — Act of April 6, 1850 — Act of May 16, 1857 — Constitutional law — Art. IX. § 8, and Art. XV. § 2 — Mandamus.

The bonds issued under the provisions of the Act of April 2, 1870, and its supplements, for the improvement of Penn Avenue and other avenues and streets in the city of Pittsburgh, are the bonds of the city of Pittsburgh and a part of its funded debt.

That the improvements were made through commissioners is immaterial.

City of Philadelphia *v.* Field, 8 Sm. 320, followed.

Per PAXSON, J. The plain object of the provision in the Penn Avenue Act for the assessment of the cost of the improvements upon the abutting properties, was to provide a fund out of which the city should be reimbursed in whole or in part, for the outlay. The bondholders have nothing to do with it.

Semble, that the latter part of the proviso contained in the 12th section of the Act of May 16, 1857, was not a contract with the tax-payers but merely a limitation on the taxing power of the city which could be repealed by the Legislature at will.

Semble, that the Act of April 6, 1850, and the Act of May 16, 1857, were repealed *pro tanto*, by the Act of April 2, 1870 (the Penn Avenue Act), and its supplements.

The contracts for the improvements having been entered into prior to January 1, 1874, and some of the bonds having been issued thereafter:

Held, that it was the contracts, and not the bonds issued to pay liabilities that had accrued thereunder, which increased the debt of the city.

Held, further, that Article IX. section 8, and Article XV. section 2, of the Constitution, being prospective in their operation, did not apply.

The municipal authorities having failed to provide for the payment of the interest of these bonds:

Held, that *mandamus* was the proper remedy.

City of Williamsport *v.* Commonwealth *ex rel.* Bair, 3 Norris, 487; 4 WEEKLY NOTES, 385, distinguished by AGNEW, C. J.

Error to the Common Pleas No. 1, of Allegheny County.

This was an application by the Commonwealth at the relation of Henry Whelen, for a mandamus to the Select and Common Councils of the city of Pittsburgh, to provide for the payment of the interest of $5,823,800 of bonds issued under the provisions of the Act of April 2, 1870 (the Penn Avenue Act), and its supplements. An alternative writ having issued, the respondents made a return to which the relator demurred, and the case was heard in the Court below on the demurrer.

The petition of the relator set forth *inter alia*, that he was the holder of $9500 of the bonds of the city of Pittsburgh, issued under the provisions of the Act of April 2, 1870, and its supplements, for the improvement of Penn Avenue and other avenues and streets in the city, and that he was the agent of the Pennsylvania Company for Insurance on Lives and Granting Annuities, and of others, individuals and corporations, holders of large amounts thereof; that said bonds bore interest, a portion at the rate of six per cent. and a portion at the rate of seven per cent. per annum, payable semi-annually; that the interest thereon was in arrear and unpaid; that it was the duty of the respondents to assign and appropriate annually out of the revenue of the city derivable from all sources, sufficient moneys for the payment of the interest of the funded debt of the city,* and to provide the same by directing the assessment and collection of the necessary taxes; and that they had failed to assign and appropriate "any moneys for the payment of the interest of the funded debt of said city so as aforesaid in arrear."

The respondents in their return, admitting that the bonds were, in form, bonds of the city, and that they were issued under the provisions of the Act of April 2, 1870, and its supplements, for the improvement of Penn Avenue and other avenues and streets in the city, denied that the city was in any way liable therefor, claiming that these Acts were the only authority for their issue, that the bonds authorized thereby were bonds payable *only* out of the moneys to arise from the assessments directed to be made upon the properties abutting on the avenues and streets for the improvememt of which they might be respectively issued; and that of this the holders of the bonds had due notice, the bonds themselves containing a recital that they were issued under the provisions of these Acts. They also claimed that the bonds were not a part of the funded debt of the city; that the Legislature had provided a fund—the moneys to arise from the assessments—out of which they were payable; and that they (the respondents) had no authority to levy a general tax or any tax, or to assign and appropriate any moneys out of the general revenue of the city, for

* In accordance with the Acts of April 6, 1850 (P. L. 407), and March 19, 1873 (P. L. 317).

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the payment of the interest thereon. They also averred that $3,689,200 of the bonds had been issued since January 1, 1874, contrary, as they claimed, to the provisions of Article IX. section 8, and Article XV. section 2, of the Constitution. They did not aver, however, that the contracts for the improvements for which they were issued, had been entered into since that time.

The Act of April 2, 1870 (P. L. 796), entitled "An Act to provide for the improvement of Penn Avenue and other avenues and streets in the city of Pittsburgh" (the 25th section of which provided that it should not take effect until approved by the city councils), authorized the owners of property abutting on Penn Avenue to elect five of their number, citizens of Pittsburgh, "Commissioners of the Penn Avenue improvement;" and provided, *inter alia*, that these commissioners should superintend and control the improvement of the avenue, determine the kind of pavement to be used, contract for the grading, curbing and paving as to them might seem best, etc. etc.; that the contracts (which were to be awarded after due public notice, to the lowest and best bidders), should be made in the name of, and the bonds of the contractors (with sureties to be approved by the commissioners), given to the city; and authorized the commissioners to institute suit in the name of the city to enforce their performance. It also provided that the city engineer should furnish the proper grades and lines, and see that the work was done in this respect in accordance with the city's ordinances and regulations; and that upon the completion of the work to the satisfaction of the commissioners, the avenue should be under the control of the city.

The 9th section of the Act provided that "all contracts made by said commissioners, for the payment of money," should provide for its payment "out of the funds" thereinafter provided for the improvement, and the 12th, 13th, 14th, and 15th sections provided as follows, viz.:—

SECTION 12. For the purpose of providing for the payment of the cost and expense of said improvement the said commissioners shall be authorized from time to time, as the work progresses, to make requisition upon the mayor of the city of Pittsburgh for the issue of bonds of said city, in such sums as they deem best; and it shall be the duty of the said mayor to make and execute bonds in the name of said city, to an amount not exceeding the amount of the contract price for said work, and the incidental expenses attending the same; said bonds shall be known as Penn Avenue Bonds; they shall be signed by the mayor and countersigned by the controller, and sealed with the corporate seal of said city; they shall be all of the same date, and they shall be payable twelve years after date, and redeemable at any time at the option of said city; they shall bear interest at the rate of seven per centum per annum, payable semi-annually from date, principal and interest payable at the office of the treasurer of the city of Pittsburgh; the said bonds shall be free of taxation.

SECTION 13. When said bonds have been signed by the mayor, and sealed with the corporate seal, they shall be delivered to the city controller, who shall register them in a book to be kept for that purpose; he shall then countersign the same and deliver them to the said commissioners, and take their receipts therefor.

SECTION 14. Said commissioners shall be authorized to negotiate said bonds in such manner as they may think best, and for such prices as may be obtained for the same, not less than par, and shall pay all moneys received therefrom to the treasurer of the city of Pittsburgh, and report to the controller the number of bonds sold and the amount received therefor; and before delivering the same to the purchaser, they shall be countersigned by the said commissioners.

SECTION 15. All moneys received by the city treasurer from the sale of said bonds shall be kept by him in a separate fund, and paid out on requisition of said commissioners, accompanied with an affidavit of the secretary or a member of said commission, that work has been done or materials furnished to the amount of said requisition, and that the money is required for payment of the same; all moneys received by the city treasurer shall be kept in the same manner and subject to all the regulations regarding other moneys of the city, except that he shall keep a separate account of the same; all interest received upon the same shall be credited to this fund.

The Act provided further that the commissioners should, upon the completion of the work, assess the cost of the improvement (which should be taken to be the amount of bonds sold, and the interest thereon to the first day of October preceding), equally per foot front upon the property abutting on the avenue,* and file a schedule of their assessments (which should be liens upon the property to the depth of 120 feet), in the office of the prothonotary of the county; that these assessments should be payable at the office of the city treasurer, in ten equal annual instalments, with interest at seven per cent. per annum, of which the first should be payable on the first day of October succeeding the time of making the assessment; and that, in cases of default, they should be collected by the city attorney.

The 22 section of the Act provided that—

"All moneys received from assessments shall be appropriated, under the direction of the finance committee of the councils of the city of Pittsburgh, to the payment of the interest and the redemption of the bonds which may be issued for said improvement; if any interest shall become due on said bonds where there is no fund from which to pay the same, the councils of the city of Pittsburgh shall be authorized to make a temporary loan for the purpose of paying the same."

The Act provided further, that the city councils might, "whenever the owners of a majority in interest of the property abutting upon any other street or avenue" in the city should "desire to avail themselves of the privileges contained in this Act," extend its provisions to such street or avenue, direct the grading and paving

* See Seely *v.* City of Pittsburgh, 1 Norris, 360; S. C. 3 WEEKLY NOTES, 413, and Bidwell *v.* Same, 4 Norris, 412; S. C. 5 WEEKLY NOTES, 41.

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of the same, and authorize the election of commissioners therefor.

The supplemental Act of February 1, 1871 (P. L. 17), repealed the provisions of the 12th section of the original Act, that the bonds should be redeemable at any time at the option of the city, and authorized and directed the city treasurer to register any of them that might be presented for that purpose. The other supplements are immaterial.*

After argument, before COLLIER and BAILEY, JJ. (STOWE, P. J., being a holder of some of the bonds, did not sit), the Court were equally divided in opinion, and judgment was thereupon entered on the demurrer in favor of the respondents, BAILEY, J., in an opinion filed, saying *inter alia*:—

"It will be seen how scrupulously the city has been excluded from every right and duty, under this Act. It shall not select the commissioners, nor issue the bonds, nor control the amount of the issue, nor determine the character or cost of the pavement, nor make, nor regulate any contract, nor negotiate the bonds, nor receive the proceeds into its treasury, nor supervise their disbursement, nor determine whether the contracts had been properly fulfilled, nor whether the street was good or bad, nor assess the cost, nor correct the assessments, nor file the liens, nor supervise nor enforce their collection, nor receive them into its treasury when collected, nor apply them, through its officers, elected for such purposes, to the payment of the bonds, or their interest.

"It is quite clear that the Legislature meant to empower the commissioners to require the issue of bonds in the name and sealed with the seal of the city, and to command the officers of the city as their servants, as they might require. It is equally clear that these bonds, thus issued, can bind the city no further than the Legislature has disclosed, either expressly or by necessary implication, the intention that they should. It is not clear that the Legislature intended they should be a debt of the city at all. To borrow money and to issue bonds therefor are the highest acts of legislation. Such powers do not belong to a municipal corporation as an incident of its creation. To be possessed they must be conferred by legislation. (The Mayor *v.* Ray, 19 Wall. 475. See Com. *v.* E. & N. E. R. R. Co., 9 Har. 351; Same *ex rel v.* Allegheny County, 1 Wr. 290; Same *v.* Same, 43 Id. 403.)

"The city councils could not, under the Penn Avenue Act, have issued even one bond. It conferred no power upon them, and these bonds are solely the creature of this Act. As the city authorities could not have issued these bonds, even had they so desired; and the Act does not expressly, nor by implication, declare that the city shall resort to taxation (the only implied mode of paying municipal debts) to raise one dollar to pay principal or interest, it is just to assume that the Legislature did not so intend. It would have been so very simple a matter for that body to have said that the city was to pay these bonds, and they have taken such great pains not to say it, that we need not ascribe its absence to mistake.

"Again; the Legislature, in the manner fully set forth in the return, enacted for this city the system of local assessments for the opening, grading and paving of streets, even to the extent of assessing the older parts of the city for the streets on which they abut, though these had been improved by general taxation long years before. (Magee *v.* City of Pittsburgh, 10 Wr. 358.)

"The Penn Avenue Act was in furtherance of this system. The locality had to bear the burden. What more reasonable than that the citizens of the locality should control the expenditure of their own money, and as they would thereby furnish a street for the whole city, that they should have the use of the city officials and machinery to aid them. The theory of the relator, however, would reverse the entire system. It would throw a debt of millions upon the whole city for a purpose, which the Legislature had for years declared was a local improvement, to be paid for exclusively by the locality benefited. Such a reversal of an established system of legislation must more clearly appear, to be accepted as the intention of the Legislature.

"Moreover, in establishing this system of local assessments for local benefits, the Legislature, by Act of the 6th of April, 1850, required the city to fund its debt, and to provide a sinking fund for its extinguishment, and therein provided by section 5, 'that it shall not be lawful for the said councils to issue, or authorize to be issued, any bonds, certificates of loan or of indebtedness, nor any other device as evidence of any indebtedness for or on account of any contract or engagement or undertaking, hereinafter entered into under the authority of said councils, for grading, paving, repaving or repairing any streets, lanes or alleys in said city, or for sewerage of the same.' If this section was not repealed by the Penn Avenue Act, councils could not have issued these bonds. The section was not repealed by nor referred to in the Act of 1870. The law does not favor repeals of statutes by implication, and the burden is upon the party claiming it, to show a 'strong and clear inconsistency,' between the Acts. (Street *v.* Com., 6 W. & S. 212; Society *v.* Philadelphia, 7 Cas. 181.) The Act of 1850 is in the nature of a contract

* See, however, the Acts of March 20, 1872 (P. L. 474), and March 24, 1873 (P. L. 409).

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with the tax-payers, and that of 1870 will bear a construction perfectly consistent with section 5 of the former.

"Still further; when the Legislature passed the Act of the 16th of May, 1857, assessing per foot front, the cost of the old streets upon the abutting property, which had been for years taxed for their improvement, in consideration of such tax, they provided, that 'the property so assessed and taxed as aforesaid, shall not be liable for, or taxed, or assessed at any time thereafter, for preparing, grading or paving on any other street, lane, alley or square within the limits of the said city.' This contract was not repealed in terms by the Penn Avenue Act, and could not be repealed by any implication however 'strong or clear.' The Legislature, therefore, did not mean to repeal this provision. If these avenue bonds are a debt of the city, and the principal or interest be paid out of the city taxes, it must be done in violation of this subsisting contract, the consideration of which has been paid by the old city.

"But if the Legislature did intend to bind these bonds upon the city, their power so to do is more than doubtful. A highly respectable authority, the Illinois Supreme Court, has adjudged repeatedly upon general principles, that 'no well regulated mind can entertain the idea that it is within the constitutional competency of the Legislature to compel any one of our many cities to issue its bonds, against its will, to erect a park, or for any other improvement—to force it to create a debt of millions—in effect, to compel every property owner in the city to give his bond to pay a debt thus forced upon the city.' (People *v.* Chicago, 51 Ill. 17; Marshall *v.* Silliman, 61 Id. 218.) However, our own case of Philadelphia *v.* Field (8 Sm. 320) holds, that it is competent for the Legislature to create, without the consent of the city, ministerial officers, who may contract a debt, of which the same Legislature may compel the city to provide means of payment. But neither Philadelphia *v.* Field, nor any other case which the zeal of counsel has disclosed, has held that the Legislature can authorize a few rural property holders in the outskirts of the city, representing nobody but themselves, under the pretence of making a local improvement, to absorb the highest legislative functions of the councils representing the whole city, and to borrow money and issue bonds of the city, which shall be binding upon every taxpayer.

"Again, the citizens of the older wards, under the provisions of the Act of the 16th of May, 1857, paid the consideration which the Legislature had declared was to give them a perpetual exemption from assessment or taxation for the improvement of other streets. To hold now that the Legislature may enact that the bonds for the grading and paving of Penn Avenue shall be binding upon the whole city, and that a tax can be levied upon the older wards to pay the interest thereon, would be to sustain a 'law impairing contracts.' (See Society *v.* Philadelphia, 7 Casey, 182; Philadelphia *v.* Fox, 14 Sm. 181.)

"By the Acts of the 6th of April, 1850, the 16th of May, 1851, the 11th of April, 1862, and others, the city was required to provide a sinking fund for the extinguishment of certain portions of the city debt. There are other portions, which are not entitled to this security. In the latter category are these Avenue bonds, even assuming them to be debts of the city. If the term be more than an idle name, and 'funded' was intended to distinguish one class of debts from all others, that must be the 'funded debt' for whose security the law has provided the greatest safeguards. In this view, we must assume that the 'funded debt' is that for whose payment the sinking fund was established, and the duty imposed upon councils, by express enactment, to provide annually for the interest, even though the city officers should go unpaid. This signification of 'funded debt' is confirmed by the original meaning of the term 'funds,' which was the security upon which loans were advanced, and by the mode by which portions of the debt of the British Government have become 'funded.' (Wharton's Law Dictionary; title 'Funds.') It will be seen that it was deemed necessary to make, in express terms, the railroad compromise bonds part of the 'funded debt' of the city, by Act of the 11th of April, 1862.

"As has been shown, the Act of 1870 provides a fund for the payment of principal and interest of these bonds, derived, as it should be, from assessments upon the limited locality for whose benefit the expenditure was made, and appropriates that fund to this exclusive object. From the care with which it is provided that these assessments are made payable 'at the office of the city treasurer,' and not even 'to the treasurer,' as is the phrase used when the Act speaks of payments of the proceeds of the bonds, and the designation of a special committee to see to their application to the exclusion of the city controller, it would seem to be the design that these moneys should not go into the treasury of the city, nor under the control of the city officers.

"But, however this may be, the fund thus appropriated is a trust, which could be diverted to no other use. (Maenhart *v.* New Orleans, 2 Woods, 108.) It is not a fund provided for the reimbursement of the city, but as the Act says 'for the redemption of the bonds.' No duty was imposed upon the city to see to its collection, and no right was conferred upon the city to interest itself in the subject. From such premises,

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it would be difficult to deduce that the city was bound to produce still another fund, and that by taxation of those who had been studiously excluded from all duties and rights in the matter. (See Navigation Co. *v.* Newbern, 7 Jones, N. C. 279; U. S. *ex rel. v.* New Orleans, 2 Woods, 230.)

"It is quite clear that the 'approval' by councils, of the Act of 1870, conferred no power upon the Commissioners either to issue these bonds, or to make them binding upon the city, because—first, the Legislature had not clothed the councils with power to borrow money for this purpose, and there was nothing they could delegate; second, if they possessed the power they could not delegate it. 'Among the primal axioms of jurisprudence, political and municipal, is to be found the principle that an agent, unless expressly empowered, cannot transfer his delegated authority to another, more especially when it rests in a confidence, partaking the nature of a trust, and requiring for its due discharge, understanding, knowledge, and rectitude.' (Parker *v.* Com., 6 Barr, 515; Philadelphia *v.* Fox, *supra*). And third, the Act of tbe 6th of April, 1850, section 5, provides not only 'that it shall not be lawful for councils to issue,' but 'to authorize to be issued any bonds,' or any other device, as evidence of indebtedness thereafter for grading or paving any street, lane, or alley in the city.

"And we have seen the character of this 'approval' by councils. From the manner in which this action was had, it would seem impossible that any councilman could have thought he was thereby binding the city in a solemn manner to the payment of an unlimited debt.

"And of all this, the relator and every purchaser of one of these bonds, are charged by law with the knowledge. Upon the face of these bonds, in conspicuous type, was printed, 'Penn Avenue Bonds;' the Act of the 2d of April, 1870, was set forth as the authority for their issue, and the counter-signatures of the Commissioners of the Avenue distinguished them from all other bonds upon which the city seal appeared; all in a manner to challenge attention.

"Of this state of facts, the law says: 'every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute and all its requirements.' (McClure *v.* Oxford, 4 Otto, 432.) The Supreme Court of this State, speaking upon this subject, in relation to the railroad bonds of this county, used this language: 'Every holder and receiver of the bonds had notice . . . for there on the face of the bond, it was plainly said it was "given in pursuance of the Act of Assembly of the 24th of February, 1853." That Act was a public law, of which brokers and their customers were bound to take notice, as well as other people. In the bond there was an express reference to the Act, and in the Act the condition was expressed in unmistakable English.' (Com. *ex rel. v.* Allegheny Co., 8 Casey, 230.)

"And this knowledge on the part of the relator is charged in the return, admitted by the demurrer, and conceded by his counsel.

"Under these circumstances, the bondholder can blame no one but himself, if he failed to know that these bonds had not been issued by city authority; that he had no contract with, nor claim upon the tax-payers of the city, and that he must look to the fund which the statute provided for his payment; and that it would be a great wrong upon the citizens of Pittsburgh, could they be taxed to pay either principal or interest.

"In my opinion, the *mandamus* should be refused."

The relator took this writ, assigning for error the entry of judgment for the respondents.

Geo. Shiras Jr., and *John G. Johnson* (*M. W. Acheson* with them), for the plaintiff in error.

These bonds are in form city bonds. The Act of April 2, 1870, authorizes their issue by the city, makes them payable at the city treasurer's and in no way limits the city's liability. Councils virtually adopted the Act by passing ordinances for the election of commissioners in accordance with its provisions. The contracts entered into under it were made with the city and the bonds of the contractors given to the city. Nor is there anything on the face of the bonds to limit the city's liability. The power to raise a temporary loan for payment of interest on these bonds conferred by this Act upon councils would only have been given in the case of a city debt. The Legislature intended, we concede, to fully indemnify the city by the assessments upon the abutting properties, but not to make such assessments the basis on which and the sole fund out of which these bonds were to be paid. Purchasers at par, as provided by the Act, could never have been found, had such been the legislative intent; nor could sect. 12 of the Act be equitably carried out which authorizes the city to redeem such bonds as it may choose, for the fund realized from the assessments would in such case be a trust fund which the bondholders might claim to share pro rata. The Act of April 2, 1870, is constitutional in its provisions.

Philadelphia *v.* Field, 8 Sm. 320.
Thomas *v.* Leland, 24 Wend. 65.
County *v.* Sharswood, 7 W. & S. 16.

Independent of the Act of 1870, the bonds in

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question, having been issued for legal and authorized municipal debts, are valid obligations of the city and binding according to their tenor.

Commonwealth *ex rel. v.* Councils of Pittsburgh, 5 Wr. 278.
City of Williamsport *v.* Commonwealth, 3 Norris, 487; s. c. 4 WEEKLY NOTES, 385.
Allegheny City *v.* McClurkan, 2 Harris, 83.

These bonds have therefore become a part of the funded debt of the city, for the payment of which it is the duty of councils under the Act of April 6, 1850, sect. 3 (P. L. 407) to provide.

City of Pittsburgh *v.* Biggart, 4 Norris, 425; s. c., 5 WEEKLY NOTES, 281.
State *v.* Commissioners, 6 Ohio St. 282.
Commonwealth *v.* Pittsburgh, 10 Casey, 520.
Commonwealth *v.* Allegheny Co., 7 Wright, 400.
Gas Light Co. *v.* New Orleans, 6 Reporter, 257.

The Act of April 6, 1850, sect. 5, is only intended to prevent councils from paying in bonds in cases of contracts entered into by them, but does not interfere with their power to sell bonds and appropriate the proceeds to city purposes. If any other construction be placed upon this Act, it is repealed *pro tanto* by the Act of April 2, 1870. The Act of May 16, 1857, is not a contract made by the Legislature with the tax payers. There is no consideration for such a contract, and such exemption is therefore at any time revocable by the Legislature.

Christ Church *v.* Philadelphia, 24 How. 300.

The Legislature has no right to abate any of the rights of sovereignty, such as that of taxation, so as to bind future legislatures. Any contract to that effect is void.

Mott *v.* Penna. R R. Co., 6 Casey, 9.
Brick Church *v.* New York, 5 Cowen, 538.
Bank of Easton *v.* Commonwealth, 10 Barr, 448.
Western Savings Bank *v.* Philadelphia, 7 Casey, 182.
Dillon on Municipal Corporations, § 126.
Layton *v.* New Orleans, 12 La. An. 515.

Even if the Act of 1850 be a contract, and binding, it exempts part only of the city property from taxation; we are entitled to a mandamus for a tax levy on the residue.

The return does not aver that all the contracts on account of which these bonds were issued were not entered into before January 1, 1874. Every intendment on this point must be against the return.

Commonwealth *ex rel. v.* Commissioners, 1 Wright, 237.
Commonwealth *ex rel. v.* Commissioners, Ibid. 277.
Moses on Mandamus, 213.
High on Ex. Rem. § 474.

These bonds having been issued on account of contracts all presumably entered into before January 1, 1874, Art. ix. sect. 8, and Art. xv. sect. 2 of the Constitution of Pennsylvania cannot therefore apply, being only prospective in operation.

Lehigh Iron Co. *v.* Lower Macungie Township, 31 Sm. 482.
Indiana Co. *v.* Agricultural Society, 4 WEEKLY NOTES, 481.
Wattson *v.* Chester & Del. R. R. Co., 2 Norris, 254.
Perkins *et al. v.* Slack *et al.*, 5 WEEKLY NOTES, 153.

The right to a writ of mandamus in a case like the present is indisputably settled.

Commonwealth *ex rel. v.* Pittsburgh, 10 Casey, 496.
Commonwealth *ex rel. v.* Allegheny Co., 1 Wright, 237.
Commonwealth *ex rel, v.* Allegheny Co., Ibid. 277.
Van Hoffman *v.* City of Quincy, 4 Wall. 535.
High on Ex. Rem. Sec. 369 *et seq.*

D. T. Watson, *J. F. Slagle*, and *Thos. Marshall* (*Thos. S. Bigelow*, City Solicitor, with them), contra.

The relator must show an express authority delegated to the City of Pittsburgh to issue these bonds upon its own faith and credit, otherwise they are ultra vires and void.

N. Y. Fire Ins. Co. *v.* Ely, 5 Conn. 567.

No such power is delegated by the Act of April 2, 1870. The true intention of that Act is local improvement by local taxation, and its true construction must be that the bonds issued were to be based on and payable out of the assessments upon the properties abutting on the avenues improved. There was no intention to impose any liability on the city. A tax cannot therefore be properly assessed on the city at large.

People *v.* Brooklyn, 4 N. Y. 430.
State *v.* Leavenworth, 2 Kansas, 61.
Ackerman *v.* Desha Co., 27 Ark. 457.

Where a statute prescribes for a municipal corporation a specific mode of contracting, that mode must be strictly observed, nor can the city officials bind it to any greater extent or in any different manner.

City of Leavenworth *v.* Norton, 1 Kansas, 432.
Rhinelander *v.* New York, 24 How. Pr. 304.
City of Lafayette *v.* Cox, 5 Indiana, 39.
McCracken *v.* San Francisco, 16 Cal. 620.
Farmers' Loan Bank *v.* Carroll, 5 Barb. 649.
Head *et al. v.* Ins. Co., 2 Cranch, 127.
Bank of U. S. *v.* Dandridge, 12 Wheaton, 64.
Zottman *v.* San Francisco, 20 Cal. 102.
Nicholson Pavement Co. *v.* Painter, 35 Cal. 705.
Police Jury *v.* Britton, 15 Wall. 566.
Commissioners *v.* Carter, 2 Kansas, 115.
Dillon on Municipal Corp. 610.

Nor can the city be estopped from denying its liability on these bonds by reason of any recitals therein. Citizens of a city cannot be thus estopped by acts of the city officials.

The Mayor *v.* Ray, 19 Wall. 478.
City of Baltimore *v.* Reynolds, 20 Md. 1.

Purchasers of these bonds were bound to take notice of the provisions of the statute by virtue of which they were issued.

Commonwealth *ex rel. v.* Allegheny Co., 8 Casey, 230.
McClure *v.* Township of Oxford, 4 Otto, 432.

There is no power conferred upon Councils by the Act of April 2, 1870, to levy such a tax as is

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asked by the relator. A specific delegation of power must be shown, and the construction is strict against such delegation.

Cooley's Taxation, pp. 201, 202, 208, 209, 474, and 524.
Cooley's Cons. Lim., pp. 517, 518, and 520.

This rule is adhered to with particular strictness in the case of a municipal corporation.

Cooley's Cons. Lim., p. 192.
Green's Brice's Ultra Vires, p. 42, and note.
Southwark R. R. Co. *v.* City, 11 Wright, 323.
Commonwealth *ex rel. v.* E. & N. E. R. R. Co., 3 Casey, 351.
Reed *v.* Toledo, 18 Ohio, 161.

The Act expressly authorizes councils to raise a temporary loan in a certain contingency. Such limited power would not have been conferred had it been the intention to make it their duty to levy a general tax. *Expressio unius est exclusio alterius.*

Broom's Legal Maxims, *638.

The Act of April 6, 1850, forbids the issuing of bonds by the city on account of any contracts for street improvements. There is no such clear inconsistency between this Act and that of 1870 as would repeal the former by implication.

Dwarris on Statutes, 674.
Street *v.* Commonwealth, 6 W. & S. 212.
Western Savings Fund *v.* Phila., 7 Casey, 181.

The Act of May 16, 1857, was virtually a contract with the then twelve wards of the city, that if the property then in the wards would pay the assessed cost of all streets theretofore improved, never after, under any pretext, should they be taxed for future street improvement.

Western Savings Fund *v.* Phila., 7 Casey, 175.
Philadelphia *v.* Fox, 14 P. F. Smith, 181.
Dartmouth College *v.* Woodward, 4 Wheat. 578.
The Binghamton Bridge, 3 Wall. 51.

The assessments made under the Act of April 2, 1870, constitute a trust fund which cannot be applied to any other purposes than the payment of these bonds.

Maenhart *v.* New Orleans, 2 Woods, 708.

It does not appear that there is not now sufficient of this fund in the City Treasurer's hands to pay the interest due. A mandamus cannot issue until the remedy provided by the Act has failed.

Dillon on Municipal Corp., 401 and 402.
Burroughs on Taxation, 492.

Difficulty in enforcing the remedy will not justify a resort to other means of payment not provided by law.

Neuse River Nav. Co. *v.* Newberne, 6 Jones, 204.
Rees *v.* Watertown, 19 Wall. 717.

If the Act of April 2, 1870, does confer a general power of taxation, it is unconstitutional, in that it virtually vests that power in the owners of the properties abutting on the improvements, while it should be and remain vested only in the Commonwealth.

Many of these bonds were issued after January 1, 1874. This issue was clearly within the prohibition of the present Constitution of Pennsylvania, Article IX., Sec. 8.

Nov. 18, 1878. THE COURT. The Act of 2d April, 1870, entitled "An Act to provide for the improvement of Penn Avenue and other avenues and streets in the city of Pittsburgh" (P. L. 796), bears upon its face the evidence that the Legislature intended a system by which the city of Pittsburgh should be enabled to extend its streets and avenues from time to time, as required for its convenience or pleasure. The immediate occasion of the passage of the Act was probably the large extension of the city limits by the Act of 1867. Said extension embraced a considerable amount of strictly rural territory, used and cultivated, for the most part, as farm lands. It was considered desirable, during a period of inflation and in the midst of expanding values, to open broad avenues for miles through these farms, to grade down hills, fill up ravines, and curb and pave the avenues in a costly manner. The Penn Avenue Act may be regarded as the result of this condition of things. We will not stop to discuss its wisdom. It is enough to say that it was passed with all the forms necessary to a legal enactment, and its 25th section provides that said Act should not take effect "until the councils of the city of Pittsburgh shall have approved thereof." The city councils having approved of it, and proceeded to act under it in the opening of its avenues, the city must be held to the full measure of its legal responsibility therefor.

Without going into unnecessary detail, the principal features of the Act are those providing for the election of commissioners by the owners of property abutting on the street to be improved, whose duty it is declared to be to control and superintend the grading, curbing, and paving; the payment of the cost of the work from the proceeds of sales of bonds of the city; the assessment of the cost upon the abutting property, which was made payable in ten equal annual instalments with seven per cent. interest, thereby creating a fund to be applied under the direction of the finance committee of councils to the payment of the interest on, and the redemption of, the bonds. Under the system thus briefly sketched, Penn Avenue and several other streets and avenues have been graded and paved, and bonds of the city, amounting to over $5,000,000, have been sold in the market, the proceeds paid into the city treasury, and drawn out upon the orders of the commissioners in payment of the cost of the improvements referred to. For several years the city paid the interest upon these bonds with promptness, but defaulted for the year 1877, and has paid no interest since.

The relator, Henry Whelen, is the owner of

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$9500 of these bonds, and is the agent of several corporations and individuals who are large holders of the same. In February, 1878, he presented his petition to the Court below praying the said Court to award a writ of alternative mandamus, commanding the councils of said city to show cause why they should not provide for the payment of the interest. To the writ thus granted, a majority of the councils made a return denying the liability of the city upon the bonds. The relator filed a demurrer to the return. The President Judge of the Court below, being the owner of some of the bonds, declined for that reason to sit at the hearing. The remaining two Judges differed in opinion. In order, however, that the case might be brought to this Court, they entered judgment for the defendants, and refused the writ of peremptory mandamus. To the judgment thus entered, this writ of error was taken.

That the writ of mandamus is a proper and appropriate remedy in such cases is settled law. We need only to refer to Commonwealth *ex rel.* Hamilton *v.* The Councils of Pittsburgh (10 Casey, 496); Commonwealth *ex rel.* Middleton *v.* Commissioners of Allegheny County (1 Wright, 237); Commonwealth *ex rel.* Armstrong *v.* Same (Id. 277); Von Hoffman *v.* The City of Quincy (4 Wall. 535); Perkins *v.* Slack (5 Nor. 270; 5 WEEKLY NOTES, 153). The relator having selected the proper remedy, it remains to be seen whether he has shown such a case as entitles him to the writ. That the facts set forth in his petition establish a *prima facie* case, is too clear for argument, and must prevail, unless the defendants have set out such matters in their return as relieve them from responsibility.

We need not go over in detail the grounds of defence specified in the return. They may be reduced to two heads: 1st. That the bonds issued under the Act of April 2, 1870 (Penn Avenue Act) and its supplements, do not constitute part of the funded debt of the city of Pittsburgh; that the holders of said bonds are bound to look for the payment of interest due thereon, and to become due, to the assessments made, under the provisions of said Acts, upon the properties abutting upon the streets and avenues improved; and that no authority or power has been given or delegated to the councils of the city to levy a general tax, or any tax, to pay the interest on said bonds, or to apply any moneys out of the general revenues of the city for that purpose. 2d. That the bonds in question were issued in disregard of that provision of the Constitution which limits the debt of the city; and on the requisition of commissioners, without any previous appropriation made for their payment by councils as required by the Constitution. We will consider these propositions in the order in which they are stated.

The first material question is, Are the bonds in controversy the bonds of the city of Pittsburgh, and for which the city is directly liable to the holders for the payment of both principal and interest? That they are so in form is manifest. They purport to be the bonds of the city; are signed by the mayor and controller, countersigned by the Penn Avenue commissioners, and have the corporate seal affixed. And for the true and faithful payment of the sum of money mentioned in each bond, and the semi-annual interest thereon as aforesaid, "the faith, credit, and property" of the city of Pittsburgh are therein solemnly pledged. So that if the bonds were issued by authority of law, upon a sufficient consideration, there can be no doubt but that they are the bonds of the city. No question has been made as to the consideration. It is not denied that the holders paid par for them in good money, and that the proceeds went into the city treasury. Were they issued in pursuance of law? It is admitted that they were issued under section 12 of the Penn Avenue Act, which section is as follows: "For the purpose of providing for the payment of the cost and expense of said improvements, the said commissioners shall be authorized from time to time, as the work progresses, to make requisition upon the mayor of the city of Pittsburgh for the issue of bonds of said city, in such sums as they deem best; and it shall be the duty of the said mayor to make and execute bonds in the name of said city, to an amount not exceeding the amount of the contract price for said work, and the incidental expenses attending the same; said bonds shall be known as Penn Avenue bonds; they shall be signed by the mayor and countersigned by the controller, and sealed with the corporate seal of said city; they shall be all of the same date, and they shall be payable twelve years after date, and redeemable at any time at the option of said city; they shall bear interest at the rate of seven per centum per annum, payable semi-annually from date, principal and interest payable at the office of the treasurer of the city of Pittsburgh; the said bonds shall be free of taxation." Every street or avenue improved under the Penn Avenue Act and its supplements, was so improved by virtue of an ordinance of the city councils, directing the grading and paving thereof in accordance with the provisions of said Acts, and authorizing the election of commissioners by the owners of the abutting properties. Each bond issued by the city has a recital of the ordinance authorizing the improvement of the street or avenue for which it was issued. The contract for each improvement was made in the name of the city, and the security for the faithful performance of the work was in each instance given to the city. Here then we have the case of bonds issued in the name and

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under the corporate seal of the city, the proceeds of which went into the city treasury, and were drawn out upon orders for the payment of the debts of the city lawfully contracted in the course of its municipal improvements. That all this was done through the interposition of commissioners amounts to nothing. That such commissions created by the Legislature may lawfully bind a municipality was expressly ruled in City of Philadelphia *v.* Field (8 P. F. S. 320). But these commissions, if not created by the direct action of the city councils, were certainly raised up with their consent. We need not argue that a municipal corporation may give its bonds, or other evidence of indebtedness, for a debt lawfully contracted in the proper performance of its municipal duties. That question is settled by Commonwealth *ex rel.* Reinboth *v.* The Councils of the City of Pittsburgh (5 Wright, 278); City of Williamsport *v.* The Commonwealth *ex rel.* Bair (3 Norris, 487; 4 WEEKLY NOTES, 385).

It was urged, however, that notwithstanding the fact that the bonds were issued by the city, and upon their face pledge the faith and credit of the city for their payment, yet that the holders must look for the payment of their interest to the street assessments upon the properties abutting upon the avenues. There is nothing in the case to indicate that such was the understanding or agreement of the parties at the time the bonds were sold. On the other hand, there are persuasive reasons to show that it was not. These bonds were sold at par. The 14th section of the Act of 2d April, 1870, required that they should be sold at not less than par. That they could have been disposed of at par, or indeed for any considerable sum, had it been known that the holders were to look for payment to the municipal assessments upon abutting property, is a proposition too absurd for discussion. It is not alleged that the city at any time, or at any place, gave notice to anybody that these bonds, though issued by her over her corporate seal, were payable out of street assessments. It is true each bond contained the statement that it was issued for the improvement of a certain avenue, in pursuance of the before recited Act of 2d April, 1870. It is conceded that the bondholders are bound by the terms of that Act, for the reason that it is the authority upon which the bonds were issued. But I have looked in vain through the Act for anything to show even a glimmering of legislative intent that the bondholder should look to the street assessments for his pay. Such a provision, if apparent upon the face of the Act, must necessarily have rendered it wholly abortive. The whole plan depended upon the ability of the city to borrow the necessary amount of money. In construing this Act, therefore, we are not to assume that the Legislature intended to do that which would entirely defeat the object of the Act itself. We do not regard it however as of doubtful interpretation. It clearly makes the city responsible. By the 12th section, as well as by the express terms of the bonds themselves, the city is to pay the interest semi-annually from the date of the bonds, whereas by the 18th section the first instalments of the assessments are not payable until the first day of October succeeding the time of the assessment. By section 16 the assessment is not to be made until after the improvement is completed, and the basis for the assessment is the amount of the bonds previously sold. By section 22 it is provided that "All moneys received from assessments shall be appropriated, under direction of the Finance Committee of the Councils of the City of Pittsburgh, to the payment of the interest and the redemption of the bonds which may be issued for said improvement; if any interest shall become due on said bonds, where there is no fund from which to pay the same, the Councils of the City of Pittsburgh shall be authorized to make a temporary loan for the purpose of paying the same." Surely it was never heard that an Act of Assembly authorized the councils of a city to make a temporary loan to enable them to pay money which the city did not owe. An examination of these sections, as well as the entire scope of the Act, leads us irresistibly to the conclusion that the Legislature did not intend that the bondholders should depend for the payment of their interest upon the street assessments. Had such been the intention of the Legislature it would have been expressly so provided. Good faith to the bondholders required that they should have been told so in explicit terms.

The system of municipal assessments is not new. It has been in use for a long time, and is well understood. Streets are being constantly paved and sewers constructed, the cost of which is by authority of the Legislature assessed upon the abutting property. Yet it has never been held that the city contracting for such work can turn the contractor over to the property owners for his pay, unless he agrees to look to them for payment. The plain object of the provision in the Penn Avenue Act for the assessment of the cost of the street improvements upon the abutting properties, was to provide a fund out of which the city should be re-imbursed in whole or in part, for the outlay. The bondholders have nothing to do with it. They have no contract relation with the property owners as such, nor have they any right to enforce the payment of the assessments.

If the bonds in question are bonds of the city, then the duty of the city councils to include the interest as it accrues in the annual appropriation ordinance, and to provide for its payment by a levy of sufficient taxes, is clear. Section 3 of the Act of 6th April, 1850 (P. L. 407), makes it the

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duty of councils to assign and appropriate the revenue of said city derivable from all sources, and in case of a deficiency, preference shall be given to the payment of the interest on the funded debt of the city. The Act of April 15, 1867 (P. L. 1258), removes all limitations and restrictions contained in prior Acts of Assembly, upon the power of the city to raise money by a tax levy to pay the interest upon the city debt and for other city purposes; while the tax rate is to be adjusted so as to meet the liabilities of the city. The second section of the Act of 19th of March, 1873 (P. L. 317), provides "That the Councils of the City of Pittsburgh shall hereafter make the appropriations during the month of January or February in each and every year, in the manner prescribed by the said Act of April 6, 1850." This Act (19th of March, 1873) was after the Penn Avenue legislation, and after the issue of bonds thereunder had commenced.

A further objection was made to the bonds that they were issued in violation of Article IX. section 8, of the Constitution, limiting the debt of municipal corporations. It is a sufficient answer to this to say that the section of the Constitution referred to does not apply. It is prospective in its operation. The same remark may be made in regard to the further objection that the bonds were issued without any previous appropriation made for their payment by councils, as required by the present Constitution. It appears from the return that $2,134,600 of the bonds were issued prior to the first of January, 1874. The remainder were issued after that date. But we gather from the record that the contracts for the improvements for which the later bonds were issued were entered into prior to January 1, 1874. It was the contracts that increased the debt of the city. The issuing of bonds to raise money to pay the liabilities of the city under the contracts was but the exchanging of one form of indebtedness for another. It did not increase the debt. That the sections in the Constitution invoked by the defendants do not apply to their case we think is settled by Lehigh Iron Co. *v.* Lower Macungie Township (31 P. F. S. 42); Wattson *v.* Chester and Delaware River Railroad Company (2 Norris, 254): Indiana County *v.* Agricultural Society (4 Nor. 357; 4 WEEKLY NOTES, 481); Perkins *et al.* *v.* Slack (5 Nor. 270; 5 WEEKLY NOTES, 153).

We are all of opinion that the bonds in controversy are the bonds of the city of Pittsburgh, and a part of its funded debt; that they were issued by lawful authority, and for a sufficient consideration; and that honor, good faith, and the law of the land alike require that the city should provide for their payment.

The judgment is reversed and judgment is now entered for the relator upon the demurrer; and it is further ordered that a writ of peremptory mandamus issue to the Select and Common Councils of the City of Pittsburgh, commanding said Councils to forthwith make full and ample provision for the payment of all interest now due on said bonds, and the interest as it shall become due; and further commanding the said Councils to assign and appropriate out of the revenue of the said city, derivable from all sources, sufficient moneys for the payment of the interest of the funded debt of said city, so as aforesaid in arrear, and to become due, giving preference, if any deficiency should arise, to the payment of said interest before the payment of salaries of city officers and the ordinary current expenses of the city.

Opinion by PAXSON, J. WOODWARD, J. absent.

Concurring opinion by AGNEW, C. J. (Filed Jan. 6, 1879.) I concur in the judgment in this case. I think the entire Penn Avenue Act bears conclusive evidence of the intent of the Legislature that the money for the *immediate* construction of the avenue should be raised by loan on the faith and credit of the city, and then that the city should be reimbursed by assessments upon the property holders, payable in annual instalments. The only evidence the lender of the money has for his debt is the bond of the city, and this was to be issued by the city through her proper officers. The law is the *express* authority for the debt, and the bondholder has no other security. He has nothing to do with the assessment in any form, and nothing to do with its collection. It formed an inducement to make the loan, because it would put the city in the possession of the means of payment, but it was not made even as a collateral security in the hands of the lender himself. He cannot control it. The decision in Seely's case [was] against the legality of the assessments, on the ground that the charge per foot front was a gross and palpable violation of the taxing power, and has nothing to do with the question before us now. That pertained to the relation between the city and the property owners, this to the relation between the city and her creditors, the lenders of the money.

But the learned Judge, who delivered the opinion of this Court, refers to the Williamsport bond case, as if it had some bearing on this case, and I notice that an impression is created that it has. This *dictum* and consequent impression make it necessary that I should distinguish this case, otherwise I could not concur.

I shall not repeat what I said there, but shall merely state the point in which that case differs. There the law gave authority to issue bonds only to the sum of $200,000. The officers of the city actually issued and delivered an excess over this

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sum of $450,000 or $650,000 in all of negotiable bonds, and sold them at various rates of discount from thirteen to thirty-seven per cent. This over-issue was justified upon an *implied* power to issue them in payment of debts—a doctrine, in my judgment, founded in no authority of law, and subversive of the rights of property, and the welfare of the people. It is unfounded also in any authority derived from the people, who are represented in a *municipal* corporation, *a public body*, only to the extent that the laws creating the municipality confer power upon the officers elected to carry out the law. These laws convey the only authority of the people, whose officers are not agents, but persons elected to perform legal duties.

At the time when that decision was made, the city of Philadelphia had a floating debt exceeding eleven million dollars. If by a mere *implication* from the creation of a debt for ordinary corporate purposes, a power can be inferred to issue negotiable bonds to be sold in the market to raise money on terms determined by the city councils, I see no reason why the councils may not, under the Williamsport decision, fund the whole of the floating debt, and as that city raises less revenue than her expenditures, why this funding process may not go on forever, or, at least, until the *maximum* allowed by the new Constitution shall be reached, or it comes into conflict with some other provision. This was the latitudinarian doctrine to which I objected in the Williamsport case, and to which I would again object if it were in this case.

This brings out, as fully as I think it necessary in a short opinion, the difference between the two cases. Here, Pittsburgh, by the Penn Avenue Act, is *expressly* authorized and commanded to issue her bonds for the money to improve the avenue. There, Williamsport had authority to issue only $200,000 in city bonds, and an over-issue of $450,000 (it might have been so many millions so far as the question of power is involved) was defended on the ground of an implied authority. The difference is plain. Hence, I concur here, because of the express authority of law; while I dissented there, because of the want of this authority.

Oct. and Nov. '78, 156. Oct. 22, 1878.

Wilcox v. Payne et ux.

Compulsory arbitration—Act of March 23, 1877, § 1, construed—Service of copy containing names of arbitrators and time and place of meeting—What is a legal service.

The service of a certified copy of the record containing the names of the arbitrators and the time and place of meeting required in cases of compulsory arbitration may, under the provisions of the Act of March 23, 1877, § 1 (P. L. 28), be made upon *either* the opposite party *personally, or* his agent or attorney; if he have no agent or attorney, the service may be in like manner as of a summons in personal actions.

Irregularities in appointing arbitrators or in their proceedings, when apparent on the record, may be corrected by writ of error, but those which are made apparent by extrinsic proof can be corrected only by the Court below.

While the proceedings remain in Court, *i. e.*, until the arbitrators are appointed, it must appear by the record that everything is regular, but after they are appointed the proceedings are out of Court, and need not be reduced to writing.

In the Supreme Court every presumption will be made in favor of the award unless flagrant error appears in the record.

Error to the Common Pleas of Erie County.

Ejectment, by John S. Wilcox against Morris Payne and Harriet Payne, his wife.

The defendants having appeared by attorney, the plaintiff entered a rule to arbitrate, in pursuance of which the parties by their respective attorneys chose arbitrators, and appointed a time and place of meeting, on the certificate of which was made the following endorsement:—

"Served a true copy of this rule on Allen & Rosenweig, defendants' attorneys, also on Benson & Brainerd, plaintiff's attorneys, by handing S. M. Brainerd a true copy of rule."

At the time and place of meeting, the arbitrators, being all present, "after having been sworn, heard the proofs and allegations of the plaintiff, the defendants not appearing, and now the arbitrators do award for the plaintiff the land described in the writ, or upon defendants' paying to the plaintiff the sum of $196.87 and costs of suit within ten days from this date, then the defendants to have and to hold said land." Thirty-six days after this award was filed, and after a writ of possession had issued, the defendants' moved the Court to set aside the award and all proceedings thereunder, on the grounds: (1) That the rule fixing time and place of hearing was not served upon defendants, they residing in the county. (2) The rule fixing time and place of hearing was not served upon any person. (3) No proof before arbitrators of service.

The Court below (GALBRAITH, P. J.) set aside the award, delivering the following opinion: "The Act of March 23d. 1877, made no change in the existing law regulating the mode of service of notice of time and place of meeting of arbitrators with the names of the arbitrators, except that in the case of the absence of a party resident from the county, the service can be made in the manner pointed out for the service of a summons. It was not meant that in case of a party resident in the county service on his attorney would be sufficient, although a first reading of

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the Act of 1877 gives that impression. Taking the admitted rules of construction of statutes referred to by Judge WILLIAMS in the case of Navel *v.* Elliot (5 WEEKLY NOTES, 35), it seems clear that this is the proper view, and that service on the attorney is not sufficient. It follows that the choosing of arbitrators by the attorneys, and the fixing of the time and place of meeting, etc., is not a waiver of further service. The parties were still entitled to notice, either personal or in some of the modes required for service of summons."

The plaintiff thereupon took this writ, assigning the action of the Court for error.

Benson (*Brainerd* with him) for plaintiff in error.

The Act of March 23, 1877 (P. L. 28), supplies and repeals the 16th section of the Act of June 16, 1836 (P. L. 72), and authorizes service of the certified copy of the record containing the names of the arbitrators and the time and place of meeting upon the attorney of the opposite party. Its language directing upon whom service shall be made is identical with that of the 12th section of the Act of 1836, which provides for service of the notice of entering the rule to arbitrate, and that it authorized service *upon the attorney* of the opposite party, has never been doubted.

It often happened that a party, though residing in the county, was absent or difficult to find. The object of the Act of 1877 was to remedy this by allowing service upon the attorney of record in such cases.

Rosenweig (*Allen* with him), contra.

The Act of 1877 did not repeal the Act of 1836 as to service. Its sole intent was to correct a defect in the Act of 1836 by permitting service upon a party in like manner as of a summons when a personal service cannot be had upon him.

Navel *v.* Elliot, 5 WEEKLY NOTES, 35.

The return of service was defective. Upon whom and how was the service made? The return must set out the manner of service (Weaver *v.* Springer, 2 Miles, 42), and that the copy served was attested (Bank *v.* Perdriaux, Brightly, 67).

The award of the arbitrators was irregular. They could not hear the proofs and allegations of the plaintiff until due proof of service of the certified copy.

Act of June 16, 1836, *supra.*

Oct. 28, 1878. THE COURT. The provision in section 16 of the Act of 1836 (P. L. 715), directing service of the prescribed copy "on the opposite party, if he reside within the city or county, and if not, upon his agent or attorney," was so plain that it needed no construction. Equally clear is the Act of March 23, 1877 (P. L. 28), which enacts that the said copy "shall be served upon the opposite party, his agent or attorney; but if said party have no agent or attorney, then it shall be lawful to serve said certified copy upon the opposite party in the same manner as a writ of summons." In this there is no room for interpretation, for there is no "obscurity, ambiguity, or other defect of expression." Nor does the sense of the law, as it appears in the words, lead to false consequences or unjust decisions. What evil can result from service as directed by the later Act? Like directions for service of notices are not infrequent in statutes and rules of practice, and have always been understood in one way, namely, that it may be made upon either the party or his agent or attorney. Section 12, Act of 1836 (Purdon, 82, pl. 39), directing upon whom the rule for arbitration may be served, works no hardship or injustice. To serve the certified copy as required by the 16th section of that Act was often difficult and frequently imposed useless trouble and expense upon the party who entered the rule. The Act of 1877 gives relief. It makes full provision for service of the certified copy, which may be on the party, or his agent, or his attorney; and if he have no agent or attorney, the service may be in like manner as of a summons. How can its terms be reconciled with the 16th section of the Act of 1836, which directs service upon the party "if he resides within the city or county, and, if not, upon his agent or attorney?" Interpolation of these words into the Act of 1877 leaves the law precisely as it was before, except only this addition, namely, service of the copy may be made on a party non-resident and who has no agent or attorney, in the same manner as a writ of summons. This was not the sole intendment of the Act. We are of opinion that service was good if made on the defendant's attorney, and that the first exception should have been overruled.

The second and third exceptions aver that the certified copy was not served, and that proof of service was not made before the arbitrators. These are exclusively for the Court below, unless the irregularities appear on the record. Irregularities in appointing arbitrators or in their proceedings, when apparent on the record, may be corrected by writ of error, but those which are made so by extrinsic proof can be corrected only by the Court below. (Taggart *v.* McGinn, 2 Har. 155; McEntire *v.* Elduff, 1 S. & R. 19; Bemus *v.* Clark, 5 Casey, 251.) In this Court, and so it ought to be elsewhere, "every presumption is made in favor of the award, unless flagrant error appears on the record." (Finch *v.* Lamberton, 12 P. F. Smith, 370.) While the proceedings remain in Court, that is to say, until the arbitrators are appointed, it must appear by the record that everything is regular, but after

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they are appointed the proceedings are out of Court, and need not be reduced to writing. (Oppenheimer *v.* Comly, 3 S. & R. 3.)

This record on its face does not show that due proof of service of the certified copy was made. The indorsement is manifestly defective in showing a legal service. Extrinsic proof might have been made of a legal service and due proof thereof before the arbitrators. What admissions of parties or testimony were before the Court we have no means of ascertaining or considering. The opinion of the learned Judge is persuasive that he acted solely upon the first exception; but the other exceptions are on the record, and we cannot say there was error in sustaining them and setting aside the award.

Judgment affirmed.

Opinion by TRUNKEY, J. WOODWARD, J., absent.

Common Pleas—Law.

C. P. No. 3. June 2, 1879.

Adams Express Company v. Lyons.

New trial—When not granted—Feigned issue—Retention of possession of personal property by vendor—Gas fixtures—When severance necessary—Fraud.

Rule for a new trial.

Feigned issue to determine the ownership of certain gas fixtures, consisting of chandeliers, side brackets, and pendants. On the trial, before FINLETTER, J., the following facts were shown: In 1866 the Express Company leased to one Davis a certain hotel property, of which they were the owners. Davis took possession as tenant under the lease, and remained so until 1876, when they sold the house to him for $350,000, payable partly in cash and partly in bonds and mortgages of Davis. No mention was made of the gas fixtures, but Davis testified that he supposed he was buying every thing in the house. Davis afterwards became insolvent, and in August, 1877, a creditor, Stockton, sold all the furniture under an execution. Default being made in the payment of the mortgages, they were sued out, and the property advertised for sale. Near the time of the sale, Davis being anxious lest he should be held liable for any deficiency on his bonds, and the Express Company wishing to obtain immediate possession of the hotel, together with everything necessary to continue the business, in case they should become the purchasers, verbally agreed, through their counsel, that Davis should be released from all liability on his bond, in consideration of his surrendering to the Express Company everything on the premises not sold by Stockton, and assign the leases of the stores under the house, and deliver immediate possession. This agreement, according to the uncontradicted testimony of both Davis and his counsel, included the gas fixtures. The property was purchased by the Express Company, and the deficiency for which Davis would have been liable, in the absence of the above agreement, amounted to $30,000. Davis remained in possession as tenant at will until January 1, 1878, when the property was leased to him. In April, 1878, the defendant recovered judgment against Davis, and issued execution.

Defendant presented no testimony.

The Court, having charged the jury that, if they believed "these gas fixtures were in the hotel, and the evidence is that they were, they need not have been specifically mentioned, and they passed to the plaintiffs under the agreement," concluded as follows: "The next question is, was the property in question delivered to the plaintiffs—did they take possession of it? The law says that in sales of ordinary personal property there must be an actual delivery of the property. If it remains in the seller's hands, it is a fraud. But it is not necessary that there should be an actual delivery of all species of personal property. It need be only such delivery as the nature of the property sold will permit. The law does not require the performance of idle and useless ceremonies. You must consider all the circumstances of each case. There are a number of cases in which there cannot be actual delivery without a severance from the freehold, such as steamboilers, etc.; and in these cases the law does not require it. The idea of severance may be precluded from the nature of things, from the manner of use, from their connection to the house. If these fixtures come within the class of cases in which it has been held that actual delivery is not required, then the plaintiffs have done all that was necessary. You will take into consideration that the premises were used as a hotel; that the plaintiffs had become the owners of the hotel by the sheriff's sale; that they might not have been able to remove the fixtures without damage both to the business of the house and to the house itself; and, considering all the circumstances, it will be for you to say whether these gas fixtures attached to the house come within the class of cases requiring actual delivery and severance. If it was the duty of the parties to actually deliver them, then you will find for the defendant; but if the delivery made was all that was required by

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the nature of the property, the plaintiffs have done everything necessary, and your verdict will be for them."

The verdict was in favor of the defendant.

The reasons assigned for a new trial were, that the verdict was against the evidence, as also against the charge of the Court; and, lastly, because the learned Judge left it to the jury to determine "whether the gas fixtures, which were attached to the freehold, came within the class of cases requiring actual delivery and severance from the house."

Angelo T. Freedley (with him *Wm. Henry Rawle*), for the rule.

The effect of the verdict being to impute an intent to defraud, and this without any evidence to sustain it, is a sufficient reason for a new trial.

Levingsworth *v.* Fox, 2 Bay, 520.
Hilliard on New Trials, 461, § 467.

When the facts are undisputed, and no question of intention or *bona fides* is left to the jury, the duty of the parties, or the sufficiency of delivery of chattels such as these, is a question for the Court, and the jury simply determine the credibility of witnesses.

Benford *v.* Schell, 5 Sm. 393.
Haynes *v.* Hunsicker, 2 Cas. 59.
Milne *v.* Henry, 4 Wr. 357.
Barr *v.* Rietz, 3 Sm. 256.
McMarlan *v.* English, 24 Sm. 296.
Funk *v.* Staats, 24 Ill. 632.

The province of a jury is to determine *disputed* facts; and where the evidence is uncontradicted, in Pennsylvania the Court is, *in all cases*, to pronounce upon the sufficiency of the motives and reasons for non-delivery.

Notes to Twyne's Case, 1 Smith's Lead. Cas. 53.

The sole question is, Has there been a delivery sufficient to meet the requirements of the law? This is not a question of fact.

Fixtures and chattels real are not within the rule in Twyne's Case.

Strauss *v.* Day, 3 Phila. 137.
Knight *v.* Bank, 3 Id. 138.
Williams *v.* Downing, 6 Har. 65.
1 Smith's Lead. Cas. 79.

And with respect to chattels which are not fixtures, but are attached to realty, and can only be used in connection with real estate, it has always been held that possession of the real estate is possession and delivery of such chattels.

Steward *v.* Lombe, 1 Brod. & Bing. 506.
Caldwell *v.* Gainer, 31 Mo. 131.
Sheldon *v.* Sharpless, 2 WEEKLY NOTES, 311.
Craig's Appeal, 27 Sm. 448.
Packard *v.* Dunsmore, 11 Cushing, 283.
Vining *v.* Gilbreth, 39 Maine, 496.

When real estate of a defendant has been sold, it violates no legal policy for such defendant to sell for a valuable consideration articles indispensable to the enjoyment of the realty, and possession of the house is possession of the articles. The reason is that no fraud can be practised by the tenant, for there is no reputed ownership of such chattels—the possession of the tenant being the possession of the landlord. Any other rule would prevent a lease of furnished houses, or would render the property of the landlord liable for a tenant's debts.

Sheldon *v.* Sharpless, *supra.*
McVicker *v.* May, 3 Barr, 224.
Fry *v.* Miller, 9 Wr. 441.
Craig's Appeal, 27 Sm. 448.

T. J. Diehl (with him *Joseph C. Ferguson*), contra.

C. A. V.

September 22, 1879. Rule discharged.

Orphans' Court.

June 18, 1879.

Dewald's Estate.

Decedents' estates—Promise in writing to pay one city bond of $1500 one year after decedent's death not a testamentary paper, but a non-negotiable promissory note—Consideration—Words "value received" import consideration—Measure of damages—Commissions.

Sur exceptions to adjudication.

At the audit of the account of the executor of Frederick Dewald, deceased, the following facts appeared: The decedent died June 28, 1875, leaving a will, whereby after making certain bequests, he devised the residue of his estate to the German Reformed Church. A large proportion of the residuary estate, amounting to $7600, consisted of certificates of indebtedness of the German Reformed Church, which the latter was allowed to retain on account of their legacy. The accountant claimed a commission of five per cent. on the whole amount of the estate, which the Auditing Judge (HANNA, P. J.) reduced to two and a half per cent. To this finding the accountant excepted.

Charles Krupp also presented a claim against the estate, based upon the following instrument:—

"$1500. Philadelphia, February 18, 1874.

One year after my death after date I promise to pay to the order of Charles Krupp one city bond of fifteen hundred dollars without defalcation value received without interest. FREDERICK DEWALD.

Witness present, WM. P. BECKER."

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The execution of this instrument was proved by the subscribing witness, who also testified that decedent had induced Krupp and his wife to come on from New York and keep house for him, and that decedent had executed a lease to Krupp of his house, and entered into an agreement with him by which decedent was to pay ten dollars a week board, and furnish the fuel. Shortly before the execution of the note in controversy, the decedent grew tired of this arrangement, and consulted witness as to recovering possession of his property from Krupp, who refused to leave, but shortly after the execution of the paper, surrendered possession of the house. There was no direct evidence showing consideration for the note. This claim was allowed by the auditing Judge, and exceptions were thereupon filed by the legatees under the will.

Thorn and *Gormly*, for exceptant, contended that there was no evidence of consideration for the note, and that the circumstances raised a presumption of fraud.

W. R. Fisher, contra.

The fact that the note is made payable after the maker's death does not of itself destroy its character as negotiable paper, nor render it a testamentary instrument, and therefore if it were payable in money it would be subject to all the incidents of a negotiable promissory note, and would beyond all controversy import upon its face a valuable consideration throwing upon the promissor or his representatives the burden of overcoming the presumption.

1 Daniel on Negotiable Instruments, p. 37, § 46.
Bristol *v.* Warner, 19 Conn. R. 7.
Com. *v.* Thornton, 46 Ala. R. 587.
Cooke *v.* Colehan, 2 Strange's R. 1217.
Hyatt *v.* Taylor, 42 N. Y. R. 262.
Ernst *v.* Steckman, 24 Sm. 13.
Zimmerman *v.* Anderson, 17 Sm. 422-423.
Chitty on Bills, p. 155.
Story on Promissory Notes, p. 38, § 27.
Shields *v.* Executors of Mifflin, 3 Yeates, 389.

Although the note is made payable in a medium other than money, whereby its negotiability is destroyed, its being expressed to be "for value received," renders it *prima facie* evidence of the fact and the necessity of showing want of consideration is devolved upon the promissor or his representatives.

1 Daniel on Negotiable Instruments, pp. 127-129, §§ 161 and 163.
1 Parsons on Notes and Bills, p. 228.
Averett's Adm'r *v.* Booker, 15 Grattan's R. 163.
Walrad *v.* Petrie, 4 Wend. 575.
Bourne *v.* Ward, 51 Me. R. 191.
Jerome *v.* Whitney, 7 Johns. R. 321.
Lansing *v.* McKillip, 3 Caines, 287.
1 Story on Contracts, § 546.
Whitney *v.* Stearns, 16 Me. R. 394.
2 Greenleaf on Evidence, § 105.
Fisher *v.* Leslie, 1 Esp. 426.
Holliday *v.* Atkinson, 11 Eng. C. L. R. 558.
Toner *v.* Taggert, 5 Binney, 490.
Roberts *v.* Beatty, 2 Pen. & Watts, 67.
Sidle *v.* Anderson, 9 Wr. 467.

The evidence adduced by the heirs opposing the payment of the claim founded upon this note shows that there was in fact such a consideration, and without more would be sufficient to support the promise made to claimant by the decedent—"a spark of benefit or accommodation is sufficient."

Wainwright *v.* Crawford, 4 D. 226.
Mercer *v.* Lancaster, 5 Barr, 162.
Hind *v.* Holdship, 2 Watts, 104.
Brown *v.* Sloan, 6 Watts, 421.
Rinehart *v.* Olwine, 5 W. & S. 163.
McCulloch *v.* Cowher, Ib. 429.
Chamberlain *v.* McClurg, 8 W. & S. 37.

The instrument upon which the claim is based showing upon its face that the consideration supporting the promise of decedent was executed at the time the promise was made, the claimant is entitled to the highest value of the bond called for at any time between the maturing of the note and the allowance of the claim.

Shiperd *v.* White, 3 Cowen, 32.
Clark *v.* Penney, 7 Cowen, 681.
Bank of Montgomery *v.* Reese, 2 Casey, 143.
Musgrave *v.* Beckendorff, 3 Smith, 310.
Reitenbaugh *v.* Ludewick, 7 C. 132.
Wilson *v.* Whitaker, 13 Wright, 117.

This case is distinguishable from—

Huntingdon & B. T. R. R. Co. *v.* English, 5 WEEKLY NOTES, 354.
North *v.* Phillips, 7 Id. 151, and kindred cases.

July 5, 1879. THE COURT. The authorities cited in the adjudication, to which many others might be added, fully establish the validity of the instrument given by the testator to Chas. Krupp, and show that it is not rendered testamentary by the mere fact that it was made payable one year after his death. It is true it was not negotiable, but the admission contained in it, that it was for value received, was sufficient to throw the burden of proving the want of consideration upon the estate, and the adjudication states that no evidence to this effect was given. Apart from this, however, we think it may fairly be inferred from the testimony, that it was given in consideration of the surrender of the premises demised by the testator to the claimant, and of the abandonment of the contract under which the latter had been induced to leave the city of New York, and, with his wife, come to Philadelphia to keep house for the testator and his wife.

The contract, however, was not one as to which specific performance could be enforced. It was broken at the expiration of a year (June 26, 1876), from the testator's death; and, there being no fraud or relation of trust, the measure of liability was the value at that time of the security promised to be then delivered with interest

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to date of adjudication. (See Huntingdon R. R. *v.* English, 5 Norris, 247; North *v.* Phillips, 7 WEEKLY NOTES, 151.)

It was admitted at the argument that this value was 108 per cent. Such being the case the sum awarded to the claimant should be as follows:—

$1500 City 6s at 108.	$1620 00
Interest from June 26, 1876, to May 30, 1879, 2 years, 11 months, 4 days . . .	284 58
Amount due May 30, 1879 . . .	$1904 58

With regard to the exceptions filed by the accountant, it is clear that he has no right to complain so far as concerns the reduction of commissions on the certificates of indebtedness of the German Reformed Church. That church was the residuary legatee, and by consent of all parties was, as such, allowed to retain the entire amount of the indebtedness shown by the certificates. The trouble involved in this transaction was certainly not inadequately compensated by an allowance of two and a-half per cent. on the sum so distributed ($7600). (McCauseland's Appeal, 2 Wright, 466; Montgomery's Appeal, 5 Norris, 234.)

But beyond this, there seems to be no reason for reduction. It is true that at the time of the adjudication the securities remained in the hands of the accountant, unconverted, but the conversion of all of them, except the certificates of indebtedness of the German Reformed Church, is required for the purpose of settlement and distribution, all of the legacies being pecuniary, and the claim of Chas. Krupp being one that is to be compensated in damages and not paid in kind. We think that upon the amount produced by a sale of the securities, so required to be converted, the accountant is entitled to a commission of five per cent.

As the account cannot be fully settled, or the amount to be paid to the residuary legatee ascertained, until a conversion of the securities has actually taken place, it must be recommitted for further adjudication.

The exceptions, so far as they are not sustained by this opinion, are dismissed, and the account is recommitted to the auditing Judge.

Opinion by PENROSE, J.

May, 1879.

Watson's Estate.

Orphans' Court practice—Appointment of examiner by Court to take testimony as to disputed facts before Auditing Judge—Constitutionality of such appointment—Article V, section 2 of the Constitution—Practice.

Sur petition to vacate order of reference, and answer.

The petition averred that George W. Watson died in 1867, intestate, leaving a widow and three children; that letters of administration were granted to the widow, Amanda F. Watson, in December, 1868, but that no account was filed until June, 1876, she in the mean time having married one Martin. In September, 1876, the account having come before the Court for audit, one of the children, Frank M. Watson, objected to certain credits claimed by accountant, when the accountant submitted to the Court a paper signed by the said Frank, in which he admitted the entire account as stated to be correct, and desired the Court to confirm it. Frank then set up that his signature was obtained while he was intoxicated, and not fully capable of understanding the effect of what he did. The Court referred the matter to an examiner to take testimony, and report the facts to the Court.

This reference was never carried out, owing to the extreme poverty of Frank. He having died since the order of reference, his widow and administratrix presented this petition to vacate the said order of reference, and to proceed with the audit of the account of the administrator of George W. Watson, deceased.

The answer admitted the facts as set forth in the petition, but submitted that the proper course for the petitioner to follow was to withdraw the objections to the account, and abide by the writing admitting the correctness of the account made by the said Frank M. Watson.

Byerly Hart, for the petitioner.

This reference should be vacated, as being unconstitutional; for all the audits of accounts by this Court must be "without expense to the parties."

Const. Penna., Art. V., Sec. 22.

[HANNA, P. J. That is in relation to the *audits* themselves, but here the expense was incurred by your client attempting to set aside his own act.]

He offered to prove, at the audit, that he never knowingly or willingly signed the agreement.

Sellers, contra.

May 31, 1879. THE COURT granted the petition.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, OCT. 30, 1879.* [No. 27.

Supreme Court.

Jan. '79, 210. March 28, 1879.

Merriman v. Moore et al.

Mortgage—"Under and subject" clause—Personal liability of grantee to mortgagee, what sufficient to create—Parol agreement of grantee with grantor to that effect—What is sufficient consideration for such an agreement—Suit by party on promise for his benefit made to another—Act of June 12, 1878 (P. L. 205).

Though a conveyance of land "under and subject" to the payment of a mortgage, does not of itself create any personal liability on the part of the grantee directly to the mortgagee, yet such grantee may, by contract with his grantor, make himself directly liable to the mortgagee for the amount of the mortgage, even though his grantor was not so liable.

A. took a conveyance of land from B. "under and subject" to the payment of a mortgage held by C.; the deed to B. contained no "under and subject" clause; in a suit by C. against A. to recover the amount of the mortgage, the plaintiff offered to show that at the time A. took the land from B., he expressly agreed that he would assume payment of the mortgage, and that said mortgage formed part of the consideration-money:

Held (reversing the judgment of the Court below), that such evidence was admissible.

Held further, that although B., the grantor, was not liable for the amount of the mortgage, yet such contract by A. was not without consideration; the consideration was the price of the land.

Per PAXSON, J. It is a rudimentary principle, that a party may sue on a promise made on sufficient consideration for his use and benefit, though it be made to another and not himself.

The Act of June 12, 1878 (P. L. 205), was only intended to apply to future cases; it is not retrospective.

Error to the Common Pleas of Montgomery County.

Assumpsit, by Merriman against Moore *et al.*, executors, etc., of Kennedy and Heebner, to recover the amount of a mortgage held by plaintiff on land taken by the defendants under and subject to the payment of said mortgage, the lien of which had been discharged by a sheriff's sale under a prior encumbrance.

This was, in the Court below, an appeal by defendants from an award of arbitrators. The narr. alleged that on Nov. 2, 1875, one E. R. Cochran and wife conveyed to defendants a lot of ground "under and subject" to the payment of a mortgage of $800 held by plaintiff; and that the defendants, in consideration of the lot of ground, promised the said Cochran and wife to pay to plaintiff the said mortgage; there was also a count for money had and received. Plea, *non assumpsit.*

On the trial, before Ross, P. J., the plaintiff offered to prove by R. W. Hammell that he was the broker who effected the sale to defendants, and that it was expressly agreed by the parties to defendants' deed that defendants did assume to pay said mortgage, and a prior one under which the premises had subsequently been sold by the sheriff; and that the mortgage formed part of the consideration-money. Objected to; objection sustained; exception.

Under the direction of the Court the jury then found a special verdict, setting forth the following facts: E. R. Cochran and wife conveyed to the defendants on Nov. 2, 1875, certain lots in the city of Philadelphia for the consideration of $9650 "under and subject" [as to one of the lots] to the payment of two mortgages, one of $800, executed by one Milner, Cochran's grantor, and a prior one of $2550, executed by Milner's grantor. The deed to Cochran contained no under and subject clause as to the $800 mortgage; the latter mortgage came by assignment into the hands of the plaintiff. Writs of *scire facias* were issued on both mortgages to March Term, 1877; the writ on the subsequent mortgage of $800 was stayed by the sheriff, and the premises sold by him for a sum insufficient to more than cover the first mortgage and costs. The amount due the plaintiff is $998. If the Court be of opinion that the plaintiff is entitled to recover, we find in his favor the sum of $998 as damages; if the Court be of opinion that the plaintiff cannot maintain his action, then we find for the defendants.

The Court entered judgment for the defendants on the special verdict. Plaintiff took this writ, assigning for error the ruling on evidence above given, and the entry of judgment for defendant on the special verdict.

J. W. Hunsicker (with him *C. Hunsicker*), for plaintiff in error.

The offer of evidence made below was to prove that the defendants expressly agreed to pay this mortgage, and that said mortgage formed part of the consideration-money; this evidence was clearly admissible, and was sufficient to establish the defendants' liability.

Taylor *v.* Preston, 29 Sm. 441.
Moore's Appeal, 6 WEEKLY NOTES, 474.
Samuel *v.* Peyton, Ibid. 476.
Thomas *v.* Wiltbank, Ibid. 477.

The Act of June 12, 1878, was only intended to apply to future cases; otherwise, it would be

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unconstitutional, as it not only affects our remedy, but strikes down the contract itself.

McCabe *v.* Emerson, 6 Harris, 111.

Penrose *v.* Erie Canal Co., 6 Sm. 46.

J. Boyd and *B. E. Chain* (with them *C. H. Stinson*), for defendants in error.

The plaintiff's offer was irrelevant, as it did not propose to show any liability on Cochran's part, from which defendants agreed to indemnify him. It was, besides, at most an endeavor to show that we agreed without consideration to pay another man's debt; and, therefore, would not be admissible without a writing.

The Act of June 12, 1878, does not impair the obligation of any contract, but merely regulates the measure of proof; it is merely a regulation as to what shall be sufficient evidence.

June 23, 1879. THE COURT. In recent cases some attempts have been made to define with as much precision as possible the mutual and dependent rights and duties of mortgagees, mortgagors, the grantees of mortgagors, and the alienees of such grantees. (1) A conveyance of land "under and subject" to a mortgage executed by the grantor, creates as between themselves a covenant of indemnity to the grantor on the part of the grantee. (2) If the grantee alien by a deed containing the same "under and subject" clause, without more, the alienee does not assume a liability to the mortgagee, or undertake to discharge the grantee's covenant of indemnity. (3) It is competent, however, for the mortgagee to show by adequate evidence that the alienee has taken upon himself not only the grantor's duty to indemnify the mortgagor, but a personal obligation to pay the mortgage debt. (4) In all cases arising before the Act of 12th of June, 1878, this adequate evidence may consist of stipulations in the deed, of written articles outside its terms, or of a verbal cotemporaneous agreement between the parties. And the fact of such an undertaking may be implied from circumstances attending and connected with the conveyance of the land. (Moore's Appeal, Samuel *v.* Peyton, and Thomas *v.* Wiltbank, 6 WEEKLY NOTES, 474, 476, and 477.)

Is the present case within those principles? It is an action of assumpsit brought by the assignee of a mortgagee against a grantee to enforce a promise to the grantor to pay off an outstanding mortgage, for which the grantor was not himself personally bound, made upon no other consideration than the value of the land conveyed. At the trial an attempt was made to fasten a personal liability upon Cochran's grantees for the amount of the $800 mortgage to Clay. The plaintiff proposed to prove by Richard W. Hammell that "he was the broker who effected the sale to Heebner and Kennedy, and that it was expressly agreed between the parties to this deed that they were to assume the payment of both the mortgages named in the deed, and that said mortgages formed part of the consideration." The testimony was rejected, and afterwards upon the facts found by the special verdict, a judgment was entered for the defendants.

Was Cochran in a position to enable him to make a contract like that alleged so that it may enure to the benefit of the plaintiff? The Court below held that he was not, for the reason that he was bound by no personal obligation to Milner, for he had received a general conveyance of encumbered property without any stipulation that it should be subject to the encumbrances. In other words, that because Cochran was under no obligation or duty to pay the encumbrances, his grantees, who had bought "under and subject" to such encumbrances, and had expressly agreed to pay them as part of the purchase-money, were not liable upon such promise, because without consideration. This was clearly error. The consideration was the price of the land. It was nothing to Cochran's vendees what the former did with the purchase-money. He saw proper to apply a portion of it to the payment of the mortgages which bound the land conveyed, although they imposed no personal liability upon him. A vendor may direct how the purchase-money shall be paid. He may reserve it to himself, donate it to a public charity, or may make such other disposition of it as may best meet his views, and if his vendee agrees to pay it according to such directions, he cannot set up as a defence that his vendor was under no duty to apply it in such manner. The difficulty in the way of the defendants is that the evidence rejected would go to show that they have not paid the purchase-money. The right of the plaintiff to recover does not depend upon privity of contract. It is a rudimental principle, that a party may sue on a promise made on sufficient consideration for his use and benefit, though it be made to another and not himself. (Hoff's Appeal, 12 Harris, 200; Townsend *v.* Long, 27 P. F. S. 143; Justice *v.* Tallman, 5 WEEKLY NOTES, 90.)

The Court below rejected the evidence offered by the plaintiff for the further reason that it came within the Act of the 12th of June, 1878 (P. L. 205). There is nothing upon the face of the Act to lead to the conclusion that the Legislature intended it to be retrospective. It speaks in the future tense throughout, and evidently means only to apply to future cases. In this respect it closely resembles the 4th section of the Act of 2d April, 1856 (Purdon, 724), which was held to be prospective in Lingenfelter *v.* Ritchey (8 P. F. S. 485.)

Judgment reversed and a *venire facias de novo* awarded.

Opinion by PAXSON, J. MERCUR and GORDON, JJ., dissent.

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Jan. '78, 166. Jan. 14, 1879.

West's Appeal.

Mortgage—Satisfaction on record—When no conclusive as between the parties—Satisfaction under mistake of fact.

The satisfaction of a mortgage on the record may be shown to have been entered by mistake, and in that event is not conclusive as between the parties to the transaction.

A mortgagee, who held notes of the vendee of the mortgaged premises, which were secured by the mortgage, under the mistaken supposition that all but one of the notes had been paid, satisfied the mortgage of record, and took other security for the remaining note. There was a second note still unpaid, of which the mortgagee was not aware. On the following day the debtor made an assignment for the benefit of creditors. The property having been sold under a judgment for arrears of ground-rent, the surplus of the purchase-money was awarded to the mortgagee to the amount of the note still due.

Appeal from the Court of Common Pleas No. 4, of Philadelphia County.

The facts of the case as found by the auditor appointed to distribute a fund produced by a sheriff's sale of real estate, were as follows: On November 6, 1876, a wharf property on the river Schuylkill, the title to which was in the Girard Tube Works and Iron Company, was sold under a judgment for arrears of ground-rent; the balance of the purchase-money, amounting to $3607.70, remained in the hands of the sheriff. The fund was claimed by the Farmers' National Bank of Reading, and also by Harry F. West, assignee of the Girard Tube Works and Iron Co.

On December 31st, 1874, Chas. T. Murphy, treasurer of the Girard Tube Works, in whose name the title to the property stood, mortgaged the same to the company for the sum of $17,000. The mortgage was assigned January 2, 1875, to The Farmers' National Bank of Reading. The mortgage was held under a written agreement to secure certain notes of the Girard Tube Works, and "any renewals of the same." Immediately after the creation of the mortgage, Murphy conveyed the title to the wharf property to the Girard Tube Works. The notes were renewed and paid from time to time, and it appeared that the renewal notes were always sent several days in anticipation of the maturity of the originals. There were three notes amounting to $5156.95, due March 3, 1875, which were renewed by one note for the aggregate amount at four months. On April 15 following, the Girard Tube Works wrote as follows: "The two notes of ours maturing on the 21st and 27th inst., were included in Mr. Norris's statement for renewal. We are advised you have sent them forward for collection. Enclosed we hand you two notes of Geary, Tilton & Colwell, for $2718.75 and $2371.69 respectively, which, if you prefer to our paper, we ask you to discount, and apply proceeds to payment of our notes." On April 19th the bank wrote in reply, "Yours 15th, with two inclosures addressed to Mr. Eckert for discount, has been received. I send inclosed statement, showing you are short in the transaction $74.42, for which send us your check." The following day the Girard Company acknowledged receipt of this letter, and inclosed a check. At this point of time there were due the note of the company for $5156.95, and the two notes of Geary, Tilton & Colwell, of which that for $2718.75 was paid on June 27. On June 9th the Girard Company wrote that they desired to have the wharf property released from the mortgage. The negotiations terminated on July 3d, in an interview between Eckert, President of the bank, Murphy, treasurer of the Girard Co., and Norris, attorney for the bank. Before leaving Reading for Philadelphia, the place of interview, Eckert received from one of the clerks of the bank a statement of the account with the bank, showing only the note of $5156.95 due by the Girard Co. Eckert swore that he did not then know of the existence of the Tilton, Geary & Colwell note for $2371.69, which was still unpaid. The result of the interview was that Murphy gave to Eckert two notes of the Pittsburgh Bolt Company, with the Girard Co.'s indorsement, in exchange for the $5156.95, the bank paying a small difference in cash, and receiving as security a mortgage on another property for $4000. Eckert then satisfied on the record the mortgage for $17,000. On the following day the Girard Co. failed, and made an assignment to the appellant. The auditor found that the transaction on the part of all the parties to the interview on July 3d, "proceeded upon the declaration and the assumption that but one note of the Girard Company was still held by the bank." He further reported as follows: "It is impossible for the auditor, in the view that he takes of the evidence, to conclude otherwise than that the mortgage of the bank was surrendered and satisfied by its chief officer through mistake and oversight caused by the misinformation of the clerk and the conduct of Mr. Murphy. It is not pretended by any one that he knowingly released, or intended to release, a first class security, with knowledge of the note in dispute being in existence, without an equivalent. He distinctly swears he knew of but one note due, and that he would not have released the security for that one, except getting, as he thought, nearly an equal one in the $4000 mortgage. Even Charles T. Murphy does not testify that the other note was at all spoken of or considered at the interview, or that it was regarded by the parties as having been taken out of the protec-

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tion of the $17,000 mortgage. The extent of his claim is that because the bank took and discounted the Geary, Tilton & Colwell notes, shifting the Girard Company's debtor's place from maker to that of indorser, therefore there was no indebtedness to the bank on that account. He did not swear that the bank held no other liability of the company, only that they held none of the company's paper for this amount except their indorsement. He says he knew of this indorsement at the settlement, but considered that the Girard Company was not liable because the Bolt Company was then good, and that while, as every one concedes, the unpaid note was not one of the notes (originally) secured by the mortgage, he goes the length of swearing that neither was it taken in lieu of one secured thereby. That is not a renewal, because he says, *arguendo*, the proceeds of the secured notes, when discounted, took the place of the original notes, and were placed to their credit. He does not aver any parol agreement to release the security and accept the new notes, nor does he pretend that the credit and standing of the new names of Geary, Tilton & Colwell were known to the bank, or that they acted upon it."

Upon the law of the case, the auditor reported as follows:—

"(1) First, then, as to the effect of the entry of satisfaction of the mortgage: If this question arose between parties strangers to the transaction—if, in other words, the satisfaction was sought to be invalidated, and the mortgage revived to the prejudice of an innocent purchaser for value without notice—there would be little difficulty in disposing of the attempt to do so manifest an injustice. But such is not the case in hand, and for the present the question is to be regarded as between the original mortgagor and mortgagee, and whether the mortgagee is bound absolutely and at all events by the satisfaction of record. I am of opinion that he is not, and that if a plain mistake of fact was made in satisfying the mortgage, he is entitled to be heard in this controversy. Judge WOODWARD said, in Fleming *v.* Parry (12 H. 47), that between the original parties, where the rights of third parties had not intervened, a release or extinguishment of a mortgage or bond without actual payment, is not a discharge unless so intended by the parties, and 'that there is no magic in an entry of satisfaction, either on a judgment or mortgage, which can prevail against the truth and equity of the transaction,' and if put on record at the instance of the mortgagor and for his benefit, he is not entitled to plead an estoppel; 'a record it is,' he says, 'but not a judicial record,' citing Morris *v.* Brady (5 Wh. 541), Roberts *v.* Halstead (9 B. 32). The case of Saurman's trustee, *v.* Binder (7 W. 209), decides that the entry of 'settled' on the record of the suit on a mortgage, was not conclusive on the mortgagee as against a purchaser having knowledge of equities to the contrary. The whole subject was very fully considered by Judge AGNEW, in Lancaster *v.* Smith (17 Sm. 427). He held that the registry of a mortgage is not such a record as imports absolute verity, that it is in no sense judicial, that the entry of satisfaction is the act of the party, not the official act of the recorder, and that a satisfaction procured by fraud is no satisfaction at all.

"The result of an examination of these and other cases shows that as between the parties, where there is no element of estoppel, the record of satisfaction of a mortgage has no greater sanctity or solemnity than any ordinary declaration in writing or a receipt made by a party, procured by fraud or by accident or mistake, and it is therefore open to contradiction, and may be shown to have been given under a mistake of fact or law. (Per SHARSWOOD, J., Russell *v.* The Church, 15 Smith, 9.)

"Not importing absolute verity itself, therefore, as a judicial record, it is not protected by any rule governing official records of courts which imply judicial consideration and determination; nor does it stand in equity as a deed, requiring a preponderance of proof, unusual in other cases, to overcome it.

"That equity would set aside the entry of satisfaction upon proof of the facts alleged in this case, I do not entertain a doubt, upon the grounds either of mistake or fraud, and since the sheriff's sale has divested the lien of the mortgage from the land, the only remedy of the mortgagee is the present one—by claim upon its proceeds. (Brightly's Equity, sections 58-9, 61-2; Adams' Equity, *188, 9.)

"(2) Upon the second question, as to whether the assignee for creditors stands in any better position than his assignor, the mortgagor, I have no difficulty whatever. The very recent case of City Bank of Harrisburg *v.* Sherlock, decided June 11th, 1877 (reported in Legal Intelligencer, p. 220), definitely settled this question, citing Fulton's Estate (1 Smith, 211), which contains a review of a host of authorities on the subject."

The auditor awarded to the bank the amount of the Geary, Tilton & Colwell note, with interest, and the balance of the fund, to the assignee.

To this report the assignee filed exceptions, *inter alia:* (4) "Because the said auditor has reported that the notes given by letter of April 15th, 1875, were a renewal of the previous notes, and secured by the mortgage of $17,000." (9) "Because the said auditor did not report that the letter of April 15th, 1875, from the Girard Tube Works, together with the reply

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thereto, made the notes then taken a payment of the previous notes." (11) "Because the said auditor admitted the testimony of Mr. Eckert to contradict or explain the meaning of said letter." (13) "Because the said auditor reports that the entry of satisfaction so made was not final and conclusive between the said parties." The Court dismissed the exceptions, and confirmed the auditor's report. From this decree the assignee took this appeal, assigning as error the award to the bank, the dismissal of the exceptions, and the confirmation of the report.

Samuel Dickson (with whom was *E. G. Platt*), for appellants.

The satisfaction of the mortgage extinguished the legal right of the mortgagee.

Act of May 28, 1715, Purd. Dig. 480, pl. 115.

And his only remedy was by bill in equity to restore the legal rights. The sole question for the auditor was whether the *lien* of the mortgage was gone by reason of the entry of satisfaction. The liability of the Girard Tube Works, as indorsers, was not disputed; but that is a very different question from the one decided by the auditor. It is denied that the security for that liability could remain after the satisfaction of the mortgage. As between the parties to the transaction, this lien was extinguished absolutely, and it could only be restored upon the clearest evidence of fraud or mistake.

A mistake will not be relieved against, if it is the result of the party's own negligence.

Bispham's Equity, sec. 191.

Nor where he has not made use of the means of inquiry open to him.

Kerr on Fraud and Mistake, 407.

The mistake must be mutual.

Cooper *v.* The Farm. Mut. Ins. Co., 14 Wr. 299.

The very fact that new notes were taken in payment or satisfaction of the prior debt, precludes the idea that they are securities for the same debt.

E. Spencer Miller, contra.

The appellant admits that if the new notes were not in payment, but were renewals, and if the satisfaction of the mortgage was entered by mistake, the auditor was correct in his finding, and he admits also that both of these are questions of fact. The auditor has found the facts, and this Court will not set aside that finding unless so manifestly unjust that, if it were the verdict of a jury, it would be set aside.

February 3, 1879. THE COURT. We entirely concur in the conclusions of law and fact of the learned auditor in the Court below, and affirm this decree on his report.

Decree affirmed and appeal dismissed, at the costs of the appellant.

PER CURIAM.

Jan. '79, 20. March 19, 1879.

Graver, etc. v. Fehr.

Justice of the peace, jurisdiction of—Landlord and tenant—Laches—Rent—Act of March 6, 1872, Supplement to Act of April 14, 1863—What is necessary to jurisdiction of proceedings under landlord and tenant Act.

When a summary proceeding is given by statute, and is in derogation of the common law, the necessary jurisdiction must appear affirmatively on the face of the record, or the proceeding is *coram non judice*, and utterly void.

A justice of the peace has no jurisdiction under the landlord and tenant Act when it does not appear affirmatively that a certain rent was reserved.

The limitation of twenty days within which a writ of *certiorari* must be sued out does not apply when it is apparent that the justice has no jurisdiction.

The twenty-first section of the Act of 1810, the one hundred dollar Act, does not apply to the landlord and tenant Act.

Rubicum *v.* Williams (1 Ash. 230) and Lacock *v.* White (7 H. 495) followed.

Error to the Common Pleas of Schuylkill County.

Certiorari to the proceedings before a justice of the peace, by the defendant, Charles Graver, trustee.

The proceedings were commenced by Morgan W. Fehr against the said Graver to recover possession of certain premises from the defendant, who, as the plaintiff alleged, held them under him as his tenant by virtue of a lease in writing; during the progress of the case, both parties appeared several times before the justice. On December 5, 1877, judgment was given in favor of the plaintiff, and a writ of possession issued. The record of the justice, after describing the premises, set out that the plaintiff "did demise the said premises during the will and pleasure of Morgan W. Fehr to Charles Graver, trustee for his wife, Melinda Graver, the tenant now in possession, and that the said Charles Graver, trustee as aforesaid, entered into possession of said premises by virtue of said lease in writing, and held the same, and that the said term, for which the premises are demised, is fully ended," etc.

The writ of possession was superseded on the same day by a writ of *certiorari* taken by the defendant. After argument this writ was quashed by the Court, and an *alias* writ of possession was issued by the justice on Jan. 28, 1878. On January 29, 1878, the constable made return that possession of the demised premises had been given to the plaintiff, and that defendant had "no goods."

A second *certiorari* was issued February 25, 1878. On exceptions thereto, the Court affirmed

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the proceedings of the justice in the following *per curiam* opinion: "That the justice had jurisdiction of the subject matter and the parties cannot be doubted. It is claimed, however, that in this particular case, the record made by the justice shows no amount of rent reserved. This was known when the first writ of certiorari was taken, which was in time, with full knowledge of all the facts. Can the defendant, after having failed in his first writ of certiorari, lay by till nearly a month after possession has been given under the alias writ of possession, and then issue his second writ of certiorari, on the ground that the omission of the justice to specify a rent reserved ousted his jurisdiction? If so, how often in the same case, and at what indefinite length of time may he avail himself of the privilege? The judgment here was not obtained by trick or fraud, and is not within the cases which decide that a party may issue his certiorari where more than twenty days have elapsed, provided he takes action within twenty days after the facts have come to his knowledge. Counsel for the defendant strenuously resisted the offer made by counsel for plaintiff to submit the written agreement to the Court, for the reason that the record of the justice alone must govern, and the written contract recited by the justice was therefore withheld. Our impression is that the defendant has been guilty of such laches as gives him no right now to invoke the powers of the Court. He refused to appeal in the proper time, and if he can succeed in his present effort, it will lead to a very troublesome line of practice which we are not willing to inaugurate, unless in obedience to the mandate of a superior power."

The defendant took this writ, assigning for error the action of the Court in affirming the proceedings of the justice, in entering judgment against the defendant, and in not sustaining his exceptions grounded on the fact that no certain rent appeared to have been reserved, and no service of the original summons had been made on Melinda Graver.

W. D. Seltzer and *Benjamin Cumming*, for the plaintiff in error.

The Act of 1863, as amended in 1872, is the same as that of 1772, consequently the older decisions apply.

The summary remedy to a landlord only applies to leases either written or parol, in which a certain rent is clearly reserved, and not to cases where the rent is so uncertain as to require the intervention of a jury for its determination.

McGee *v.* Fessler, 1 Barr, 126.

All the facts necessary to give jurisdiction should be set out in the proceedings, and if it do not appear on the record that the lease was under a certain rent, the proceedings of the justice will be set aside.

Want of jurisdiction may be taken advantage of at any time and at any stage of the proceedings.

Stiles *v.* Jeffries, 8 Phila Rep. 303.

The twenty days' limitation in regard to the writ of *certiorari* does not apply where the record shows on its face that the justice had no jurisdiction.

Offerman *v.* Downey, 2 Wh. Dig. § 134.
Lacock *v.* White, 7 H. 498.
Adams *v.* Hill, 29 Leg. Int. 126.
Collins *v.* Collins, 1 Wr. 387.
Ingham *v.* Sickler, 1 Leg. Chr. 151.

J. W. Roseberry (with whom was *F. W. Bechtel*), for the defendant in error.

Even under the recognized exceptions a party has not an unlimited, but a reasonable time within which to take out a certiorari. Such *reasonable* time has repeatedly been held to be twenty days.

French *v.* Penna. & N. S. Canal & R. R. Co., 1 Leg. Chr. 66.
Offerman *v.* Downey, 2 Wh. Dig. 134.
Lacock *v.* White, 7 H. 498.
Dailey *v.* Bartholomew, 1 Ash. 135.
Stedman *v.* Bradford, 3 Phila. Rep. 258.
Brookfield *v.* Hill, 1 Id. 439.
Heft *v.* Hammill, 1 Id. 394.
Schaeffer *v.* Smith, 2 Leg. Chr. 52.
Harrison *v.* Wilkinson, 1 Luz. Leg. Reg. 89.
Jones *v.* Del. and Hud. Canal Co. 31 Leg. Int. 173.

The Act of 1863 must receive a liberal construction.

Snyder *v.* Carfrey, 4 Sm. 90.

The joinder of Melinda Graver as a party would have been improper.

Snyder *v.* Carfrey, *supra.*

May 7, 1869. THE COURT. This was a proceeding instituted by Morgan W. Fehr, the plaintiff below, before a justice of the peace, under the landlord and tenant Act of December 14, 1863 (P. L. 1864, 1127), to recover from the defendant certain demised premises, situated in the borough of Tremont, Schuylkill County. The record of the justice, after describing the premises, sets out that the plaintiff "did demise the said premises, during the will and pleasure of Morgan W. Fehr to Charles Graver, trustee, for his "wife Melinda" Graver the tenant now in possession, and that the said Charles Graver trustee as aforesaid, entered into possession of said premises by virtue of said lease in writing, and held the same, and that the said term for which the premises were demised is fully ended." There is also a statement of demand and notice, and the necessary allegation that the defendant had refused to deliver up possession. In all these proceedings, however, there is nothing by which the jurisdiction of the justice can even be inferred.

The supplement to the Act of 1863, approved March 6, 1872 (P. L. 22) prohibits a proceeding under this Act, "unless such proceeding shall be

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founded on a written lease or contract in writing, or on a parol agreement in and by which the relation of landlord and tenant is established between the parties, and a *certain rent is therein reserved.*" Now not only does it not appear by the proceedings before the justice that a certain rent was reserved in the lease therein recited, but from the whole case, as we have it before us, it is manifest that there was no such rent. As, therefore, this summary proceeding, though convenient and necessary in proper cases, is in derogation of the common law, and as it is given only by statute, the necessary jurisdiction must appear affirmatively on the face of the record, or the proceeding is *coram non judice* and utterly void. (McGee *v.* Fessler, 1 Barr, 126.) We have here, however, a case in the very teeth of the legislative prohibition, a lease at will without a reservation of rent of any kind, so that, as far as jurisdiction is concerned, it is affirmatively by the proceedings themselves put out of the question. Indeed it does not seem to be seriously denied that the justice, in taking cognizance of and giving judgment in the case, did that which the law gave him no right to do, but the defendant was turned out of court on the ground that the *certiorari*, not having been sued out within twenty days from the rendition of the judgment, was too late. This was error, for, in the first place, even under the twenty-first section of the Act of 1810 this limitation does not apply where it is apparent the justice has no jurisdiction. (Lacock *v.* White, 7 Har. 495.) And in the second place, that Act does not apply to the summary process for obtaining possession of leased property under the landlord and tenant Acts. This was so held by Judge KING in Rubicum *v.* Williams (1 Ash. 230), and we are inclined to think that, in this, his conclusion was correct. The Act of 1810, known as the one hundred dollar act, is a uniform symmetrical code designed to regulate the powers and jurisdiction of justices of the peace in the collection of "debts and demands," and the twenty-first section being part and parcel thereof extends to nothing beyond its provisions.

It is true the Act of 1863, as well as that of 1830, provides, that "nothing therein contained shall prevent the issuing of a certiorari with the usual form and effect," but the usual form and effect of this writ is found rather in its general judicial character, than in any description of it as found in the Act of 1810. Besides this it has an effect in that Act which it has not in the summary proceeding under consideration. When properly sued out under the statute above named, it becomes a supersedeas to further proceedings, but such is not the case under the landlord and tenant Acts. This was so held under the Act of 1772, in the cases of Grubb *v.* Fox (6 Bin. 460) and Stewart *v.* Martin (1 Yeates, 49), and we can find nothing in the later Acts which would alter this rule. We think, therefore, that the Court below erred in the disposition of the defendant's writ.

The judgment of the Court below is reversed, and the judgment and proceedings before the justice of the peace are reversed and set aside.

Opinion by GORDON, J.

May, '79, 155. May 22, 1879.

Bower v. Fenn and Wife.

Vendor and vendee—Representations at time of sale—Belief of the vendor immaterial where statements operate as an inducement—Conditional verdict improper in ejectment on a mortgage.

In a sale of stock, lease, and fixtures of a drug-store, the vendor put a value upon the whole concern which the vendee, who had had no experience in the drug business, relying upon the truth of the vendor's statement, agreed to pay. In an ejectment upon a mortgage given to secure part of the purchase-money:

Held, that the belief of the vendor that the statements made by him were true would not prevent the vendee from setting up the falsity of such statements as a defence, for the vendee was no less deceived, and the vendor, if he chose to allow the vendee to contract on the faith of such statements, was bound to know that they were true.

Held, also, that a conditional verdict is improper in an ejectment upon a mortgage.

Error to the Common Pleas of Dauphin County.

Ejectment, by Robert S. Bower against James V. Fenn and Rebecca J. Fenn, his wife, upon a mortgage for $9000 upon real estate of the wife.

The evidence showed that the plaintiff, Robert S. Bower, a druggist of twenty years' experience, had offered for sale the stock, fixtures, lease, and goodwill of a drug-store; that he had represented to the defendant, James V. Fenn, who had had no experience in the drug business, that the stock and fixtures alone were worth about $9000, and that finally he had agreed to sell to Fenn the whole establishment for $10,500, persisting that he was disposing of it cheaply at that figure. Fenn, depending upon Bower's representations, never made a thorough examination of the establishment, and had no inventory of the stock taken, Bower objecting to the latter on account of the time and trouble he said it would involve. The whole concern, upon being subsequently sold at sheriff's sale produced only about $2000. Fenn paid Bowers $1500 of the purchase-money in cash, and gave him his judgment bond for the balance, further secured by a mortgage upon his wife's land. Default having

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been made in the payment of the instalments stipulated in the bond to the amount of about $7500, this action of ejectment was brought upon the accompanying mortgage.

Upon the trial, before PEARSON, P. J., the plaintiff presented *inter alia* the following point: (5) Even if the jury should believe that Fenn relied upon the statements as to the value of the stock made by the plaintiff, yet if they were made in good faith and constituted the latter's real opinion as to such value, though the estimate may have been too high, it will be no ground of defence to this action, especially as defendant had full opportunity to verify the statements and might have declined the purchase unless an inventory was taken. *Answer:* In case of misrepresentation by one who had long and well known the value of goods to one who was ignorant of the value, the contract should be rescinded early after the fraud is discovered. If not discovered until afterwards, when it was out of the power of the defendant to return the goods, the price may be reduced in cases of actual fraud practised on him in the sale.

The Court in the general charge instructed the jury that they had it in their power to render a conditional verdict. The jury rendered a conditional verdict for the plaintiff, to be released upon the payment of $1500 in three instalments of $500 each, the last of which was to mature on April 1, 1881, bearing interest from the date of the verdict; and further providing that upon failure to pay any instalment when due a *levari facias* might issue for the whole sum found to be payable on the mortgage. Judgment was duly entered on the verdict. The plaintiff took this writ, assigning for error, *inter alia*, the instruction that the jury might find a conditional verdict, and the answer to the fifth point.

H. M. Graydon, for plaintiff in error.

If the plaintiff's statements were made in good faith and constituted his real opinion, they will form no defence to this action, even though his estimate may have been too high. Such defence could only be grounded on intentional misrepresentation.

Phipps *v.* Buckman, 6 Casey, 401.
Watts *v.* Cummins, 9 P. F. Smith, 84.
Clark *et al. v.* Everhart *et al.*, 13 Id. 347.
Weist and Myers *v.* Grant, 21 Id. 95.

In ejectment on a mortgage the jury has no right to render a conditional verdict.

Fluck *v.* Replogle, 1 Harris, 405.

Fleming and *McCarrell*, contra.

The plaintiff's fifth point was fairly answered by the Court, in its charge, "If there was no misrepresentation and overreaching, no taking advantage of the purchaser's ignorance by falsehood, there can be no deduction."

Actions of ejectment are virtually equitable actions, and the Court has large discretion in so disposing of them as to do justice and equity between the parties. A conditional verdict is proper.

June 2, 1879. THE COURT. The only assignment of error that has particularly drawn our attention in this case, is that embracing the answer to the plaintiff's fifth point. It is complained that the answer is not responsive to the point, and this we think is well founded. It only remains for us to consider whether the plaintiff was entitled to an affirmative answer, for if not, if it might have been negatived or refused then he has nothing of which to complain. The point is as follows: "Even if the jury should believe that Fenn relied upon the statements as to the value of the stock made by the plaintiff, yet if they were made in good faith and constituted the latter's real opinion as to such value, though the estimate might have been too high, it will be no ground of defence in this action. Especially as the defendant had full opportunity to verify the statements, and might have declined the purchase unless an inventory was taken." It will be observed that this point is put upon the ground that Fenn relied upon the statements concerning the value of the property made by Bower, and consequently that he dealt upon the faith of those representations; this, of course, means that Fenn was induced to depend upon Bower's knowledge of the stock, and to trust to that knowledge rather than to information which he might have acquired by an inventory or other means. This statement of the question, however, settles the controversy adversely to the point put, for if, as the jury have found, the statements made by the plaintiff of the value of the property were false in fact, his belief that they were true was of no consequence; for because of such belief they were none the less false, neither was Fenn the less deceived thereby. If Bower chose to permit Fenn to contract with him on the faith of his statements of value he was bound not merely to believe, but to know that they were true. This very point is ruled in the case of Fisher *v.* Worrall (5 W. & S. 478), wherein it was held, that a misrepresentation by a vendor of an occult quality in land, though it may have been made in ignorance of the truth, and although the vendee agreed to run the risk of this, was, in an action for the recovery of the purchase-money, a decisive objection to the plaintiff's recovery. Here, as in the case in hand, the contract resulted from the plaintiff's representations which in the end turned out not to be true; without these the contract never would have been made, hence, without regard to his belief, the plaintiff was responsible for their verity. The best indeed that can be said for Bower is, that he asserted for truth what he did not know to be so, but this

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as is ruled in the case above cited, is equivalent to the assertion of a known falsehood. Weist *v.* Grant (21 P. F. S. 95), and Watts *v.* Cummins (9 P. F. S. 85), have been cited in support of the point under consideration, but in both these cases Fisher *v.* Worrall is recognized as authority, and the cases are so clearly distinguished by Mr. Justice AGNEW, who delivered the opinions in the two first named, that it is unnecessary for us to attempt a rediscussion of the subject.

The conditional verdict, as directed by the Court, and the judgment entered thereon, are wrong and must be corrected. As was said in Fluck *v.* Replogle (1 Har. 405), "There is no necessity for a conditional verdict. Indeed it would be unjust for the jury to prescribe conditions by delaying the payment of money already due and thereby impairing the security." It is, indeed, difficult to see how the verdict as rendered in this case can be enforced. It gives the plaintiff no right to enter upon the premises, neither could default in payment bar the defendant's equity of redemption. It is true the verdict provides for a levari facias on the non-payment of any one of the instalments; but this in effect substitutes the writ of ejectment for a scire facias, or for a bill in equity, but as no such use has been heretofore made of this writ in the case of a mortgage, its legality may well be doubted. But as the verdict finds the amount due the plaintiff, the conditional part of it may be treated as surplusage; for the Court has the right to mould a verdict according to the requirements of the law. (Byrne *v.* Grossman, 15 P. F. S. 310.) We, therefore, direct that the verdict be amended as above directed, and that judgment be entered for the plaintiff for the land described in the mortgage, to be by him possessed and held until the net rents, issues, and profits thereof pay the amount of the said verdict ($1500) with interest from the 22d of March, 1879, and costs.

Subject to the amendment as above stated the judgment is affirmed.

Opinion by GORDON, J. PAXSON and WOODWARD, JJ., absent.

May, '78, 150. June 7, 1879.

Pennsylvania R. R. Co. v. Fries.

Practice—Errors and appeals—Venire facias de novo.

Upon reversal of a judgment by the Supreme Court, for error committed in the course of the trial, a *venire facias de novo* is not grantable of course, even where the plaintiff's declaration set forth a good cause of action.

Upon the trial of an action on the case for negligence, the defendant requested the Court below to instruct the jury that there was no evidence of negligence. This the Court refused to do, and the verdict was for the plaintiff. Upon writ of error, the Supreme Court, being of opinion that there was not sufficient evidence of negligence to have been submitted to the jury, reversed the judgment. A subsequent application to the Supreme Court to award a *venire facias de novo* was discharged.

Rule to show cause why a *venire facias de novo* should not be granted.

On May 29, 1878, this case was argued before the Supreme Court, on a writ of error to the Common Pleas of Blair County, and on June 17, 1878, judgment of reversal was entered, without a new venire. (See 5 WEEKLY NOTES, 545.)

A motion for the award of a *venire facias de novo* was made by counsel for defendant in error, in May, 1879, and this rule to show cause was granted, returnable June 7, 1879. The following reason, *inter alia*, was filed and principally relied upon by counsel for the motion: (1) "Because the declaration of the plaintiff below (defendant in error) discloses a good cause of action."

S. S. Blair, for the rule.

Where the declaration sets forth a good cause of action and the judgment is reversed for error committed in the course of the trial, a new *venire* is granted of course.

Railroad *v.* Norton, 12 H. 465.
Griffith *v.* Eshelman, 4 W. 58.
Reed *v.* Collins, 5 S. & R. 351.

L. W. Hall and *D. J. Neff*, contra.

The remarks of the Court in Railroad *v.* Norton and Griffith *v.* Eshelman, relied upon by counsel for the rule, are mere *dicta*, and are not sustained by the practice of this Court in very many subsequent cases. Reed *v.* Collins has no application to this case.

June 9, 1879. PER CURIAM. Rule discharged.

Quarter Sessions.

Sept. 23, 1879.

Commonwealth v. Dickerson et al.

Criminal prosecution and civil action pending at same time—Priority as to trial—It is the general rule, where a civil and criminal suit, growing out of the same transaction, are pending at the same time, to try the civil cause first, though it is entirely within the discretion of the Court—When continuance granted on terms.

Motion for continuance.

Robert Whitaker died August 23, 1878. On

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the 12th of September following an instrument of writing purporting to be the will of the deceased was presented by William R. Dickerson *et al.* for probate. After several meetings the counsel for the persons named as executors announced, on the 28th of September, that he could not prove the will, and probate of the paper was then refused.

On September 30, 1878, warrants were issued for the arrest of William R. Dickerson, Herman C. Pulte, and Joel M. Vanarsdalen, and on November 2d they were indicted by the Grand Jury for conspiracy and forgery of the will above mentioned as presented by them for probate. Shortly afterwards a petition was presented to the Register for a re-hearing, and, after much testimony had been taken, the Register directed an issue to the Court of Common Pleas No. 1, to determine the question whether or not said instrument was the will of Robert Whitaker. (See Sheets *v.* Whitaker, *ante*, 403.)

On September 22, 1879, the criminal cause was called for trial, the civil issue in the Court of Common Pleas No. 1, pending at the same time; whereupon this motion for a continuance was made by defendant.

Louis Bregy and *F. A. Bregy*, for Vanarsdalen, for the motion.

This case should not be tried now, because of the relation of the parties, and manifest injustice that might be done the defendants; and because the matter in controversy is now pending in a court which has exclusive jurisdiction of the question of forgery.

The Register's Court here has taken the place of the Ecclesiastical Courts of England, which had exclusive jurisdiction of wills of personalty, and its judgment is conclusive and binding.

Act of March 15, 1832, Purdon's Dig. 1255.

Until the Register's Court determines whether this is or is not a forged will, the indictment should not be tried. If found to be a forgery, then the Commonwealth can try these defendants to determine if they forged it.

The general principle has always been that during the pendency of a civil suit, if a criminal action is brought, or if they both be pending at the same time, the Court will postpone the trial of the indictment until the civil issue is disposed of.

State *v.* Blyth, 1 Bay (S. C.), 166.
Fielding's Case, 2 Burr. 719.
Com. *v.* Bliss, 1 Mass. Rep. 32.
Com. *v.* Elliott, 2 Ibid. 372.
Rex *v.* Simmons, 8 Carrington & Payne, 50.
Respublica *v.* Goss, 2 Yeates, 479.
Rex *v.* Vincent, 1 Strange, 481.
Com. *v.* Lowry, 2 Luz. Leg. Obs. 409.
Com. v. Dickinson, 3 Clarke, 265.
Rex *v.* Rhodes, 2 Strange, 703.
Rex *v.* Carroll, Wilson's Rep. 75.

Such is the practice even where the civil case is pending in a court of general jurisdiction; *à fortiori* where the civil case, as here, is before a court whose jurisdiction of the question whether or not this is a forged will, is exclusive.

H. McMiller, for Dickerson, and *H. F. Hepburn*, for Pulte, also joined in the motion.

The *District Attorney*, contra.

A private person and the State may severally carry on, the one a civil suit and the other a criminal prosecution, simultaneously, for the same act of wrong if both have suffered by it; or the one may go on in advance of the other, and the one will have no effect on the other.

Bishop's Cr. Law, 264.
Blassingame *v.* Glaves, 6 B. Monroe, 38.
Drake *v.* Lowell, 13 Mich. 292.
Foster *v.* Com., 8 W. & S. 77.
Jones *v.* Clay, 1 B. & P. 191.
State *v.* Frost, 1 Brev. 385.

The earlier English authorities on this point are to be considered in the light of the fact that the prosecution of offences in the English courts of criminal jurisdiction partook largely of the nature of private prosecutions, conducted by private counsel, and in that respect differed materially from criminal proceedings in the American courts, which are conducted by public officers representing the Commonwealth.

Whether the Court will continue one of the cases until the other is disposed of is a matter of discretion solely, depending on the special circumstances of the case, the usage of the tribunal, and on what the Judge may deem best adapted to promote justice.

Rex *v.* Ashburn, 8 C. & P. 50.
People *v.* Judges, 13 Johnson, 85.
Bishop's Cr. L. 266, note 7.
Wharton's Cr. Law, 549.

While the usage of the Court of Quarter Sessions of Philadelphia has been to delay the trial of a prosecution for perjury until after the trial of the civil suit in which the perjury was alleged to have been committed, this practice has not hitherto been applied to indictments for forgery where there was a civil suit pending involving the question of the validity of the alleged forged instrument, nor to other prosecutions where civil suits were also pending. The recent cases of Com. *v.* Morton *et al.*, and Com. *v.* Ervin, may be cited in support of what is here alleged to be the usage of this Court.

If a continuance is granted, it should be upon terms to speed the trial of the civil issue.

THE COURT (MITCHELL, J.). Undoubtedly the general rule is, where a civil and criminal suit growing out of the same transaction are pending at the same time, to try the civil cause first; though it is entirely within the discretion of the Court. I am not at all able to assent to the argument of the prisoner's counsel, that there is any compulsion to try the civil suit first. But as there are interests of legatees under the alleged

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will, and others, involved in the civil issue that might be affected by the trial of this cause, and which cannot be heard or represented here, this case should be continued, and the civil suit in the Court of Common Pleas tried first.

But the continuance should be upon terms: First, that the parties, both prosecutors and defendants, should apply to the Court of Common Pleas No. 1 to fix an early day for the trial of the civil case. Second, that the parties agree that in the event of any of the witnesses of either side being removed by death, or leaving the jurisdiction, so that their presence cannot be had at the trial, the testimony taken heretofore, or in the pending civil suit, shall be used upon the trial of the criminal cause. If these are agreed to, I will grant a continuance.

Both sides agreed as stipulated, and the continuance was granted.

Common Pleas—Equity.

C. P. No. 3. Sept. 17, 1879.

People's Bank v. Nathan Spering et al., Administrators, etc., and Nathan Spering in his own right, and The Fidelity Trust and Safe Deposit Company.

Equity jurisdiction—Fraud, when mere silence does not amount to—Procuring a bank to discount a note made by a minor—Ratification by minor after reaching majority—Bill to recover specific sum—Confusion of moneys—Bill in equity pending claim in Orphans' Court.

Hearing on bill and answer.

The bill set forth that Joshua Spering, prior to Sept. 1, 1873, kept an open account with the complainants, and on said day presented for discount a promissory note for $600, signed by his son Albert Spering, dated September 1, 1873, and payable four months after date, to the order of Joshua Spering, and by him indorsed; that the note was duly discounted, and the amount thereof less the discount, to wit, the sum of $587.40 placed to the credit of the said Joshua Spering, and so continued up to the time of his death, which occurred on or about Dec. 8, 1873; that Albert Spering, at the time of making said note, was a minor, which fact was concealed from the complainants; that on a settlement of the bank account of said Joshua Spering, dec'd, with Nathan Spering and Eleanor Spering, his administrators, etc., there appeared to be due from the complainants to him, in said account, the sum of $1080, which was paid to Nathan Spering, one of the administrators aforesaid, on a check drawn by him on the complainants, dated Dec. 12, 1873; that the complainants up to this time were ignorant of the fact of the minority of the said Albert Spering, but that Nathan Spering knew that part of the money paid to him by complainants, to wit, the sum of $587.40 was the proceeds of the discount of the said note; and also that the said Albert Spering was at the time he signed the note, and then still continued a minor; that the above sum of $1080 was deposited by him in the Fidelity Insurance Trust and Safe Deposit Company, where it still remains; that the said administrators of Joshua Spering, dec'd, filed their account and included therein the whole of the said sum of $1080, which account was referred by the Orphans' Court to an auditor for distribution; that the complainants appeared before the auditor, and claimed out of the fund of $1080 so on deposit the sum of $587.40 with interest thereon, at the rate of four per cent. per annum, from Dec. 12, 1873, as their specific property and money; that objection being made to such allowance, an application was made to the auditor to set apart or reserve a sufficient fund to meet said claim, and to refer the claimants to another and appropriate tribunal for the adjustment of their rights, and thereupon an order was made to that effect. The bill further set forth that the estate of Joshua Spering was insolvent, and concluded with a prayer for discovery, and that it be decreed that the "Fidelity Trust Insurance and Safe Deposit Company aforesaid pay over to the complainants the sum of $587.40 with interest thereon at the rate of four per cent. per annum from Dec. 12, 1873."

The administrators, in their answer, admitted the discounting of the note, but averred at the time the said sum of $587.40 was placed to the credit of the said Joshua Spering in his account with the complainants, he had other moneys of his own there, with which the said sum of $587.40 was mingled and confused; and that deposits of money in his account were subsequently made, and checks drawn by the said Joshua Spering, but the balance to his credit was never below $587.40. They admitted the minority of Albert Spering at the time of his making the note, but refused to admit that this fact had been concealed by Joshua Spering, or that complainants did not know at the time of the discount of the said note, or at the time the balance of $1080 was drawn from the bank, that the said Albert Spering was a minor. The defendants admitted that complainants had paid to Nathan Spering the sum of $1080, and that it was still on deposit in the Fidelity Company; they also admitted the insolvency of the estate, but averred that Albert Spering the maker of the note, having since at-

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tained his majority, had by a writing signed by him and delivered to complainants, ratified and confirmed said note; and agreed that he would be bound thereby and be responsible therefor; they denied that an order had been made by the auditor as stated in the bill, but averred that "it appeared at the audit that said plaintiffs had then a suit pending in the Court of Common Pleas No. 2, of this county, against the defendant, Nathan Spering, in his own right, to recover back the same sum of money, which suit was then at issue, and waiting to be tried by a jury. And thereupon the auditor, with the consent of all the parties before him, decided to suspend further proceedings in the audit until the verdict of a jury could be had upon the issue so pending in the Court of Common Pleas. It is not true that any such order was made as stated in the bill, and we are advised that no more appropriate tribunal for the determination of the matters contained in the bill, exists under the laws of this Commonwealth than the Orphans' Court of this county, who now have jurisdiction of the moneys claimed in said bill as is shown therein."

In the above-mentioned trial in C. P. No. 2 the complainants were nonsuited.

Hood Gilpin (with him *Charles Gilpin*), for the complainants, cited—

Aycinena *v.* Peries, 6 W. & S. 243.
Frazier *v.* Bank, 8 Id. 18.
Matthews *v.* Stephenson, 6 Barr, 498.
Lestapies *v.* Ingraham, 5 Id. 71.
Graham *v.* Pancoast, 6 Casey, 89.
Bank *v.* King, 7 Sm. 202.
Voight *v.* Lewis, 33 Leg. Int., p. 402.
United States *v.* State Bank, 6 Otto, 30.
Atlantic Bank *v.* Merchants' Bank, 10 Gray (Mass.), 532.
Skinner *v.* Merchants' Bank, 4 Allen (Id.), 290

W. E. Littleton and *E. Coppée Mitchell*, for respondent.

The identification of this money is impossible, as it was mingled and confused with other moneys deposited by Joshua Spering, and the right of pursuing a fund fails when the means of ascertainment fails.

Thompson's Appeal, 10 Har. 16.

There has been no fraud committed, as the maker of the note, since attaining his majority, has ratified and confirmed it.

The jurisdiction of the Orphans' Court having attached is exclusive.

Hammett's Appeal, 2 Nor. 392.
Otterson *v.* Gallagher, 6 WEEKLY NOTES, 555.

C. A. V.

Sept. 27, 1879. THE COURT. We are of the opinion that the relief prayed for in this bill cannot be granted. In every case of this description, in order to invoke the aid of a court of equity, there must exist some relation of trust and confidence between the parties. The fraud consists in the breach of a trust or confidence, fully reposed, and in most, if not all, of the cases, the silence of the party, must import as much as a direct affirmation, and must be deemed equivalent to it. (Ins. Co. *v.* Mabbett, 1 Wisconsin, 667, 1 Story Eq. 214.)

The facts as developed in this suit simply present a cause, in which a note drawn by a minor, and indorsed by his father, was presented for discount, and was discounted. It does not appear that any representations were made as to the age of the drawer, and, without evidence, it is as fair to presume, that the bank discounted the paper upon the faith of the solvency of the indorser, and after due inquiry as to the drawer, as to believe, that in a business transaction like this, the officers of the bank were overreached and defrauded.

It is as well also to remember, that the contract made by the minor was not void, but only voidable, and while it could not bind the minor, without his consent, yet the drawer did, by a writing signed by him, after he attained his majority, "ratify and confirm said promissory note, and agree that he would be bound thereby, and be responsible therefor."

It is impossible to see in this case any such breach of trust or confidence as is required by a court of equity to enable it to act, and where the fact is that the maker of the note is a minor, silence alone is not equivalent to a direct affirmation, especially, as it is possible that a voidable contract may be made with one not of age.

Other difficulties stand in the way of the plaintiffs. The funds of the estate of the indorser, are now under the jurisdiction of the Orphans' Court of this county; that tribunal is abundantly able to give to the plaintiffs every remedy to which they may be entitled; while upon the evidence before us, there seems to have been such a mixture of funds, as to bring the case fairly within the decision of the Supreme Court in Thompson's Appeal (10 H. 17), wherein LEWIS, J. declares, "The right of pursuing it (the fund) fails when the means of ascertainment fail. This is always the case when the subject matter is turned into money, and mixed and confounded into a general mass of property of the same description," and we may add the remark of the learned Judge in that case, "This mixture has taken place in the case under consideration."

Bill dismissed with costs.

Opinion by LUDLOW, P. J.

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Common Pleas—Law.

C. P. of Mercer Co. Aug. 7, 1879.

Sutton v. Clark, Owner, and Taylor, Contractor.

Mechanic's lien—Amendment—Act of June 11, 1879, § 2—Not retroactive—A mechanic's lien filed prior to the passage of said Act cannot be amended by adding the name of an additional contractor as a co-defendant.

Petition and motion to amend the record, by adding the name of Sidney Fulk, as a co-contractor.

The mechanic's lien in this case was filed January 26, 1878, by W. J. Sutton & Co. against Ralsa Clark, owner, and W. G. Taylor, contractor. The present application was made Aug. 7, 1879, under the Act of June 11, 1879, which provides as follows:—

Sec. 2. That in case of any mechanics' claim or lien, filed according to existing laws, in any county of this Commonwealth, the Court having jurisdiction in such case is hereby authorized and required, in any stage of the proceedings, to permit amendments conducive to justice and a fair trial upon the merits, including the changing, adding, and striking out the names of claimants, and by adding the names of owners and contractors respectively, whenever it shall appear to such Court that the names of the proper parties have been omitted, or that a mistake has been made in the names of such parties, or too many or not enough have been joined in such case: *Provided*, That no amendment so allowed shall have [effect on] or prejudice the rights of *bona fide* purchasers for a valuable consideration without notice, or the rights of other lien creditors, when such purchase has been made, or such other lien would otherwise be prior, if such amendment were not made or had not been allowed (P. L. 123).

A. Henline, for the motion.

Wm. H. Sheakley, contra.

Oct. 13, 1879. THE COURT. That this amendment could not have been allowed prior to the passage of the Act of 11 June, 1879 (P. L. 122), is not controverted; for, according to all the authorities, a claim was not then amendable after the statutory period for filing it had expired. Whether this statute applies to the amendment of liens filed before its passage, is the sole question for solution.

Where civil rights are to be affected, statutes are to be so construed, if possible, as not to have a retroactive effect. (Neff's Appeal, 9 Har. 243; Fisher *v.* Farley, 11 Id. 501; Becker's Appeal, 3 Cas. 52; Taylor *v.* Mitchell, 7 Sm. 209.) In the last case, SHARSWOOD, J., says: "There is no canon of construction better settled than this, that a statute shall always be interpreted so as to operate prospectively and not retrospectively, unless the language is so clear as to preclude all question as to the intention of the legislature." "Retrospective laws generally, if not universally, work injustice, and ought to be so construed only when the mandate of the legislature is imperative."

"The general rule is that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action or suits, and especially vested rights, unless the intention that it shall so operate is expressly declared; and Courts will apply new statutes only to future cases, unless there is something in the very nature of the case, or in the language of the new provision, which shows that they were intended to have a retroactive operation. And although the words of the statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that thereafter arise, unless a contrary intention is unequivocally expressed therein." (Potter's Dwarris on Statutes, and Note 9.) From the numerous cases cited in this note, the American authorities seem to be quite uniform on the subject of retroactive operation of statutes, "and it cannot, upon sound principles, be admitted that a statute shall by any fiction or relation have any effect before it was actually passed. A retroactive statute partakes in its character of the mischief of an *ex post facto* law; and when applied to contracts or property, would be equally unjust and unsound in principle as *ex post facto* laws when applied to crimes and penalties." (Warren Manufacturing Company *v.* Etna Insurance Co., 2 Paines' C. C. R. 517.)

"A retrospective statute affecting and changing vested rights, is very generally considered in this country as founded on unconstitutional principles, and, consequently, inoperative and void. But this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights already existing, and are in furtherance of the remedy, by curing defects and adding to the means of enforcing existing obligations." (1 Kent's Com. 455; Shonk *v.* Brown, 11 Sm. 320.)

But the object of the amendment prayed for is not to add to the means of enforcing or collecting a lien existing before the passage of the Act, but to make a claim a lien which is feared was not so then. The language of the Act is not "so clear as to preclude all questions of the intention of the legislature," that it should apply to liens filed before its passage, nor is there anything in the very nature of its subject matter which shows it was intended to have a retroactive operation.

Holding the Act not to be retrospective in its

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operation, relieves us from the necessity of passing on the question whether the legislature could convert a mere chose in action into a lien.

If the plaintiff's claim is now a lien, the amendment is unnecessary; and if it is not, said Act cannot be given a retroactive operation in order to make it one.

The amendment prayed for is refused.

Opinion by McDermitt, P. J.

C. P. No. 2. Oct. 11, 1879.

Rowand v. Fox.

Replevin—Justification of surety—Practice.

Rule on plaintiff to show cause why additional security should not be entered, or writ of replevin quashed.

Replevin for furniture distrained for rent. The writ issued August 7, 1879, and the surety in said writ swore upon justification that he owned certain premises, worth $10,000, which were rented for $60 per month, and were assessed at $5900; and that there was but one mortgage on said property of $3500, and that he was not surety for any other person except in the sum of $200, for stay of execution.

The affidavit of defendant in support of this rule, alleged, on information and belief, that the title to the said property was obtained by the said surety by fraud, and is now in litigation; that said property is not rented as above stated (giving the particulars); that it is assessed at $5600, instead of $5900; that the surety went bail on July 6, 1879, for J. W. Hellinge, charged with swindling, and that said bail has been declared forfeited; that the property is of little, if any value, over the mortgage, unpaid interest, and taxes due thereon.

Wm. C. Hannis, for the rule.

W. F. Johnson, contra.

Rule absolute.

C. P. No. 2. Oct. 11, 1879.

Samuel v. Scott.

Practice — Amendment — Costs — Suit for less than $100 in the Common Pleas.

Rule on plaintiff to show cause why assessment of damage should not be corrected, and costs disallowed to plaintiff.

Covenant for rent reserved by lease.

The statement and additional statement of amount due, filed by plaintiff, were as follows:—

1 month's rent due 1 June, 1879 . . .	$125 00
7 June, 1879, by cash over-payment on account of rent due prior to Sept. 1, 1878 . .	8 36
Balance due . .	$116 64
Amount of bill for gas consumed from Feb. 22 to May 22, 1879, and penalty . . .	$51 92

The affidavit of defence filed by defendant averred (1) That the gas bill had been paid by him; and (2) a surrender of the premises by defendant, and an acceptance of possession thereof by plaintiff on May 22, 1879; and alleged that there was only due plaintiff the sum of $88.66, less the $8.36 credited in plaintiff's statement. Judgment, by mistake, was entered for $88.66, instead of $80.36.

George Northrop, for rule.

Under the Act of 20 March, 1810, § 26 (Purd. Dig. 848, pl. 31), the plaintiff having recovered less than $100, and filed no affidavit, is not entitled to recover costs.

Spear *v.* Jamieson, 2 S. & R. 530.
Stewart *v.* Mitchell, 13 S. & R. 287.
Grant *v.* Wallace, 16 S. & R. 255.

Louis C. Massey, contra.

By our lease we were entitled to sue for gas consumed. This item has been paid by defendant since suit brought. Undoubtedly, at the time of suit brought, more than $100 was due us. We admit the credit of $8.36 should be deducted from judgment.

The Court. Plaintiff has leave to file an amended assessment of damages *nunc pro tunc*. Rule discharged as to costs.

C. P. No. 3. Sept. 27, 1879.

Gerke v. Jacoby.

Scire facias sur mortgage—Agreement by mortgagee to notify mortgagor of the time when interest should become due—Forfeiture—Parol agreement modifying written contract.

Rule for judgment for want of a sufficient affidavit of defence.

Scire facias sur mortgage, dated July 17, 1878. The breach alleged in the *scire facias* was nonpayment of interest. The defendant filed an affidavit of defence, setting up that "at the time the mortgage was executed it was agreed by G. S. Seidel, agent for the plaintiff, and to whom the interest was to be paid," that Seidel would notify defendant as the half-yearly payments of interest fell due; that in accordance with this agreement Seidel had notified defendant when the interest fell due the first time, but had failed to do so when the interest fell due, for the failure to pay which this *scire facias* issued; that defendant has not changed his place of residence, etc. etc. Plaintiff took this rule.

T. P. Judge, for the rule.

S. Wagner, Jr., contra.

This evidence would clearly be admissible to vary the written instrument, because it is evidence of an oral stipulation made at the time of

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execution of the mortgage; and such evidence is admissible under the latest decisions.

C. A. V.

Oct. 4, 1879. THE COURT. Rule absolute.

[See Pancoast *v.* Haas, 1 WEEKLY NOTES, 264; Gaskill *v.* Schenerle, 2 Id. 156; McNeil *v.* Amey, Id. 65.]

C. P. No. 4. Sept. 21, 1879.

Burton v. Association.

Ground-rent—Personal liability—Act of June 12, 1878—Grantee who acquired title prior to the Act continues personally liable for rent falling due while he holds the land.

Rule to open judgment.

It appeared, by a case stated, that plaintiff was owner of a ground-rent on property which defendants had purchased at sheriff's sale under proceedings on a mortgage given by one Smith, assignee of the original covenantors. The sheriff's deed was dated Sept. 23, 1876, and defendants had paid ground-rent up to Dec. 1, 1877, leaving three semi-annual payments in arrear. If the Court be of opinion that under the Act of June 12, 1878 (Purd. Dig. 2160), the suit is improperly brought against defendants, then the rule to be made absolute, and judgment to be entered for the defendants; if the Act does not apply to this case, or is unconstitutional, then the rule to be discharged; if the Act does apply to this case and is constitutional, the judgment to be restricted in lien and execution to the land out of which the rent issues.

J. D. O'Bryan, for the rule.

The Act prescribes that the grantee "shall not be personally liable for the payment of such ground-rent, mortgage, or other encumbrance, unless he shall, by an agreement in writing, have expressly assumed a personal liability therefor, or there shall be express words in the deed of conveyance, stating that the grant is made on condition of the grantee assuming such personal liability. *Provided*, that the use of the words 'under and subject to the payment of such ground-rent, mortgage, or other incumbrance, shall not alone be so construed as to make such grantee personally liable as aforesaid."

The ground-rent owner formerly had several remedies; this Act takes away his personal action against the terre-tenant, and an Act affecting the remedy for enforcing a vested right, is constitutional.

[THAYER, P. J. If the defendants acquired the title of the original covenantor, were they not bound as assignees of the land by the covenants running with the land? And if so bound, how can their liability be discharged by any subsequent Act of Assembly?]

If the Legislature could pass the Act of April 25, 1850, giving an action of covenant where the party had not sealed the deed, it could pass the Act in question.

J. A. Burton, contra.

THAYER, P. J. This Act provides that there shall be no personal liability except by an agreement in writing, that is, an agreement by the person sought to be charged. It seems to effect a material alteration of the old and well-settled law upon this subject, but it is only applicable to future contracts.

Rule discharged.

(*Cf.* Merriman *v.* Moore, *ante* 425.]

Orphans' Court.

May 20, 1879.

Baird's Estate.

Decedents' estates—Conditional subscription to projected enterprise—Uncertainty of time of payment—Subscription not enforceable while project remains uncertain.

Sur exceptions to adjudication.

Before the auditing Judge (HANNA, P. J.) it appeared that the claim was to recover a subscription by decedent of $5000 towards the establishment of a college for females.

The following subscription written in a book, was presented at the audit, the decedent's name thereon being erased:—

"Towards the establishment of a female college and, if practicable, for the purchase of the Jay Cooke place, including the house, grounds (214 acres), furniture, paintings, etc. etc., to be the property of the 'Philadelphia Female College,' we, the subscribers, agree to pay the sums affixed to our names.

A. WHILDEN,	$5000,	E. C. KNIGHT,	$1000,
C. W. MUSGROVE,	500,	D. M. NOBLIT,	500.

"M. Baird's subscription of $5000 transferred by me to new book.

"W. W. KEEFER, Attorney-in-fact."

The second or "new book" being also produced, contained the following:—

"Whereas an effort is now being made to establish a first class female college in the city of Philadelphia, . . . and whereas the trustees under the charter for the same have unanimously resolved to attempt raising the sum of $500,000 to be applied to the purchase of a site for the erection of buildings, and for the endowment of, and the expenses incident to the complete establish-

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ment of such college; therefore, we the subscribers agree to pay to the treasurer of the college, or such other person as may be authorized by the trustees to receive the same, the sums affixed to our respective names.

M. BAIRD, by W. W. KEEFER, $5000.
WILLIAM CURRAN, M.D., $500.
A FRIEND, $5000."

The decedent was the owner of certain real estate valued by him at $185,000, which he offered to the trustees of the college at said price, and in case they bought he agreed to donate or deduct $10,000 thereupon as a subscription, towards the object.

Then followed an additional subscription by decedent of $10,000, which was also written in the aforesaid second or new subscription book, the payment of which was conditioned upon the purchase of the real estate of him for $185,000, by the board of trustees of the institution for which the money was being raised.

Keefer's authority to sign was admitted. Keefer also testified that one Edwards, as agent of the trustees, signed an agreement to purchase the said property, on which alone he, Keefer, was authorized to sign. The trustees never raised the $185,000 or purchased decedent's lot, and the projected institution has not yet been established.

The auditing Judge found the first subscription to be void, the second conditional and therefore void, and disallowed the claim. The grounds for these findings are set out at length in the opinion of the Court. To this finding exceptions were filed in behalf of the trustees of the aforesaid institution.

G. C. Purves and *George Junkin*, for the exceptants.

If the second subscription is conditional and void, the cancellation of the first subscription is void, and the writing remains unimpaired.

[PENROSE, J. These two subscription papers or books do not seem to have much to do with each other, for the second, with the exception of the name of the decedent, by his attorney, contains none of the names on the first.]

As to estoppel from setting up unwritten conditions, see—

Nippenose Man. Co. *v.* Stadon, 18 Sm. 256.
Bavington *v.* R. R. Co., 10 Casey, 358.
Graff *v.* R. R. Co., 7 Id. 489.
R. R. Co. *v.* Gazzam, 8 Id. 340.
Caley *v.* R. R. Co., 2 WEEKLY NOTES, 313.

It was not necessary that a building should be put up before claiming of the subscribers, otherwise all could set up such a defence and defeat the project.

J. G. Johnson, contra.

May 31, 1879. THE COURT. The paper upon which it is sought to recover from the decedent's estate shows that the purpose of the subscription was a contemplated, and not an actually existing enterprise.

It begins with a recital of "an *effort* now being made to establish a first class female college in the city of Philadelphia," and of an *attempt* by the trustees to raise the sum of $500,000, "for the purchase of a site, the erection of buildings, and for the endowment, and the expenses incident to the complete establishment of said college;" and it was for "the purpose above stated" that the subscribers agreed to pay the sums set opposite their respective names, "to the treasurer or such other person as *may be* authorized by the trustees to receive the same."

When the payment was to be made is not stated; but it is fairly to be implied that it was not to be until there was at least a reasonable prospect that enough should be subscribed to make the project something more than "an attempt." It is conceded that no site has been purchased, and that no contract whatever has been made on the faith of the subscription; and it is admitted that the amount of subscriptions thus far is such that for the present, at least, and for many years to come, the citizens of Philadelphia can have no well-grounded expectation of enjoying the benefits to be derived from the existence in their midst of the first class female college contemplated by the trustees when they began "their effort" to raise $500,000.

No subscription has ever been paid, or, except in the single instance now before us, even asked for; and if a recovery should be permitted, there is at least a strong probability that the amount would ultimately have to be returned on account of the complete failure of the project.

Apart from the reasons stated in the adjudication, we think the claim cannot be sustained.

The case falls within the principle of Phipps *v.* Jones (8 Harris, 260), and much that is said there may well be applied to it. The scheme proposed was, as in that case, "an experiment," and so long as it remains such, it cannot be said that there was a complete contract on the part of subscribers.

Exceptions dismissed and adjudication confirmed.

Opinion by PENROSE, J.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, NOV. 6, 1879.* [No. 28.

Supreme Court.

Oct. & Nov. '78, 164. May 29, 1879.

County of Allegheny v. John Gibson's Son & Co.
Same v. Webb & Son.

Constitutional law—Liability of county for damages caused by mob—Act of May 31, 1841—Constitutionality of, not affected by Constitution of 1874.

The Act of May 31, 1841, extended to Allegheny County by the Act of March 20, 1849, making the county liable for property destroyed by a mob, was constitutional at the time of its passage, and is not repealed or declared void by the passage of the present Constitution.

The provisions of the said Act are broad enough to embrace all riotous disturbances, without reference to the size or character of the mob.

A property owner is not required by said Act to give notice to the county officials unless he has a knowledge of an intention on the part of the mob to destroy his property and sufficient time intervenes to give the notice contemplated. Such notice is not necessary where such officials already have knowledge of the intention or attempt to destroy the property.

The words "illegal or improper conduct" in said Act construed.

The Act of 1841 is both a remedial and penal statute, and must be liberally construed. The fact that the civil authority is unable to cope with and quell a riot can afford no defence to the county's liability for damages done thereby.

The said Act of 1841 applies to cases where the property destroyed is real or personal property of any description. The fact that it is in transitu at the time of its destruction does not exempt the county from liability.

The said Act of 1841 applies equally to cases of the destruction of the property of non-residents as of residents.

Error to the Common Pleas of Beaver County.

This was an action of trespass on the case brought by John Gibson's Son & Co., of Philadelphia, against the County of Allegheny for the loss of sixty barrels of whiskey destroyed by the mob during the labor riots of July, 1877. The suit was originally brought in Allegheny County and the venue was subsequently changed to Beaver County. The facts were these:—

The whiskey in question was shipped to plaintiffs from Cincinnati, Ohio, on July 16, 1877, to be carried by the P. C. and St. L. R. W. Co., and the Pennsylvania Railroad Company to Philadelphia, and it arrived at Pittsburgh on the morning of Thursday, July 19th. On the evening of that day the sheriff of Allegheny County was warned by the Pennsylvania Railroad Company that a number of men had taken forcible possession of their property and refused to allow trains to run upon their road.

The sheriff endeavored to disperse the mob, who positively refused to obey him, asserting "that they were going to wade in blood to their waists." Several other efforts were made by him to the same end, and with like effect, during the ensuing Friday and Saturday. He finally withdrew, and on Saturday night and Sunday the whiskey in question was burned by a fire kindled by the mob.

The action was brought against the county under the provisions of the Act of May 31, 1841 (P. L. 415), extended to Allegheny County by the Act of March 20, 1849 (P. L. 184), whereby it was enacted that:—

SECT. 7. "In all cases where any dwelling-house or other building or property real or personal has been or shall be destroyed within the county . . . in consequence of any mob or riot, it shall be lawful for the person or persons interested in and owning said property to bring suit against said county where said property was situated, and being for the recovery of such damages as he or they sustained by reason thereof. . . ."

SECT. 8. "No person or persons shall be entitled to the benefits of this Act, if it shall appear that the destruction of his or their property was caused by his or their *illegal or improper conduct*, nor unless it be made to appear that he or they, upon the knowledge had of the intention or attempt to destroy his or their property, or to collect a mob for such purpose, and sufficient time intervening, gave notice thereof to a constable, alderman, or justice of the peace, of the ward, borough, or township, in which such property may be situated, or to the sheriff of the said county. . . ."

On the trial before HICE, J., the defendant made the following offers of evidence: (1) To show that the riot which resulted in the destruction of plaintiffs' goods was inaugurated by a strike of the employés of the Pennsylvania Railroad Company caused by a reduction of their wages; and further that no destruction of property took place until the railroad authoritities had, by means of State troops, sent to their aid, endeavored to run their trains and enforce their rules against their striking employés by attacking them with arms and shooting some of their number; the purpose of this offer being to show that the railroad company, bailees of plaintiffs, had been guilty of improper conduct within the meaning of the statute. Objected to as irrelevant; objection sustained; exception (second assignment of error). (2) To show that the said railroad company had been guilty of improper conduct in that it had entered into an illegal combination with other railroad companies to put down the wages of their respective employés

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—that in consequence of the said combination the employés of the railroad had struck and refused to allow the passage of freight trains, whereupon the said company called upon the State authorities for a military force who came into armed conflict with the mob caused as aforesaid, and that in consequence of such conflict the mob, who had theretofore destroyed no property, became exasperated and uncontrollable and proceeded to the destruction of the plaintiffs' goods. Objected to, as irrelevant; objection sustained; exception. (3) To show that the mob and violence whereby the plaintiffs' goods had been destroyed was not a local mob, or not within the meaning of the Act of Assembly, but was a part only of a widely extended and organized insurrection which broke out simultaneously in various parts of the country; and further that the said outbreak, by reason of its nature and extent, was beyond the power of the local authorities to anticipate or to subdue. Objected to; objection sustained; exception. (Third and fourth assignments of error.)

The defendant requested the Court to instruct the jury substantially as follows, viz: That the Act of May 31, 1841, was in contravention both of the Constitution of the United States and the Constitution of Pennsylvania, and was therefore void, and that the Act of March 20, 1849, extending the several sections of the Act of 1841 to Allegheny County, was void for the same reasons. That the property of the plaintiffs was, when destroyed, merely *en route* to its destination, and was not, therefore, property *situate* in the county, within the meaning of the Act of Assembly. That the State authorities having at the request of the county and railroad authorities called out the State troops, and having undertaken to overpower and subdue the said rioters, the county was thereby relieved from any liability for loss thereafter occurring.

The Court refused to instruct the jury as thus requested, but affirmed the following point presented by the plaintiffs, viz.: "That under all the evidence in this case, if the same be believed by the jury, the plaintiffs are entitled to recover."

Under the instructions of the Court a verdict was found in favor of the plaintiffs, and judgment entered thereon. Defendant took this writ, assigning for error the rejection of testimony, and the refusal to charge as requested by defendant, and the affirmance of the plaintiffs' point.

The case of Allegheny County *v.* Webb & Son was argued with this case. The material facts were identical, except that Webb & Son were non-residents of Pennsylvania, and it was argued, therefore, by plaintiff in error that the Act of 1841 did not extend to them any right of action.

Daniel Agnew, *George W. Biddle* and *Geo. Shiras, Jr.* (with them *S. H. Geiger*), for plaintiff in error.

The plaintiffs failed to show any notice on the part of the railroad company to the county authorities of any intent on the part of the mob to destroy property in their possession. The plaintiffs ought not therefore to recover.

The railroad company was guilty of "illegal and improper conduct" within the meaning of the Act of 1841. Offers to prove this improper conduct were improperly rejected.

The Act of 1841 was not intended to apply to cases of mobs of such a character as the mob of 1877. The true intent of the law must govern.

Bacon's Abridgment Tit. Statute, 247–937.
Dwarris on Statutes, p. 690.
1 Blackstone's Comm. 61–87.
Cadbury *v.* Duval, 10 Barr, 270.
Commonwealth *v.* Fraim, 4 Harris, 169.
Commonwealth *v.* Erie and N. E. R. R. Co., 3 Casey, 339.

The presence of the State military exempted the local authorities from all obligation to control the mob, and relieved the county from all liability for damages caused by the mob.

Although this Act was constitutional when passed, it has since become unconstitutional by the adoption of the present Constitution of Pennsylvania.

When a former frame of government is abrogated by the people themselves and a new government substituted as an entirety, in its room, all laws not essential to preserve vested rights, fall with the superseded government. This Act is in conflict with Article III. sect. 7 of the new Constitution prohibiting special legislation. The Legislature could not now pass such an Act.

Commonwealth *ex rel*, Fertig *v.* Commissioners of Crawford County, 7 WEEKLY NOTES, 6.

It is also inconsistent with the 8th section of the 9th article, limiting the debt of any county to seven per cent. of the assessed value of taxable property therein. No limit can be set to a loss occasioned by the violence of rioters.

It is inconsistent with the 10th section of the 9th article, providing that no municipality shall incur any indebtedness without previously providing for the collection of a tax sufficient to pay the same within thirty years; and with the 2d and 3d sections of the fifteenth article providing that no liability shall be contracted by any municipal commission except in pursuance of an appropriation by the municipal authorities. It is inconsistent with the equality of persons, benefits, and burdens maintained and enforced in the New Constitution.

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It is inconsistent with the constitutional guarantees of the right of private property. Contribution to pay for a loss caused by the trespass of another is not taxation, because it is not an assessment for a *public* use or purpose. The trespass is an individual act of violence which cannot raise a constitutional right to make others pay for it.

The Act is inconsistent with the fourteenth amendment to the Constitution of the United States, in that it imposes burdens upon a certain number of persons, within certain boundaries, not shared in by others, and, therefore, fails to extend to every person the equal protection of the law. The Act, therefore, is void.

Nor do the following decisions touch the present case:—

Lehigh Iron Co. *v.* Lower Macungie Township, 31 Sm. 482.
Wattson *v.* C. and D. River R. R. Co., 2 Norris, 254.
Indiana County *v.* Agricultural Society, 4 Id. 357.

because the Acts there decided to remain still in force are local or special laws essential to vested rights, or to maintain existing institutions and necessary regulations. These the New Constitution did not *ipso facto* repeal.

The Act of 1841 applies only to the kind of personal property usually found connected with real estate in the county.

Thomas M. Marshall, M. W. Acheson, and *D. T. Watson*, for defendants in error.

Sufficient notice of the impending danger was given by the railroad company to the county officials. No "illegal or improper conduct" on the part of the railroad company was set forth in the offers of defendant, which would defeat a recovery by the plaintiffs. To bring a case within the terms of the Act, such conduct must be the proximate cause of the injury, and the destruction be the natural and necessary consequence.

Lavery *v.* Philadelphia Co., 2 Barr, 231.
Donoghue *v.* Philadelphia Co., 2 Barr, 230.
Eby v. County of Niagara, 36 N. Y. 197
Blodgett *v.* County of Syracuse, 36 Barb. 526.
Newberry *v.* New York, 1 Sweeny, 369.
Schiellein *v.* King's Co., 43 Barb. 491.
St. Michael's Church *v.* Philadelphia, Brightly, 21.

The Act of 1841 refers to all cases of mob violence, whether beyond the power of the authorities to quell or not. It is remedial as well as penal and must be liberally construed.

Charge of Judge KING to Grand Jury of Philadelphia, 4 Penna. Law Journal, 31.
St. Michael's Church *v.* Philadelphia, *supra*.
Commissioners of Kensington *v.* Philadelphia, 1 Harris, 78.
Hermits of St. Augustine *v.* Philadelphia, Brightly, 116.
Davidson *v.* The Mayor, etc., of New York, 2 Robertson, 230.
Darlington *v.* The Mayor, etc., of New York, 31 N. Y. 173.
Wilmot *v.* Horton Douglass, 677.
Charge of Judge JONES to Grand Jury of Philadelphia, 3 Penna. Law Journal, 397.

The inability of the county officers to quell the riot cannot limit the liability of the county, otherwise the interest of the county would be to have large mobs and not small ones, and peaceable citizens would be encouraged to join the mob and swell its numbers. The word "situated" in the statute is used to designate the county. It is not a restriction or limitation of the first portion of the section which covers "all cases," and "any . . . property, real or personal." The Act of 1841 was a lawful exercise of the police power of the State. Such an act is sanctioned by the History of England for over five hundred years.

Farrar's Report of Dartmouth College Case, pp. 319, 335, and 352.
Darlington *v.* New York, 31 N. Y. 194.
Philadelphia *v.* Field, 8 Sm. 320.

There is no clause in the New Constitution expressly repealing the Act. Hence it remains in force. The New Constitution acts only prospectively.

Trustees of Erie Academy *v.* Erie, 7 Casey, 516.
Cooley's Cons. Lim. (2d ed.), *61.
Allbyer *v.* State, 10 Ohio N. S. 588.
State *v.* Barbee, 3 Ind. 258.
State *v.* Thompson, 2 Kansas, 432.
State *v.* Maysville, 13 B. Monroe, 1.
Taylor *v.* Mitchell, 7 Sm. 209.

No statute not positively repugnant to the New Constitution can be repealed by implication.

Perkins *v.* Slack, 5 Norris, 279.
In re Contested Election of Barber, 5 Norris, 400.

When the framers of the New Constitution intended to repeal a prior Act of Assembly they did so in express and unambiguous language.

See Bright & Co. *v.* Oakdale C. and M. Co., 10 Phila. 609.

The prohibition against special legislation is entirely prospective, as is shown by the provision that "laws repealing local or special acts may be passed."

Lehigh Iron Co. *v.* Lower Macungie Township, 31 Sm. 486.
Wattson *v.* Chester & Del. R. R. Co., 2 Norris, 256.
Indiana Co. *v.* Agricultural Society, 4 Id. 358.

The rest of the constitutional provisions cited by plaintiff in error refer to voluntary contracts for and expenditure of money by a county, and do not intend to limit a county's liability. Hence the Act of 1841 is not inconsistent with the New Constitution.

October 6, 1879: THE COURT. This was one of the cases brought against the county of Allegheny to recover damages for property destroyed by the mob during the riots of 1877. The particular property which is the subject of this suit consisted of sixty barrels of whiskey belonging to the plaintiffs below. It was wholly destroyed, and its value is not disputed. A verdict and judgment were had in favor of the plaintiffs, and the defendants have removed the record to this

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Court for review. The questions it presents are of grave importance.

The plaintiffs have no common law remedy. They must recover, if it all, by virtue of Act of May 31, 1841 (P. L. 416), which provides that in "all cases where any dwelling-house or other building or property, real or personal, has been or shall be destroyed within the county of Philadelphia, in consequence of any mob or riot, it shall be lawful for the person or persons interested in and owning said property to bring suit against said county where said property was situated and being for the recovery of such damages as he or they sustained by reason of the destruction thereof, and the amount which shall be recovered in said action shall be paid out of the County Treasury on warrants drawn by the Commissioners thereof, who are hereby required to draw the same as soon as said damages are finally fixed and ascertained." The provisions of this Act were extended to the county of Allegheny by the Act of March 20, 1849 (P. L. 184). A somewhat similar Act had been in force in Philadelphia since 1836. (See Pamphlet Laws, 711, § 36.) We are charged with no duty of vindicating the wisdom of this legislation. It is proper to say, however, that the principle embodied in the Act is not new. As early as 1285 the Parliament of England, by Statute of Winton, or Winchester (1 Stat. 13 Edw. I., p. 2, ch. 3, see 1 Hawk. P. C., ch. 68, § 11), provided a remedy against the hundred, county, etc., in which a robbery should take place, for the damages caused thereby, to be recovered by the party robbed in any action against any one or more of the inhabitants. This statute was re-enacted by 28 Edward III., ch. 2. Subsequently the Statute 27 Eliz., ch. 13, § 2, provided for the assessment of the damages against all the inhabitants of the hundred after a recovery against one or more. Next we have the famous Riot Act of 1 George I., ch. 5, §§ 1 to 7, which was passed by reason of the tumult attendant upon the accession of that king to the throne, and which made it a felony, without benefit of clergy, for any persons unlawfully to assemble and demolish any church or dwelling-house. The sixth section of the same Act provided that in case such church or dwelling-house should be destroyed, the inhabitants of the hundred in which it was situated should be liable for its value. This was followed by the Act of Geo. II., ch. 10, § 1, and the laws upon this subject were consolidated in 1827 by 7 and 8 Geo. IV., ch. 31. It will thus be seen that we have imported the principle of the Act of 1841 from that country from whence we derive the great body of our common law. That it was not transplanted at an earlier date is perhaps due to the fact that new countries sparsely settled do not early develop riotous tendencies.

Among the numerous questions raised by the assignments of error is that of the constitutionality of the Act of 1841. As this underlies the entire case, it will be first considered. It was pressed with great earnestness upon the argument, the learned and distinguished senior counsel for the plaintiffs in error having devoted his attention exclusively to its consideration, in connection with the inapplicability of the Act of 1841 to the case in hand. It was not contended that the Act was unconstitutional at the time of its passage, but that by reason of its inconsistency with the new Constitution, it was not preserved by section 2 of the schedule, and fell with the adoption of that instrument. This argument is based upon the theory that the Constitution was not a mere amendment of the Constitution of 1838, but a substitution of a new frame of government, and that it was an abrogation of all Acts and authorities derived from the old frame unless preserved by the new. It is true this principle of constitutional law was introduced into this State by the Constitution of 1777, and the Act of revival of January 28 of that year (1 Bioren's Laws, 429). The preamble to the Constitution recites the rights of the people and the oppressions of the crown, and declares that all allegiance and fealty to the said king and his successors are dissolved and at an end, and all power and authority derived from him ceased in these colonies. It is not difficult to understand why this principle should be asserted in a constitution that was the outgrowth of a revolution and of a total severance of all political relations between the colonies and the mother country. In its application to the present times we must not overlook the fact that the conditions are essentially different. The Convention of 1873 was not throwing off the yoke of an oppressor and abrogating laws imposed upon the people by a Parliament not in sympathy with their views, or in whose deliberations they had no voice. The Convention was simply the people of the State, in a representative capacity, it is true, sitting in judgment upon their own acts, altering and modifying their own Constitution to suit the progress of the age, and changing their own laws where deemed essential to the welfare of the State. To such a body so constituted no intention to abrogate all that had gone before can be imputed, unless such intention be clearly expressed. I will not stop to discuss the difference between the Constitutions of 1838 and 1874 in this respect. It is more seeming than real. Each is an alteration or amendment of the constitution existing at the time, and nothing more. It was provided by the schedule of each, that all laws in force at the time of its adoption, "not inconsistent therewith, and all rights, actions, prosecutions and contracts, shall

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continue as if this Constitution had not been adopted." It is true the schedule of the Constitution of 1838 uses the words "as if the said alterations and amendments had not been made," instead of the words "as if this Constitution had not been adopted," used in the schedule of 1874. The Act of April 11, 1872 (P. L. 53), which called the recent Convention into existence, was entitled "An Act to provide for calling a convention to amend the Constitution." It is true the 4th section of said Act authorized the Convention to propose to the citizens of the Commonwealth, for their approval or rejection, a new Constitution, or amendments to the present one, or specific amendments to be voted for separately." The amendments were radical, yet they were but amendments. A large body of the prior Constitution remained. It may be called a new Constitution in the sense in which we call a machine new after it has left the repair shop. Still the fact remains that the Constitution is but the prior Constitution amended. It matters little how we designate it. The Constitution of 1874 was not an abrogation of a former frame of government, as was the Constitution of 1777. The frame of government means its form or system. In this sense it remains substantially the same. It is as essentially "a government of the people, by the people, and for the people," as it was before the Convention met. It is changed only in matters of detail. Some of the machinery supposed to be worn out has been replaced by new, intended to be of an improved character.

It was urged that the Act of 1841 is inconsistent with the following provisions of the Constitution, viz.:—

1st. The seventh section of Article 3: "The General Assembly shall not pass any local or special law regulating the affairs of counties, cities, townships, wards, boroughs, or school districts."

2d. The eighth section of the ninth Article: "The debt of any county, city, borough, township, school district, or other municipality, or incorporated district (except as herein provided) shall never exceed seven per centum upon the assessed value of the taxable property therein. Nor shall any such municipality or district, incur any new debt, or increase its indebtedness to an amount exceeding two per centum upon such assessed valuation of property, without the assent of the electors thereof at a public election in such manner as shall be provided by law."

3d. The tenth section of the ninth Article: "Any county, township, school district, or other municipality, incurring any indebtedness, shall, at and before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof within thirty years."

4th. The first and second sections of the ninth Article: "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. But the General Assembly may, by general laws, exempt from taxation public property used for public purposes," etc., and "all laws exempting property from taxation, other than the property above enumerated, shall be void."

In addition the said Act was alleged to be inconsistent with certain other portions of the Constitution, the purpose and intent of which are claimed to be, to maintain equality in the burdens and impositions necessary to the public welfare, the most important of which are: Article 1, sections 4, 14, and 23; Article 10, section 1; Article 15, sections 2 and 3; Article 16, section 8; Article 17, sections 1, 3, 7, and 8.

It is not deemed essential to discuss all of these constitutional provisions, or to refer to them *seriatim*. Some of them manifestly have no application to the present contention. Thus we have no question before us as to the extent of the debt of the county of Allegheny, or of the assessed value of its property. This record furnishes us no information which would enable us to form an intelligent opinion as to whether the judgment below so increased the debt of the county as to bring it within the prohibition of the Constitution, and if it did it would be a novel defence to an action at law for the county to plead that it already was in debt to the extent of the constitutional limitation. How far such a plea would avail in restraint of an execution I need not stop to discuss. It is clearly no reason why a judgment should not be recovered, and I apprehend would be a frail shelter for municipal corporations from the consequences of their tortious or negligent acts. The tenth section of the ninth Article refers to the contracting of a debt or the incurring of an indebtedness by virtue of a contract by municipalities, when it provides for the levying of an annual tax sufficient to pay the interest and the principal within thirty years.

The failure to levy such a tax by the municipality is no reason why a party injured by its negligence should not sue therefor and recover his judgment. The argument is that there can be no liability on the part of a municipality, because the amount thereof being unknown prior to the destruction of the property, it is impossible to comply with the mandate of the 10th section in providing an annual tax to meet it. The 8th and 10th sections were not intended to make corporations dishonest, nor to shield them from the consequences of their own wrongful or negligent acts. Further than this it is not necessary for us now to go. The delicate questions which

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will probably arise under these sections will be decided when they are legitimately before us.

It may be conceded that if the Act of 1841 had been passed subsequent to the adoption of the Constitution it would have been "a local or special law regulating the affairs of counties, cities, townships, wards, boroughs or school districts," and therefore within its prohibition. But such prohibition is prospective. Its language is "The General Assembly shall not pass." Hence it is plain the Act of 1841 is not affected by the prohibition: the only question is, was it repealed? The Act was well known at the time of the Convention. It had been upon the statute books since 1841, and had been made especially prominent by reason of the Philadelphia riots of 1844. The Convention might have repealed it in express terms. Yet there is no direct repeal in either the Constitution or schedule. If repealed at all, it is by implication only, and fell with the adoption of the Constitution with the body of the old laws that were not essential to preserve vested rights and existing institutions necessary to the public welfare. This is not an entirely new question. A somewhat similar one was considered in the Trustees of the Erie Academy *v.* The City of Erie (7 Casey, 515). In 1849 the town Councils of the borough of Erie passed an ordinance for the paving of certain streets. Before the paving was done the Legislature changed the government of the borough into that of a city, and it was argued that the ordinance fell. This Court held, sustaining the Court below, that the ordinance of the borough continued in force notwithstanding the change in the frame of its government. Said Mr. Justice STRONG, "There is no doctrine better settled than that a change in the form of government of a community does not *ipso facto* abrogate pre-existing laws, either written or unwritten. This is true in regard to what is strictly municipal law, even when the change is by conquest. The Act of Assembly converting a borough into a city did not, therefore, of itself, and in the absence of express provisions to that effect, either repeal former Acts of Assembly relative to the borough, or annul existing ordinances. It was solely a change of the organic law for the future, and left unaffected the borough statutes, precisely as a change of a State Constitution leaves undisturbed all prior Acts of Assembly." This case was prior to the present Constitution, and has no direct reference to it. We have, however, several cases since its adoption in which the very point in controversy was before us. The first was the City of Pittsburgh *v.* Kitty Roup (1 WEEKLY NOTES, 254), which was an appeal from a preliminary injunction restraining the city of Pittsburgh from collecting the full rate of taxation upon plaintiff's real estate, which had been assessed as rural under a special local Act passed in 1868, and under which Act only two-thirds of the city rates could be assessed and levied. Notwithstanding this Act the City Councils attempted to assess and collect the full rate of city taxation from the plaintiffs, claiming that under Article 9 of the Constitution, which provides that "all taxes shall be uniform," the special Act classifying plaintiff's property as rural was inoperative. In other words, that it was repealed by the new Constitution. The Court below thought otherwise and granted the injunction, which action was sustained by this Court. This was followed by The Lehigh Iron Company *v.* Lower Macungie Township (31 P. F. S. 482), where Article 7 was again under consideration. Said Chief Justice AGNEW: "In view of the wide and extended effects of an immediate repeal *ipso facto* by the adoption of the new Constitution, it behooves us to be careful in the interpretation of the sections mentioned. Upon all the consideration we can give to this subject, after a very careful argument to assist us, we are of opinion that section 1 of Article 9 is not immediately operative, but was intended by the Convention to be mandatory upon the Legislature to enact laws framed upon its special intent, and to repeal all laws inconsistent therewith, leaving the Legislature, in the exercise of wise and sound discretion, to time the repeal, and after proper general laws have been passed. Any other interpretation would lead to most ruinous results." In Wattson *v.* Chester and Delaware River Railroad Co. (2 Norris, 254), it was held, Chief Justice AGNEW delivering the opinion of the Court, that "The provisions of the new Constitution contained in section 22 of Article 3, that 'The power to change the venue in civil and criminal cases shall be vested in the Courts, to be exercised in such manner as shall be provided by law,' was not immediately operative *eo instante* the Constitution was adopted so as to defeat existing laws." The same doctrine was asserted by this Court in the later case of Indiana County *v.* The Agricultural Society of Indiana County (4 WEEKLY NOTES, 481). The Act of March 29, 1851, enables County Agricultural Societies to receive from the treasurer of the county a certain bounty. Article 9, section 7, of the Constitution of 1873, prohibits the General Assembly authorizing any county to appropriate money for, or loan its credit to, any association, corporation or individual. It was held, recognizing and following Lehigh Iron Company *v.* Lower Macungie Township, *supra*, that the prohibition of the Constitution was wholly prospective, and did not repeal the Act of 1851. Even stronger, if possible, is the case of Perkins *v.* Slack (5 Norris, 270), in which it was held by this Court that section 22, Article 15, of the Constitution, which

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provides that "no debt shall be contracted or liability incurred by any building commission except in pursuance of an appropriation previously made by the municipal government," did not affect the Act of 5th August, 1870 (P. L. of 1871, p. 1548), creating the Building Commission of the city of Philadelphia, so as to prevent said Commission making requisitions at pleasure upon the Councils of said city for means to continue the erection of the city buildings at Broad and Market Streets. Commonwealth *ex rel.* Chase *v.* Harding *et al.* (6 WEEKLY NOTES, 305), is the last of this series of cases. It was there held that section 5 of Article 5 of the Constitution, which declares that "whenever a county shall contain fifty thousand inhabitants, it shall constitute a separate judicial district, and shall elect one judge learned in the law," is not self-executing, but merely indicates a certain basis upon which, at the proper time, and in the proper manner, judicial districts are to be created by the Legislature.

It was contended, however, that the cases cited are inapplicable to the one in hand for the reason that the special laws referred to therein were necessary to preserve existing institutions and regulations essential to the public interests in the localities affected; whereas the Act of 1841 is not necessary for any such purpose; that it preserved no existing institutions; that the occurrence of a mob and the destruction of property thereby was a mere *potentia remotissima*, and that the Act therefore fell. This is assuming the very point in controversy. If, as we are bound to presume, the Act of 1841 was a necessary police regulation at the time of its passage, we must regard it as essential now until the contrary is made to appear. Just here the ingenious and able argument for the plaintiffs in error fails. No reason has been shown why the Act in question is not now as essential to the order and good government of the cities affected by it as it was at the time of its passage. Regarding it as a remedial statute, the very riots which are the subject of the present contention furnish a potent argument to show that it has not outlived its usefulness. Its application to the Philadelphia riots of 1844 showed that at that time it was a much needed police regulation. It enabled the owners of property destroyed to recover the value; at the same time it inculcated a lesson of inestimable value to the municipal authorities and taxpayers of that city, the good results of which are seen in a well-trained police force, and a freedom from mob violence that is exceptional. The increased growth of the cities of Philadelphia and Pittsburgh, not only in area and population, but also in the materials and elements out of which spring riots and disorders, tends to show that the Act of 1841 is even more essential now than at any prior period. In our view it certainly appears as important to the public interest in the locality affected as a law giving to the Indiana County Agricultural Society a hundred dollars per year.

The late Convention had in it some of the ablest constitutional lawyers in the State, among whom were two ex-Chief-Justices of this Court. Whenever that body desired the Constitution to act retrospectively, and repeal existing laws, they knew how to do it. Thus in section 21st of Article 3, which restricts the power of the General Assembly to pass laws limiting the time in which suits may be brought against corporations for injuries to persons or property, it adds: "And such Acts now existing are avoided." Section 22 of the same Article, providing against investment by trustees, executors and guardians, in the bonds or stock of any private corporation, adds: "And such Acts now existing are avoided, saving investments heretofore made." In Article 5, section 5, regulating judicial districts, it says: "The office of Associate Judge, not learned in the law, is abolished in counties forming separate districts." Section 12 of the same Article provides: "In Philadelphia the office of Alderman is abolished." In section 21 of the same article: "The Court of Nisi Prius is hereby abolished." In Article 9, section 2: "All laws exempting property from taxation other than the property above enumerated, shall be void." Section 1 of Article 16: "All existing charters or grants of special or exclusive privileges, under which a *bona fide* organization shall not have taken place and business commenced in good faith at the time of the adoption of this Constitution, shall thereafter have no validity." Then we have the exception in the 7th section of the 1st Article, giving power to the Legislature to repeal special and local acts. This, as was said by AGNEW, C. J., in Lehigh Iron Company *v.* Macungie Township (*supra*, at p. 486), "strongly indicates the intent that such local or special Acts should remain until legislation had been adopted to harmonize these local and special provisions with the general laws so adopted." I may well stop here with this branch of the case. The principle that local or special laws were not *ipso facto* repealed by the adoption of the present Constitution is too firmly established to be overturned or shaken. The cases cited settle the broad principle that the sections of the Constitution referred to are "not immediately operative," but are merely mandatory upon the Legislature to repeal such local or special laws after protecting such interests as need preservation by the passage of general laws. The Legislature may, and doubtless will, at the proper time, legislate upon this subject. It may repeal the law, or, in view of the rapid growth of other towns and cities, and the increasing tendency to mob violence growing

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out of social, political, and labor disturbances, may extend it over the State by a general law. I notice that the Act of the 15th of April, 1863 (P. L. 490), extends it to Northampton County. There may be Acts extending it to other counties which have escaped my notice. Until such time as the Legislature shall declare its will, the Act of 1841, under all our decisions, is entitled to stand.

Just here we are met with the proposition, that, if the Act of 1841 was not repealed by the adoption of the present Constitution by reason of its inconsistency therewith, yet that said Act is inapplicable to the case in hand; that the facts as admitted and offered to be proved were not within the intent and purpose of the Act. It was urged in support of this view that the county of Allegheny has not a concentrated police force; that its townships and boroughs are disconnected municipalities, having no combined magistracy, no organized and consolidated constabulary, and no common head to govern and direct; that the riot by means of which the property of plaintiffs was destroyed was the result of a labor strike extending over many States; that at the time of the passage of the Act of 1841 our present great railroad system had no existence, and that it could not have been intended by the framers of said Act that it should apply to such unlooked-for and exceptional circumstances. A number of authorities were cited to show that in expounding a law, the reason and spirit and the intention thereof should be considered. No fault is found with the authorities. They are undoubted law, but their application to the facts of this case is not clear. We have here a statute that is free from ambiguity. In such case the intention of the Legislature is to be collected from the words of the Act. This is a primary rule in the construction of statutes. (Dwarris, 164.) The best exponents of the legislative mind are the words of the statute where they are free from ambiguity. (Com. *v.* Penn. Ins. Co., 1 Harris, 165; Bradbury *v.* Wagenhorst, 4 P. F. S. 180.) Although the spirit of an instrument is to be regarded no less than its letter, yet the spirit is to be collected from the letter. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words expressly provide shall be exempted from their operation. (Potter's Dwarris, 182; Story's Conflict of Laws, 10.) Of course the framers of the Act of 1841 could not have had this particular riot in view at the time of its passage, nor is it likely they contemplated the Philadelphia riots of 1844. But they did know, if they had ordinary intelligence, and that is to be presumed, that riots had occurred in the past in large cities, and were liable to occur in the future, of a character so serious as to shake the social fabric to its foundations. The Act was accordingly framed broad enough to embrace any and all such disturbances for the future. How then can we say, that the riots of 1877 were not within its spirit? Is it because of the size of the mob? Yet it did not compare with the London riots of 1780, the Philadelphia riots of 1844, or the New York riots of 1863. Is it because the mob was composed of strikers, and the object of their vengeance a railroad corporation? No such exceptions are found in the statute, and to write them in now to meet the exigencies of this case would be judicial *ex post facto* legislation of the most objectionable character. The argument upon this branch of the case has failed to point out just what kind of riots were contemplated by the framers of the Act of 1841. We are left to infer, however, that the Act was intended to apply only to riots where the number engaged is small and the damage inconsiderable. But where is the line to be drawn, and by whom? Is the Act to apply to mobs of ten persons, and not to those of one hundred? Or to those of one hundred, and not to those of one thousand? Is compensation to be made for a broken window, and denied where the entire building is sacked and burned? We have been furnished with no answer to these grave questions which confront us instantly upon any attempt to give to the Act of 1841 the narrow construction claimed for it.

Having disposed of these preliminary questions, we will now consider some of the incidents of the trial of the case in the Court below as developed by the assignments of error.

It is said that the plaintiffs did not prove any notice to a constable, alderman, or a justice of the peace of the ward, borough or township, or to the sheriff of the county in which their property was situated, of any intent to destroy their property, or of the fact that a mob had been collected for such purpose. Nor did they prove that sufficient time had not intervened to enable them to do so; and that, in the absence of such proof, it was error in the Court below to charge the jury, that, under all the evidence in the case, if believed by them, the plaintiffs were entitled to recover.

It is provided by the 8th section of the Act of 1841, that "no person or persons shall be entitled to the benefits of this Act if it shall appear that the destruction of his or their property was caused by his or their illegal or improper conduct, nor unless it be made to appear that he or they, upon the knowledge had of the intention or attempt to destroy his or their property, or to collect a mob for such purpose, and sufficient time intervening, give notice thereof to a constable, alderman, or justice of the peace of the ward, borough or township in which said property may be situated, or to the sheriff of the said

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county, and it shall be the duty of said sheriff, alderman, constable, or justice, upon the receipt of such notice, to take all legal means to protect said property so attacked or threatened," etc.

It is manifest that a property owner cannot be in default for want of having given notice under this Act, unless, first, he had knowledge of an intention on the part of the mob to destroy his property; and second, that there was sufficient time intervening to give the notice contemplated by said Act. It is equally clear that the object of such notice is to inform the proper officer, so that the property may be protected. These positions are fully sustained by authority, both in this State and in New York, where a statute similar to the Act of 1841 exists. In Donoghue *v.* The County of Philadelphia (2 Barr, 230), it was said by Mr. Justice SERGEANT: "The next question is as to the notice. The Act of Assembly requires that notice be given to the sheriff, alderman, justice or constable, where there is sufficient time intervening. But in what cases is the party required, by the Act, to give this notice? When he has knowledge of the intention or attempt to destroy his property, or to collect a mob for such purpose. It would be strange to require him to give notice when he has not such knowledge, and, therefore, in such case, he is not debarred from his remedy, though he has not given such notice." In St. Michael's Church *v.* County of Philadelphia (Brightly's Reports, 121), the defendant offered to prove that several days before the property was burned notice was given to two of the trustees of the church of such intention, and that they had neglected to give any notice to the sheriff. ROGERS, J., rejected the offer because the knowledge was not had by or notice given to the trustees in their corporate and official capacity. It would be equally unnecessary to give notice to the sheriff or other officer where he already had knowledge of the facts, or such notice would be unavailing for the purpose of protection. (Newberry *v.* New York, 1 Sweeney, 369; Schiellein *v.* King's Co., 43 Barbour, 491.) That the sheriff of Allegheny County had knowledge of the mob and of their intention, clearly appears from the testimony of that officer, offered by the defendants themselves. The sheriff had visited the mob on the evenings of July 19th, 20th, and 21st. When he saw the mob on the evening of the 19th they had commenced their work by the forcible seizure and retention of possession of the property of the railroad company. When he ordered them to disperse, they refused to do so, and told him "they were going to hold that road, and that they were going to wade in blood to their waists." The sheriff adds: The mob remained in possession of the road and increased in numbers, and that continued until Saturday evening. Mr. D. M. Watt was examined on behalf of the plaintiffs, and said that he called upon the sheriff in company with Hon. John Scott, of counsel for the company, on Thursday night, July 19th, and informed that officer "that the property of the company was in possession of a mob at Twenty-eighth Street, and that we were unable to move our trains or get possession of the switches, and that we desired protection. Mr. Scott called upon him, on the part of the company, for a proper force to protect the property of the company, and to protect the company in the movement of their business." "No destruction of property took place until after five o'clock P. M. of July 21st." It is manifest therefore that the objection that proper notice was not given under the Act of 1841 is without foundation.

It was further objected that the plaintiffs' bailees, the Pennsylvania R. R. Co., were guilty of improper conduct, within the meaning of the Act of 1841. The eighth section of that Act provides that "no person . . . shall be entitled to the benefit of this Act if it shall appear that the destruction of his property was caused by his . . . illegal or improper conduct." It was contended that by using the words "illegal or improper conduct," the law makes a distinction between conduct which is actually illegal and that which, although not technically unlawful, may be still improper. Just what is "improper conduct" within the meaning of the Act of 1841 is a nice question. We are not without rulings in our own State and elsewhere, where similar statutes exist, that may throw some light on the question. In Donoghue *v.* Philadelphia (*supra*), Chief Justice GIBSON placed his rulings on the legal rights of the owners of the property, and when it was urged that the introduction of armed men into the house, under the excitement existing at the time of the firing upon the mob, was injudicious, he replied, in his charge to the jury: "That it was justifiable to introduce men and arms into the house as the exercise of a freeman's privilege, whether there was an apprehension of danger or not; and that if the mob was not fired on until after it had begun the attack, this part of the defence had failed." To the same effect are the rulings of Mr. Justice ROGERS, in The Hermits of St. Augustine *v.* Philadelphia County (Brightly, 116), and St. Michael's Church *v.* Philadelphia County (Ibid. 121). It would seem to be clear that in order to defeat a recovery upon this ground for property destroyed by a mob, the "improper conduct" must have been the proximate cause of the destruction. "Was caused" is the language of the Act. In Lavery *v.* Philadelphia County (2 Barr, 233), it was said by Mr. Justice SERGEANT: "In order to debar a person from the remedy provided by the Act of Assembly of 31st of May, 1841, it must be made to ap-

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pear, in the words of the Act, that the destruction of his property was caused by his illegal or improper conduct." In the State of New York, the statute reads, that "no person shall be entitled to recover, if it shall appear upon the trial thereof that such destruction was occasioned, or in any manner aided, sanctioned or permitted by the carelessness or negligence of such person." Ely *v.* The County of Niagara (36 New York, 167), was decided upon this Act. It was an action for the destruction of a dwelling-house. The county, in the Court below, offered to prove that the house was a notorious bawdy house, kept by the plaintiff as such; that it was the resort of prostitutes, thieves, and murderers; that prior to its destruction a policeman of the town was found murdered in front of the house, and that he was so murdered by some one who made the house a resort, and during a drunken debauch therein; that when this fact became known the citizens were so enraged that in a body they assembled and destroyed the house. The Court below rejected the offer, and this ruling was affirmed, both in the Supreme Court and the Court of Appeals, and it was held that the act of the plaintiff, which would prevent her recovery, must be the proximate cause, and the loss the natural and necessary consequence. See also Blodgett *v.* County of Syracuse (36 Barbour, 526). It has never yet been held that the assertion of a legal right, in a legal manner, in pursuit of a legal and ordinary business, was such "improper conduct" as would prevent the owner of property destroyed by a mob, from recovering its value, under the Act of 1841, or similar statutes. It is not pretended that the plaintiffs did any improper act. They were hundreds of miles away, and knew nothing of the destruction of their property until it was accomplished. But it is said they are responsible for the act of the Pennsylvania Railroad Company, their bailees. Conceding this to be so for the purposes of this case, what act of the company was illegal or improper within the meaning of the statute? It was said that the mob was fired upon. Granted. But by whom? Not by the Pennsylvania Railroad Company, but by the military sent there by the Governor of the State, in response to a telegram from the sheriff of Allegheny county, asking for troops to assist in quelling the riot. Whether the firing was judicious under the circumstances, we are not called upon to say. It is no part of this case. It is enough for us to know that, whether judicious or otherwise, it was an act for which neither the company nor the plaintiffs are responsible. But it is said that the company reduced the wages of their employés, and in the face of the dissatisfaction produced thereby, endeavored to move their trains in opposition to the will of the mob. A more untenable position than this could not well be imagined. For some days cars loaded with freight from distant points had been accumulating in the yards at Pittsburgh by reason of the strike and the refusal of the strikers to allow them to be moved forward to their destination. The result was a blockade, paralyzing the business of the country, upon this, one of its greatest arteries of commerce. In such a vast collection of freight there must have been much of a perishable nature. It was the duty, involving a legal responsibility on the part of the company, to forward it. In doing so they were but asserting a legal right and performing a legal duty which they owed to shippers and consignees. Their action was neither illegal nor improper under the Act of 1841.

It was further objected that "where an insurrection is by reason of its nature and extent beyond the power of the local authorities to anticipate or subdue, a county cannot be held liable for the loss of property destroyed during and in consequence of it." This proposition is a crystallization of the offers of evidence contained in the fourth and fifth assignments of error. To which may be added the point, pressed upon the argument, that after the appearance of the military of the State upon the scene, in obedience to the order of the Executive authority, the responsibility of the county of Allegheny ceased. The word "insurrection" in this connection is not applicable. The meaning of it is: "A rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or State; a rebellion; a revolt."—*Worcester.* There was nothing of the kind here. It was a mob, and nothing more. It has never been held that the responsibility of a city or county for the violence of a mob depends upon its size or formidable character, or that the failure of the civil authorities to suppress it, or that their calling upon the military authorities for aid relieved them from liability. History furnishes three notable instances which go far to establish the contrary view. The first one to which I refer was the "No Popery" riots of London, in June, 1780. This was the most extensive riot of which we have any record. For several days, the mob, numbering 60,000 persons, had complete control of London. The authorities were paralyzed. The immediate cause of the tumult was the presentation of a petition by Lord George Gordon to Parliament for the repeal of Sir George Saville's Act for the relief of Catholics. The riot commenced on June 2d and continued until June 8th. It was not confined to the city of London, but spread throughout the kingdom. The whole city was in a state of anarchy. On the evening of June 6th thirty-six different fires were raging caused by the mob. The famous prisons of the Fleet and King's Bench were

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fired, and the prisoners released; all the public buildings threatened; many private houses sacked, included that of the Chief Magistrate of the highest criminal court in the kingdom, Lord Mansfield, whose furniture, pictures, books and papers, were all burned. More than 450 persons were killed. It was only by the vigorous use of the military power that the mob was finally subdued. The courts of England held that the loss fell within the statute, and the respective hundreds were liable. Another instance is the Philadelphia riots of 1844. Here again the civil power was wholly inadequate to suppress the mob, and it was only put down at last by the stern use and display of the military arm. Said the late Judge KING in his charge to the Grand Jury: "Our city during these scenes of violence has exhibited the appearance of a town of war, instead of the pacific seat of science and literature, of commerce and the industrial arts." The amount of property destroyed was large, for all of which the city was held liable under the Act of 1841. Later still we have the draft riots of New York in 1863, when an entire army corps was withdrawn from the front, where it was sorely needed, to hold in check the rebellious elements of that city. In numerous cases the Court of Errors and Appeals held the city liable. (Newberry *v.* New York, 1 Sweeney, 369; Davidson *v.* The Mayor, 2 Robinson, 230; Darlington *v.* The Same, 34 N. Y. 164.) Some idea of the extent of the damages caused by the mob during this riot may be inferred from the fact that upon the argument of the case last cited, counsel representing the plaintiffs in nine hundred and fifty other cases were heard. It may be that the point now under discussion was not made in any of the suits growing out of the three great riots above referred to. I do not find any trace that it was. In view of the hundreds of cases, of the large interests involved, of the number of eminent counsel employed, not only in England, but in New York, and in this State, the fact that no such point has ever before been made, is persuasive evidence that there is nothing in it. This, however, is not conclusive, and, in view of the gravity of the issue involved, we will consider it as a new question.

The Act of 1841 is both a remedial and penal statute. It is remedial so far as it provides for compensation to the person whose property has been destroyed, and penal so far as it throws the burden of that compensation upon the municipality within whose borders the destruction took place. It is but an extension of the ancient English law, which made the inhabitants of the respective hundreds responsible for robberies committed therein. Formerly, as we have seen, a person robbed had his remedy against any inhabitant of the hundred; that is to say, the inhabitants were jointly and severally liable. Then the law was so changed that damages recovered against an individual could be assessed against all the inhabitants, so as to compel contribution. Afterwards it was still further modified so as to give the right of action against the hundred. The principle upon which this legislation rested was that every political subdivision of the State should be responsible for the public peace and the preservation of private property; and that this end could be best subserved by making each individual member of the community surety for the good behavior of his neighbor, and for that of each stranger temporarily sojourning among them. The effect was to make each citizen a detective, and on the alert to prevent as well as to detect and punish crime. There was no exception in favor of robberies committed by overwhelming numbers, and by such a show of force as to overawe and overpower the limited constabulary of the hundred, or such as were committed by strangers. In either case the hundred was liable to the person robbed, however difficult or impossible it might be for the inhabitants to anticipate or prevent it. It was evidently a police regulation, based upon grounds of public policy, and enforced without regard to the hardships of particular cases. Our Act of 1841 is also a police regulation, and rests upon like grounds of policy. Under our political system the State grants a portion of its sovereignty to certain municipalities. It clothes them with certain of its powers, and exacts from them in return the performance of certain duties. Among the powers granted is that of maintaining a police force. Among the duties exacted is that of preserving the public peace. There is an implied contract between the State and every municipality, upon which it bestows a portion of its sovereignty, that such municipality shall preserve the public peace, and maintain good order within its borders. The State lends its aid when the local authorities are overborne, and a call for assistance is made in the manner pointed out by law. But it is entirely within the power of the sovereign to make such communities responsible for the preservation of order. The privileges conferred must be taken with such burdens as the law-making power chooses to annex thereto, and where liability for mob violence is imposed without qualification, it is not within the scope of judicial power to write exceptions into the law which the Legislature, in its wisdom, has not seen proper to place there. It may seem a harsh rule to hold a community responsible for the effects of mob violence, which, apparently, at least, they had no power to prevent, yet not more so than to hold every inhabitant of the English hundred liable for a robbery of which he knew nothing, and had no means of arresting.

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In both cases it is a police regulation. It is based upon the theory that with proper vigilance the act might and ought to have been prevented. That this is true with mobs, as a general rule, is well known. A mob is always cowardly, and usually of slow growth. It increases in size and courage just in proportion as the authorities evince hesitation or timidity. That this hesitation is often the result of indifference, if not of open sympathy, is unfortunately too true. It is rare that a mob is without a large body of sympathizers at its commencement. This is because its fury is generally directed against an unpopular object. In populous communities, especially in large cities, there are always antagonisms of race, religion, politics or social condition, which enable the demagogue to fan the fires of popular discontent, and incite the disorderly to acts of violence. It is because of this sympathetic feeling that mobs are often enabled to get the mastery, the fact being overlooked that a mob when once aroused, and maddened by success, becomes, like a wild beast, dangerous alike to friend and foe. There is nothing upon the face of this record to show that the Pittsburgh riots of 1877 were an exception to this rule. We see no evidence of any serious attempt upon the part of the local authorities to suppress it at the time of its commencement. A feeble attempt was made by the sheriff, resulting in the enrolment of some half dozen deputies. But there was no proclamation calling upon the body of the county to come to his assistance in preserving the public peace. No one doubts at this day that if a proper effort had heen made at the proper time the mob could have been held in check. No one doubts that it would have been, had the citizens of the county realized that they were responsible for the loss. But this Act of Assembly, folded away among the pamphlet laws, was probably forgotten or overlooked, even by those who knew of its existence. In the end the mob that had defied the military power was put down in the main by the civil authorities, after the citizens had been aroused by a sense of common danger. The law will not tolerate the spectacle of a great city looking on with indifference while property to the value of millions is being destroyed by a mob. To prevent just such occurrences was one of the objects of the Act of 1841. The fact that the State, when called upon, rendered its assistance, and sent a portion of its military to the scene, did not absolve the county from its implied obligation to preserve the peace, nor from its responsibility for a neglect of that duty. Were it otherwise, it might be to the interest of a municipality to increase the size of the mob.

The right of the plaintiffs to recover is further resisted upon the ground: 1. That being non-residents, they are not entitled to the benefit of the Act of 1841; and 2. That the property having been shipped at Cincinnati for Philadelphia, and destroyed on the cars *en route*, was not "situate" in the county defendant, within the meaning of the Act. The first ground of objection appears to be based upon a mistake of the fact. The "history of the case," furnished by the defendant, asserts that the plaintiffs are citizens of Philadelphia. I notice, however, that in the case of Webb & Son, argued with this, the plaintiffs are citizens of Baltimore, Md. As therefore the point must be met in that case, I will dispose of it here.

No authority has been cited, nor has any sufficient reason been shown, why the Act should not apply to the property of non-residents. It is broad enough in its terms to cover it. "In all cases," is the language of the statute. There is nothing in the spirit or reason of the Act to discriminate against non-residents. The stranger robbed had his remedy against the hundred as well as if he had been an inhabitant thereof. Our entire system of law, for the protection of person and property, places the citizen and stranger upon the same plane of security. It has never yet said to a mob: You must not touch the property of A because he is a citizen of the State, but you may work your will upon the property of B, because he is a non-resident. On the contrary, it protects the property of the stranger stopping for a single night at a hotel—so far as he brings it with him—precisely as it protects that of a lifelong citizen. Any other rule would be churlish and inhospitable, and if successfully asserted, would very materially lessen the business of the State, by diverting passengers and freight into channels where a more liberal rule of law prevailed.

Was the property situated within the county? Strictly speaking, personal property cannot be said to have a *situs*. It is situated wherever it may happen to be for the time being. This is all that the word means in the Act of Assembly, as applicable to *personal* property of this description. The Act, as before stated, is remedial as to the sufferer. Similar Acts have been invariably so regarded, and have been construed liberally. In Hyde *v.* Cogan (2 Douglass, 699), which was one of the cases growing out of the Lord George Gordon riots of 1780, the statute was largely considered, and all the judges, except Lord MANSFIELD, gave an opinion. Said WILLES, J.: "The sixth clause I rather consider as remedial. It may be said to be penal as to the hundred, but is certainly remedial as to the sufferer." ASHLAND, J.: "The purpose of this Act is remedial, and therefore it ought to receive a liberal construction." BUTLER, J.: "The statute is so penned that the words might possibly admit of

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two constructions, and therefore it is material to consider whether it is penal or remedial, because there is a well known difference in the rule of construction, as applied to laws of the one sort and of the other. When they are remedial the interpretation is to be liberal, so as best to apply to the end. . . . If the clause upon which this case arises (6) is remedial, which I think it is, the most extensive sense must prevail, and it was so held in both cases cited at bar (Radcliffe *v.* Eden; Wilmot *v.* Horton). But independent of authority, as the clause is remedial, it must receive a liberal construction." "It was accordingly held in that case that under the statute of George I., commonly called the 'Riot Act,'—which made it felony without benefit of clergy 'for any persons unlawfully, riotously and tumultuously assembled together, to the disturbance of the public peace, unlawfully and with force, to demolish or pull down any church or chapel, or any building for religious worship, etc.,—if any persons riotously assembled in part demolish and pull down a dwelling-house, and at the same time destroy goods and furniture in the house, although such goods and furniture were not destroyed by means of the pulling down of the house, the hundred is liable, under the above statute, for the destruction of the furniture, as well as of the house." And in Donoghue *v.* The City of Philadelphia (*supra*), an accidental destruction by fire, communicated from a building fired by a mob, was held to be within the Act. In Commissioners of Kensington *v.* The County of Philadelphia (1 Harris, 76), it was held that a municipal corporation is included within the term person or persons, authorized by the Act of 1841, to bring suit for injury to its property by a mob. Of a similar statute in New York, the Supreme Court of that State, Schiellein *v.* Kings County, *supra*, said: "The statute must receive a reasonable and liberal construction." And of our own statute, Justice ROGERS said, at *nisi prius*, in The Hermits of St. Augustine *v.* County of Philadelphia (*supra*): "The Act of Assembly has been carefully drawn, and is wise, just and beneficial in its character. . . . If the Act is always rigidly enforced when violated, the effect will be found highly beneficial." It requires no strain to bring the property in question within the letter and spirit of the Act of 1841. On the contrary, it would require a wrenching of the law to hold that the Act did not apply.

The learned Judge was right in rejecting the offers of evidence embraced in the second, third, and fourth specifications. It is manifest that if received they would not have amounted to a defence. The offers were also vague, involving conclusions rather than facts. An offer to show that the mob was beyond the control of the civil authorities was incomplete in the absence of any attempt to prove its numbers or size, or that an effort had been made to suppress it. An examination of the bill of exceptions shows that while the learned Judge rejected the offers as a whole, he nevertheless allowed the witnesses to proceed, with the understanding that they were to be checked if necessary. In this way the defendants got before the jury a very full history of the riots, which was not contradicted in its essential features.

Upon all the points presented the law is against the county. The judgment, therefore, must be affirmed.

Opinion by PAXSON, J.

STERRETT, J. withdrew before the argument.

Jan. '78, 124. Jan. 13, 1879.

Carman v. Beam, to use of Kelly.

Ejectment—Mesne profits when possession recovered pending action—Measure of damages in such case—Estoppel.

Mesne profits are recoverable in an action of ejectment, although plaintiff had acquired the legal title and possession after suit brought; he must, however, show that the title was in him at the time from which he seeks to recover the profits.

A. having brought an action of ejectment, obtained possession of the property in suit by deed from the then terre tenant, subject to a second mortgage which had been placed upon the property subsequently to the time when A. showed the title was in him:

Held, That as the evidence showed that A. voluntarily took the property subject to the mortgage, he could not, in an action for mesne profits, recover the amount of the mortgage, and that such amount could in no wise be considered an element of damage.

Error to the Common Pleas No. 2, of Philadelphia County.

Ejectment, by Jacob S. Beam, to use of S. S. Kelly, against Charles C. Carman, for a house and lot in the city of Philadelphia. Plea, not guilty. Prior to the trial the equitable plaintiff obtained possession of the premises (as hereinafter stated), and then gave defendant notice of his claim for mesne profits.

The facts were as follows: By agreement dated Sept. 18, 1867, Beam agreed with Carman to furnish all the material and to glaze and paint thirty-two certain houses then in process of erection by Carman, in payment for which he was to receive certain sums in cash at specified stages of the work, and two of the houses, of which the house in suit was one.

On January 8, 1868, Beam agreed in writing to sell to Kelly the house in suit for $4000, subject to a mortgage debt of $4000, making the whole consideration $8000. On Feb. 14, 1868,

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at the request of Beam and Kelly, Carman executed a deed in escrow of the premises to Beam, and on the same day Beam executed a deed in escrow therefor to Kelly, both these deeds being placed in the hands of a conveyancer, the former to be delivered to Beam, upon Carman's order, when Beam should have done sufficient work under his contract to warrant it, and the latter to be at the same time delivered to Kelly.

On the same day Beam gave Kelly a bond of indemnity against liens, signed by himself, Carman, and one Wilbur, which bond also contained a condition that the said house should be completely finished by June 14, 1868.

Kelly advanced to Beam the full amount of the purchase-money. The house not being completed within the specified time, Beam, on Sept. 9, 1868, with the assent of Kelly and Carman, assigned his interest in the contract to Wilbur; part of the consideration was that Wilbur should give Kelly a mortgage upon other premises for $4000, and Kelly was then to assign his interest in the house to Wilbur. The latter, however, failed to give Kelly the mortgage stipulated for, and after some litigation in relation thereto, Kelly, in April, 1873, brought this ejectment to recover possession of the house.

In the mean time Carman had reduced the mortgage of $4000 on the house to $3500, and had created a second mortgage thereon of $2500. Wilbur having completed the painting contract, now claimed the house, and Carman, at Wilbur's request, in August, 1873, conveyed it to one Pearson (who was a mere custodian of title for Wilbur), taking from him a bond of indemnity from any loss by reason of this ejectment suit, then pending.

The case was first tried in 1875, when, under the instruction of the Court, a verdict was rendered for defendant, but this verdict was set aside, and a new trial granted (see 2 WEEKLY NOTES, 260). Prior to the second trial, viz., on April 15, 1876, Kelly, the plaintiff, obtained possession of the house by virtue of a deed to him of that date, executed by said Pearson, who then held the title for Wilbur, subject to the said two mortgages of $3500 and $2500 respectively. The plaintiff then gave notice to defendant that the suit would be continued to recover mesne profits, and also to recover the amount of the increased mortgage-debt created by Carman, while he held the legal title, subject to which the plaintiff was obliged to take the premises.

The defendant presented, *inter alia*, the following points: That if Beam, after the execution of the deed in escrow, with the knowledge and consent of Kelly, assigned all his interest in the contract with Carman, and all money due and to become due thereon, to Horace P. Wilbur, whom the defendant accepted to do the work, then Carman became liable under the contract to said Wilbur instead of to Beam, and the plaintiff cannot recover. *Refused.*

That Carman was liable to Kelly only through his contract with Beam, and that as Beam, with the consent of Kelly, by the writing indorsed on the contract dated Sept. 9, 1868, released Carman from every claim and demand for or by reason of the said contract, then the plaintiff cannot recover. *Refused.*

That even though Wilbur subsequently failed to keep a portion of his said agreement with Kelly, yet Kelly having accepted said agreement and released Carman, there was a sufficient consideration for the release to Carman, and plaintiff cannot recover. *Refused.*

That as the plaintiff took the title to the premises in question, expressly under and subject to the mortgage for $2500, he is thereby estopped from making any claim for the amount of the said mortgage. *Refused.*

The Court charged the jury, *inter alia*, as follows:—

"For the purposes of this case I instruct you as a matter of law that the plaintiff is entitled to these profits; I mean, of course, subject to the questions of fact which I shall submit to you hereafter. I mean, there is no legal bar to the maintaining of this action because the plaintiff has accepted the deed and possession. . . . The first question of fact which you have to consider, and it is the turning point of the whole case, is whether or not Mr. Beam did $4000 worth of work upon this contract. If the $4000 worth of work was done, then Mr. Kelly has the right to recover. He had the right to have the first $4000 worth of work done applied to his benefit to give him title. . . . The plaintiff's case was, that he was to have had the property in 1868, subject to a $4000 mortgage, and in point of fact he did not get it until 1876, and when he did get it, was subject to mortgages of $6000. For this difference and including the profits the defendant had made out of the property in the mean time, your verdict should be for the plaintiff, if you so find."

Verdict and judgment for plaintiff for $3500. Defendant took this writ, assigning for error, *inter alia*, the refusal of the points and those portions of the charge above quoted.

Thomas J. Diehl (*J. C. Ferguson* with him), for the plaintiff in error.

Carman's possession ceased in 1873, when he made the deed to Pearson. It was error, therefore, in the Court to charge that mesne profits could be recovered until 1876. Mesne profits can only be recovered during the time of unlawful possession.

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Heckart *v.* Zerbe, 6 Watts, 269.
Zimmerman *v.* Eshbach, 3 Har. 419.

Kelly having taken the property expressly subject to the second mortgage, is estopped, in this action for mesne profits, from recovering the amount of the mortgage from the defendant.

Campbell *v.* Shrum, 3 Watts, 60.
Hoff's App, 12 Harris, 200.
Woodward's App., 2 Wright, 322.

David W. Sellers, for defendant in error.

Kelly being deprived of possession from 1868 until 1876, was entitled to recover for that time an amount equal to the rent received by the defendant, and a reasonable sum for any damage to the property.

Huston *v.* Wickersham, 2 W. & S. 308.
Kille *v.* Ege, 1 Norris, 112.

In 1868 plaintiff was entitled to the property, subject to $4000 mortgage; when he actually recovered possession, the property was further encumbered by a second mortgage of $2500, which damaged the property to that extent, and he is consequently entitled to recover that amount.

Feb. 3, 1879. THE COURT. The issue first formed by the pleading, was solely as to the right of the plaintiff below to the possession of the premises described in the writ. Before the trial he obtained possession by virtue of the deed from Pearson, to whom the defendant had conveyed after suit was brought. He then gave notice, "that on the trial a claim would be made for mesne profits, and also for the amount of $2500, secured by the defendant by virtue of a mortgage on the premises, while he was the mere custodian of the title." However it may be elsewhere, in this State it has been decided that in our statutory action of ejectment, mesne profits may be recovered by giving notice of the claim when suit is brought or afterwards, within a reasonable time before trial. (Dawson *v.* McGill, 4 Whart. 230; Cook *v.* Nicholas, 2 W. & S. 27.) Notwithstanding the plaintiff had acquired the legal title and was in actual possession of the premises before trial, he had the right to claim the mesne profits for the previous unlawful detention of the possession; but to justify a recovery, it was necessary for him to establish his right to the possession at the time suit was brought in 1873, as fully as if he were prosecuting his action of ejectment for the sole purpose of obtaining possession. Accordingly, he undertook to do this by giving in evidence the original contract with Carman, and the subsequent agreement and transactions by which it was modified. The main question of fact raised by the testimony was whether a sufficient amount of work had been done under the contract to entitle Beam to the deed which had been left in escrow with Yardley. The right of the plaintiff to recover hinged upon this question. The learned Judge after calling attention to the original and subsequent agreements, and the testimony as to what had taken place between the parties, instructed the jury, in substance, that the first question of fact for their consideration, and the turning point of the case, was whether the necessary amount of work had been done by Beam under the contract. The view taken by the Court of the contract, and subsequent agreement of the parties, was substantially correct. The questions raised by the testimony were fairly submitted to the jury, with full and appropriate instructions; and the verdict established the fact that the necessary amount of work had been done as claimed by the plaintiff; that he was entitled to the deed, and consequently to the possession of the premises in controversy.

We discover no error in the rulings of the Court touching the right of the plaintiff to recover mesne profits.

We think, however, there was error in the instructions as to the measure of damages, especially in regard to the $2500 mortgage. The plaintiff, after bringing suit, accepted the conveyance from Pearson, expressly subject to both mortgages, amounting to $6000. In addition to this, he agreed to pay one-half the delinquent taxes and three months' interest on the mortgages, $269.79. This was a voluntary act on his part, and he had no right, in the present form of action, to call upon Carman to make good the difference between $4000 and the amount of the encumbrances subject to which he took the legal title.

It would be introducing an entirely new element of damages in an action or claim for mesne profits, to permit a recovery of any part of the mortgage in question. There is nothing in the circumstances of the case to justify a departure from the general rule which sanctions a recovery for the rent or fair annual value of the premises, and for injury, if any, done thereto. A claim for mesne profits in an action of ejectment, is governed by the same general rules that are applicable to ordinary actions of trespass. When a plaintiff has recovered his possession, by ejectment or otherwise, that possession, by operation of law, relates back to the time when he was excluded, and hence all acts done on the premises, by those who have kept him out, are to be regarded as ordinary intrusions on his possession.

There is nothing in any of the assignments of error, that appears to require further notice.

Judgment reversed, and a *venire de novo* awarded.

Opinion by STERRETT, J.

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Common Pleas—Law.

C. P. No. 3. Sept. 16, 1879.

Darlington v. Ervin.

Pleading—Demurrer—Act of April 11, 1848—Assumpsit against a feme covert for necessaries—Joinder of husband.

Sur demurrer to pleas.

Assumpsit by J. G. Darlington & Co. against D. B. Ervin and Josephine H. Ervin his wife, to recover $77.13 for goods furnished. The narr. averred that the said Josephine H. Ervin, wife, etc., was indebted to plaintiff in the above sum for goods and merchandise sold and delivered to her "at her special instance and request, the same being contracted for by her, and being necessaries for the support of herself and her family; the same being sold and delivered to the said Josephine H. Ervin on her individual credit, and for her own proper use, or that of her family by her said husband," for which she promised to pay on demand, but has failed so to do. Pleas, *non assumpsit* and coverture as to the wife, and *non assumpsit* as to the husband.

The plaintiff demurred to the husband's plea of *nonassumpsit*, "because it nowhere appears or is alleged in said declaration filed that the said D. B. Ervin promised to pay the debt therein alleged; the said action being brought under the Act of 11 April, 1848;" and also to the wife's plea of coverture, because, "as appears by the said declaration, the said action is under and by virtue of the Act of 11 April, 1848, and by virtue of said Act the said defendant can contract as alleged." Joinder in demurrer.

L. W. Barringer, for demurrer.

The plea of coverture is bad: (1) because it must be sworn to; and (2) because it is no defence, the suit being under the Act of 1848, and her liability being fixed by that Act, under certain provisions, despite her coverture.

Mahon *v.* Gormley, 12 H. 82.
Bowler *v.* Titus, 5 WEEKLY NOTES, 384.
Berger *v.* Clark, 29 Sm. 340.

The husband's plea of *non assumpsit* is bad, because the narr. does not charge him; it is necessary, on the contrary, that the narr. should specially avoid charging him, as the goods must have been furnished solely on the wife's credit.

Berger *v.* Clark, *supra.*

He is joined merely as a nominal party, and his liability is fixed by the Act; it need not be averred in the narr.

Lippincott *v.* Leeds, 7 Sm. 328.

Wm. Ernst, contra.

In actions under this section of the Act of 1848, the husband must be sued jointly with the wife; no action will lie against her without joining him. The execution is against him first, and he is in no sense merely a nominal party. It is an action against both parties, and there should be an issue as to both.

Murray *v.* Keyes, 11 Casey, 384.
Leow's Estate, 6 WEEKLY NOTES, 333.
Berger *v.* Clark, 29 Sm. 340.

C. A. V.

Sept. 27, 1879. THE COURT. Demurrer sustained with leave, etc.

C. P. No. 4. Sept. 20, 1879.

John Stout v. John W. Moore.

Equitable set-off, after judgment obtained—One judgment set off against another—Judgment against firm, set off against judgment obtained by one partner—Practice.

Rule to set off a judgment.

Judgment had been obtained by the plaintiff against the defendant, a *fi. fa.* issued, and security entered for stay of execution.

It was sought, by this rule, to set off against the said judgment a certain judgment obtained by the defendant in C. P. No. 2. The docket entries in that Court showed a judgment obtained by James L. Wright to the use of John W. Moore, against John Stout and William Heisler, trading as Heisler & Co.

Lister, for the rule.

This is an appeal to the equitable jurisdiction of the Court. A judgment can be set off against a judgment, notwithstanding equities in third parties.

Hazlehurst *v.* Bayard, 3 Yeates, 152.
Waln *v.* Hughes, 5 S. & R. 468.
Cornwell's Appeal, 7 W. & S. 305.

Kratz, contra.

C. A. V.

THE COURT. Rule absolute.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, NOV. 13, 1879.* [No. 29.

Supreme Court.

July, '78, 82. Jan. 27, 1879.

Pancoast v. Gowen et al., Garnishees.

Execution—Attachment—Seat in the Board of Brokers not subject to.

By the constitution of the Philadelphia Stock Exchange it was provided that membership might be sold, with the consent of the Exchange, and the balance of the proceeds, after satisfying the owner's debts to members, was to be paid to the owner:

Held, that such membership in the Exchange is not property subject to execution in any form, but that it is a mere personal privilege or license to buy and sell at the meetings of the Board. It cannot be levied on and sold under a *fi. fa.*, or attachment execution.

Error to the Common Pleas No. 1, of Philadelphia County.

Attachment execution by S. Pancoast against Henry G. Gowen *et al.*, trading as the Philadelphia Stock Exchange, garnishees.

Upon a judgment obtained by Pancoast against Joseph Houston, an attachment execution was issued and served upon Henry G. Gowen and others, trading as the Philadelphia Stock Exchange, garnishees. The answers of the garnishees to the interrogatories filed admitted that Houston was an owner of a seat in the Philadelphia Stock Exchange, against which there were no claims by the members of that body at the time the attachment was served, although some had since been presented, and that the seat was held by Houston subject to the following conditions:—

"No election of new members shall take place until two weeks at least have elapsed after the application or nomination shall have been laid before the Stock Exchange, and the applicant shall then, upon a favorable report of the Standing Committee, or where, if unfavorable, the committee's report has been reversed by the Stock Exchange (as provided in Section VIII.), be balloted for and admitted to membership, provided that not more than fifteen black balls be cast against him, and that not less than fifty balls are cast.

"Any member shall have the right to sell his membership, subject to the following conditions:—

"When a member wishes to sell his membership, the name of the proposed purchaser shall be submitted to the Standing Committee, and on the approval of two-thirds of said committee, and after the usual two weeks' notice to the Exchange, the applicant shall be balloted for, and if elected the transfer shall be made, provided the member selling has no unsettled contracts with or claims against him by any member of the Stock Exchange, for transactions arising in or relating to the business of banking or a stock or exchange broker. Where the Arbitration Committee shall determine that such claims or contracts existed, the Standing Committee may, except in cases of insolvency, refuse to permit the seat to be sold until such claims or contracts are in its opinion satisfactorily settled.

"The proceeds of the seat, if sold, shall belong to its owner's creditors who are members of the Stock Exchange, in proportion to the amount of their respective claims, determined by the Arbitration Committee, as hereinbefore provided in Section IX. The claims of members so ascertained shall first be paid in full, and what remains, if anything, of the proceeds of the seat shall then be paid to the owner.

"When a member dies, his seat shall within six (6) months thereafter, be sold or transferred, and all claims against the deceased by members of the Stock Exchange (determined as hereinbefore provided in Section IX., in disputes between living members) shall be paid to them in full, after which, if anything remains, it shall be paid to the personal representatives of the deceased.

"Any member who fails to comply with his contracts, or who becomes insolvent, shall immediately inform the president of the Exchange of the fact, whose duty it shall be to give notice forthwith of the failure of such member; and in case of the refusal or neglect of such delinquent to make such report to the president, it shall be the duty of any member having a knowledge of the fact, to report the same forthwith to the Standing Committee or the President, who shall thereupon appoint a committee of three members to inquire into the fact and report thereon without delay; and if said committee report the charge to be true, and no appeal from said report be taken within seven days, or where an appeal having been taken, the report shall have been confirmed by the Stock Exchange, said member shall be suspended, and it shall furthermore be the duty of the Standing Committee, upon receiving information thereof, or having directly or indirectly, any knowledge of such failure on the part of any member to comply with his engagements, as above stated, to report the same without delay to the President, and ask for the appointment of a committee, as before provided. And in case of the insolvency of any member, he shall within three (3) days, make good, to the full amount thereof, all friendly loans of cash or stocks from members, or any over-draught on any bank. But seven (7) days shall be allowed him in which to settle stock contracts.

"On an application for readmission, a suspended member may be restored to his seat, provided his name shall have been posted for two weeks, and that upon a ballot not less than fifty votes are cast and not more than fifteen black balls appear against him; but such application shall first be referred to the Standing Committee, whose duty it shall be to ascertain that the applicant has settled and arranged his affairs to the satisfaction of his creditors, and that his present situation affords a reasonable security in future transactions; and unless and until the said committee report in favor of readmitting the said suspended member, he shall be held to be still in default, and no vote to restore him to his seat shall be had.

"It is expected from the applicant that he will give the committee full explanations of any disputed or unsatisfactory transactions, and, at their request, free access to his books and papers for that purpose.

"A suspended member shall, if reinstated, pay all the fines due at the time of his suspension.

"Any member who shall become a bankrupt by his own act, or that of his creditors, shall *de facto* be suspended from the Stock Exchange; but a suspended member presenting a certificate of discharge under the United

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States Bankrupt Law becomes eligible under the rules reinstating suspended members.

"If any suspended member fails to settle with all his creditors within one year from the time of his suspension from the Stock Exchange, his seat shall be sold by the secretary, and the proceeds shall be paid *pro rata* to his creditors in the Stock Exchange. The amounts due said creditors shall be determined by the Arbitration Committee, in the manner hereinbefore provided in Section IX. of the Constitution.

"No expulsion or suspension of a member shall affect the rights of creditors, as provided for in the Constitution and By-laws.

The answers further suggested that "The garnishees are of opinion, and so aver, that at the service of this writ they held no property of any kind, attachable at the suit of the plaintiff, belonging to Joseph L. Houston; the seat belonging to him not being property except between members of the Philadelphia Stock Exchange."

Two rules were taken, one by the plaintiff, against the garnishees for judgment on the answers: and the other by the garnishees on the plaintiff to show cause why the attachment should not be dissolved.

After argument of both rules the Court discharged the first, and made the last absolute, it being agreed by counsel that no property of Houston's was held by the garnishees, unless the seat were so considered.

ALLISON, P. J., delivered the following opinion: "The words of the Constitution of the Stock Exchange show that the seat, or right of membership, is property, since it is held as security for payment of debts due members of the Board. But it is the property of the Philadelphia Stock Exchange until all questions of claims against its owner by members of the Board are settled. Until we have some means of knowing that all such claims have been fully settled, or that none exist, we do not think an attachment could be lawfully issued against the Board, or the privilege sold." (Reported, in the Court below, 5 WEEKLY NOTES, 36.)

The defendant took this writ, assigning for error the making absolute of the rule dissolving the attachment.

P. F. Rothermel, Jr., for the plaintiff in error.

The provision in the Constitution making the seat a subject of purchase and sale determines that it is property, and not a mere personal right.

This point has already been decided in the United States Supreme Court.

Hyde *v.* Woods, 4 Otto, 523.

The seat being personal property is liable to execution unless the conditions annexed to the ownership exempt it; an examination of these conditions shows that it is but a pledge in the hands of the Stock Exchange as security for the liability of the owner to that body and its members, therefore, by Act of Assembly it is subject to this attachment.

Act of June 16, 1836, Purd. Dig. 639, pl. 32.

A. Sydney Biddle (*Geo. W. Biddle* and *N. Dubois Miller* with him), for the defendant in error.

The decision of the Court below was correct, but the grounds upon which it was rendered cannot be supported. A seat in the Board of Brokers is not property at all; it is a license, being merely the personal privilege of belonging to the Board, such membership affording to the owner greater facilities for transacting his business of banking and brokerage. As far as those outside the association are concerned a seat in the Board differs in nowise from membership in a club, whether formed for social, business, or political purposes, the value or price of the seat corresponding to the entrance fee required by the club. The owner of the seat has no right to sell it unless he comply with the conditions as above set forth, and even then by the Constitution "the proceeds of the seat shall belong to its owner's creditors who are members of the Stock Exchange," the balance, if any, being the only property the member is entitled to. In the present case the seat has not been sold; it is, therefore, readily seen that there is nothing subject to this attachment.

This case is decided by—

Thompson *v.* Adams, 7 WEEKLY NOTES, 281.

February 24, 1879. THE COURT. A seat in the Board of Brokers is not property subject to execution in any form. It is a mere personal privilege, perhaps more accurately a license to buy and sell at the meetings of the Board. It certainly could not be levied on and sold under a *fi. fa.* The sheriff's vendee would acquire no title which he could enforce. Nor is it within either the words or the spirit of the Act of June 16, 1836, § 35 (Pamph. L. 767), providing for attachment on judgments. Whether the proceeds of the sale of the seat in the hands of the treasurer of the Board and payable to the defendant according to the regulations and by-laws of the Board could be thus reached, is an entirely different question. This and no more is what we understand to have been decided by the Supreme Court of the United States in Hyde *v.* Wood (4 Otto, 525), where Mr. Justice MILLER says: "If there had been left in the hands of the defendants any balance after paying the debts due to the members of the Board, that balance might have been recovered by the assignee" in bankruptcy.

Order dissolving the attachment affirmed.

PER CURIAM.

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Jan. '78, 146. March 31, 1879.

Shaffer v. Clark.

Evidence—Uncorroborated testimony of the defendant in his own behalf—Competency of—Act of April 15, 1869—Usurious interest—Payment of, after maturity of the debt, an invalid consideration for an agreement to give time.

The Act of April 15, 1869, having made the testimony of parties in their own behalf competent, the unsupported evidence of a defendant in his own behalf, although positively contradicted by the plaintiff, cannot be withheld from the jury.

The payment of usurious interest after the maturity of a debt is not a valid consideration for an agreement to give time.

Prowattain *v.* Tindall, 30 Sm. 295, and Hartman *v.* Danner, 24 Id. 36, followed.

Error to the Common Pleas of Wayne County.

Scire facias to revive judgment. Pleas: nul tiel record, payment with leave, etc. The plea of nul tiel record was afterwards withdrawn, and a special plea was filed by Joseph Shaffer, in which he alleged that he was surety for Thales K. Varney on the note on which judgment was entered; that, after the maturity of the note, he gave the plaintiff notice to collect it without delay from Varney; that, if he did not do so, he should hold himself discharged from his obligation as surety; that the plaintiff wholly neglected to collect the note from Varney; that, after the note became payable, the plaintiff, at Varney's request, and for a valuable consideration, agreed to extend the time of payment of the note, without Shaffer's knowledge or consent; and that the plaintiff, after the entry of the judgment, had released lands of Varney from the lien of the judgment, without the consent or knowledge of Shaffer.

The plaintiff filed a general replication.

Upon the trial, before WALLER, P. J., the following facts appeared: On Sept. 4, 1871, Thales K. Varney borrowed from Thomas Clark the sum of $1000, for which amount he gave a judgment note, payable one year from date, with lawful interest. Upon Varney's request, Joseph Shaffer signed the note as surety, upon which judgment was entered afterwards to December Term, 1871. Upon the day the note was made, Varney paid Clark a bonus of $40. On Sept. 10, 1872, after maturity of the note, Clark entered upon the record a receipt for $100, one year's interest at 10 per cent., and agreed to extend the time of payment to Sept. 4, 1873. Upon payment of like sums the note was extended every year until Sept. 4, 1876, when this action was brought to revive the judgment. On April 5, 1875, Clark released a house and lot, which Varney had sold to Charles Bloes for $350, from the lien of the judgment. Shaffer in his evidence—which was not corroborated, and which was flatly contradicted by the plaintiff—testified that he had met Clark after the note became due and notified him to collect it, and said that, if he did not do so, he would not be responsible; that, after that conversation, he had no knowledge whether the note was collected or not; that he never heard of any further time having been given by Clark; and that he had no knowledge of the non-payment of the note up to the time of service of the writ upon him to revive the judgment.

The defendant submitted the following points:

(1) "If Shaffer was a surety for Varney, and, after the debt became due, gave notice to plaintiff to collect it, and if he failed to do so, he, Shaffer, would no longer be bound as surety; Shaffer would be discharged in law if plaintiff neglected to collect the debt; and the burden of proof is on the plaintiff to show that it could not by due diligence have been collected from Varney after such notice was given." *Answer.* In answering this point we at first inclined to affirm it, leaving to you the question of the weight of evidence as to the notice; but on more deliberation, in view of the fact that our courts of law are leaning largely to doing equity, and considering that we have the naked, unsupported oath of the defendant, upon whom devolves the onus of sustaining his plea, positively contradicted by the oath of the plaintiff, thus leaving the jury to *guess* which of the parties in interest may have told the truth, we have concluded to instruct you, and do so instruct you, that there is no sufficient evidence upon which to submit to you the question of notice. We therefore negative defendant's first point. (1st, 2d and 3d assignments of error.)

(3) "If Shaffer was a surety for Varney, and plaintiff, for any legal consideration, extended the time of payment beyond the period designated in the note on which judgment was entered, without Shaffer's consent, Shaffer is in law discharged." *Answer.* This point is sound as a legal proposition, but, in its application here, we must instruct you that the first payment upon the judgment by Varney was six days *after* the maturity of the note, and was not a legal consideration for the extension of the time of payment. The payment of interest or part of the principal, or payment of a bonus, *after* the debt has become due, is not a valid consideration in law for an agreement to extend payment. We must therefore negative this point. (3d, 4th and 5th assignments of error.)

His Honor charged the jury, *inter alia* :—

"And now, gentlemen, you will take this case and ascertain, under the instructions we have

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given you, what amount, if any, remains due to plaintiff upon the judgment. [You will see what amount has been paid, applying any excess over interest, to the principal, year by year, to April 5, 1875, when you will deduct the value of the Bloes house and lot released, and ascertain the balance.] All payments made after the 4th September, 1872, were to be applied upon a debt due, and there was no time when the plaintiff could not after that have issued execution, or at which this defendant, Shaffer, could not have paid plaintiff, taken assignment of the judgment, and enforced collection."

Verdict for the plaintiff for $483.12, and judgment thereon.

The defendant took this writ of error, assigning for error, *inter alia*, the answers to his points, and (13th assignment) the portion of the charge inclosed in brackets, as above.

H. Wilson and *W. H. Dimmick*, for the plaintiff in error.

The Act of April 15, 1869, removed the disability of a party to testify in his own behalf, and his evidence, though unsupported, must be submitted to the jury.

Prowattain *v.* Tindall, 30 Sm. 295.

If the ruling of the Court below is correct, then every question of fact will have to be decided by a show of hands or by a poll of witnesses. But such a rule is unknown either at law or in equity. The only rule consistent with established principles is that the testimony of parties in their own behalf should be submitted to the jury, as in the case of that of other witnesses. Their credibility is for the jury. The extension of the time of payment, for a valuable consideration, and without the knowledge of the surety, discharged the surety. The extension of time, accorded as it was, was such an estoppel, even if without consideration, as would prevent the plaintiff from denying that his right to collect the debt was suspended. The effect of the agreement to give time was such an actual stay of execution as to discharge the surety.

Clippinger *v.* Crebs, 2 W. 45.

George W. Waller, for the defendant in error.

Notice from a surety to a creditor to proceed against the principal, or otherwise the surety would be discharged, should be in writing, and in the most explicit terms. The proof of notice should be clear and positive, and the notice should be given at a time when the creditor has it in his power to proceed to collect the debt.

Conrad *v.* Foy, 18 Sm. 381.

In this case there was no evidence of clear and positive notice, and no certainty as to time. In answer to the question "Are *you sure* it was in 1872?" the defendant replied "I think so; it seems to me it was in 1872." This was not sufficiently positive notice to meet the requirements of law. An agreement to give time, in order to discharge a surety, requires a consideration to support it.

Zane *v.* Kennedy, 23 Sm. 182.
Brubaker *v.* Okeson, 12 C. 519.

The simple question then is, was there a legal consideration? It is not claimed that Varney paid anything for the extension except the usurious interest agreed upon at the time of the original loan. An agreement to extend the time of payment, in consideration of the payment of usurious interest, does not discharge a surety. It has no effect on the original contract.

Mayfield *v.* Gordon, 2 Am. L. R. O. S. 187.

May 5, 1879. THE COURT. This was an action of *scire facias* on a judgment. The judgment was entered on a judgment note signed by one Varney and by Shaffer. The latter claimed that he signed as surety.

He therefore requested the Court to instruct the jury that "if Shaffer was a surety for Varney, and after the debt became due gave notice to plaintiff to collect it, and that, if he failed to do so, he, Shaffer, would no longer be bound as surety, Shaffer would be discharged in law if plaintiff neglected to collect the debt; and the burden of proof is on the plaintiff to show that it could not by due diligence have been collected from Varney after such notice was given." The learned Judge conceded this point to be correct as a legal proposition, and impliedly admitted that, if the evidence of Shaffer was sufficient to establish the fact, he would submit that evidence to them, but declined to affirm it. He assigned as a reason for his refusal that the only evidence of the notice was "the naked, unsupported oath of the defendant," and it was "positively contradicted by the oath of the plaintiff," and therefore he concluded "there is no sufficient evidence upon which to submit to you the question of notice."

This instruction fails to give due effect to the Act of 1869, which permits parties to testify in their own behalf. Within the class of cases prescribed by the statute, "no interest nor policy of law" excludes them. Their legal disqualification is thereby removed. They are competent witnesses for all purposes. Being thus made competent, the Court cannot withhold their testimony from the consideration of the jury. It was well said by Mr. Justice GORDON in Prowattain *v.* Tindall (30 P. F. Smith, 295) "the Act does not require that the evidence of the party in interest, though the only evidence on his side of the case trying, should be corroborated in order to make it effective." The fact that, in a common law action, one party swears in direct conflict with the other party no more authorizes that evidence to be withheld from the

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jury, than the conflicting evidence of two disinterested witnesses. The Court passes on the competency of a witness, but the jury on his credibility. They may believe one witness and discredit another, whether interested or disinterested. Hence, in the case of Flattery's Appeal (36 Leg. Int. 338), we sustained a decree in divorce upon the testimony of the wife, which was substantially contradicted by the husband. The first, second, and third assignments are sustained. There is no error in the portion of the charge covered by the thirteenth assignment.

As the payment of usurious interest after a debt becomes due is not a valid consideration for an agreement to give time (Hartman *v.* Danner, 24 P. F. Smith, 36), we discover no fact to sustain the remaining assignments.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by MERCUR, J.

Jan. '78, 6. March 17, 1879.

Pottsville Mutual Fire Insurance Co. of Pennsylvania v. Horan.

Fire Insurance—Increase of risk against the covenants of the policy—Breach of warranty—Set-off in diminution of risk.

Neglect or omission to mention, at the time of application for a policy of insurance, the existence of a carpenter shop in close proximity to the building insured, and the subsequent erection of a new building adjoining the house insured, without notice to the company, is such an increase of risk as will vitiate a policy of insurance containing the following conditions: "The insured hereby covenants that the representations given in the application for this insurance is a warranty on the part of the insured, and contains a just, full, and true exposition of all the facts and circumstances in regard to condition, situation, value, and risk of the property;" and further, that "if, after insurance, the risk shall be increased by any means whatsoever . . . . and the assured shall neglect to notify the company of said increased risk, such insurance shall be void."

Set-off in diminution of risk by removal of a building warranted in the application for insurance not to be on the premises on which the insured dwelling stood, is inadmissible against the defence of increase of risk, in violation of the covenants of the policy, by the erection of a new building on an adjoining lot of which the insurance company had no notice.

Error to the Common Pleas of Schuylkill County.

Covenant on a policy of fire insurance, by Thomas Horan, against the Pottsville Mutual Fire Insurance Company of Pennsylvania. Pleas, covenants performed, *absque hoc*, with leave, etc.

Upon the trial, before GREEN, J., the following facts appeared: On April 5, 1873, Thomas Horan applied to the defendants for a policy of insurance to the amount of $2000, upon a two-story frame house and basement in the town of Gilberton. The application for insurance, which was signed by the agent and the applicant, contained, *inter alia*, the following question: (7) "For what purpose are the adjoining buildings used within eight rods?" Answer—"Private dwellings." There were also the following stipulations in the application: "If any untrue answer has been given to the foregoing interrogatories, whereby the said company has been deceived as to the character of the risk, or if any change be made as to tenants and occupancy of these premises, without being notified to this company, and endorsed upon their policy, then said policy of said insurance to be void and of no effect. And the insured hereby covenants and engages that the representations given in the application for this insurance is a warranty on the part of the assured, and contains a just, full, and true exposition of all the facts and circumstances in regard to condition, situation, and value of the property insured. And the said applicant hereby covenants and agrees to and with the said company, that the foregoing is a just, full, and true exposition of all the circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk."

The conditions of insurance attached to the policy stipulated, *inter alia*, as follows:—

(1) Applications for insurance shall specify the construction and material of the building to be insured, ... by whom occupied, whether as a private dwelling or how otherwise; its situation with regard to contiguous buildings, and their construction or materials. The applicant shall also state the true cash value of the property to be insured; also any other facts relating and material to the risk.

And the said valuation, description, and survey shall be taken and deemed to be the act of the insured, and a warranty on his, her, or their part.

A false description of, or omission to make known in said application any fact or feature relating to the risk, or which, if known, would induce the company to reject said application, or would, in their estimation, increase the hazard of the same, or an over-valuation of the property or interest insured, shall render absolutely void any policy issued upon such description or valuation.

(2) If after insurance the risk shall be increased by any means whatsoever, or if the property be used or occupied so as to render the risk more hazardous than at the time of insuring, and the assured shall neglect to notify the company of said increased risk, or fail to pay such additional premium as the company shall determine, and obtain the written consent of the secretary to a continuance of the policy, such insurance shall be void and of no effect.

Any misrepresentation or concealment, fraud or false swearing, shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against this company, under the within policy. And said company

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shall in no case be deemed to have waived a full, strict, and literal compliance with and performance of each and every of the terms, provisions, conditions, and stipulations in this policy contained, and hereto annexed, to be performed and observed by and on the part of the insured, and every person claiming by, through or under them, unless such waiver be express, and manifested in writing, under the signature of the secretary of said company. And no agent of this company shall have power to violate any of these conditions.

(19) No agent of this company shall have the right or power to waive any of the foregoing conditions, unless fully authorized thereto by the secretary of this company, in writing.

At the time of application for insurance there was on lot No. 6, upon which the building insured stood, a little one-story shed or building which had once been used as a carpenter shop. This shop, which stood north and back of the house insured, was not included in the plan of the buildings attached to the survey, which was indorsed upon the back of the application, Davidson, the defendants' agent, not considering that it affected the risk, because it was understood that the plaintiff would remove it at once to the adjoining lot No. 7, which he also owned, and convert it into a dwelling-house; and this was done within a short time. About two months after the defendants had issued their policy, the plaintiff erected a dwelling-house on No. 7, the vacant lot, filling up the entire frontage of the lot, and adjoining Hildebrand's house on the other side of the lot. The agent did not notify the company of the existence of the carpenter shop, nor did it appear that they had any knowledge of the erection of the new building, which was used as a saloon, up to the time of the fire. On September 23, 1874, the fire in which the plaintiff's house was burned broke out in Hildebrand's house, from which it spread to the plaintiff's new building, and was by it communicated to the house insured. The plaintiff notified the defendants of the loss of his house by fire, and sent the proofs of loss, which the company refused to pay on the ground that the existence of the shop and the erection of the new building on the lot adjoining the house insured, of which they had no notice, was such an increase of risk as by the terms of the policy avoided it. His Honor, in his general charge to the jury, said, *inter alia*—

"Therefore we say to you that the party was bound to give notice to the company of the increased risk that there was by the erection of the building, but it becomes a question of fact for you to determine as to whether there was any increased risk by reason of the erection of the adjoining building. If there was no increased risk, then there was no necessity imposed upon Horan of giving any notice to the company at all, because the risk was not increased. It is a question of fact for you to determine whether it was increased or not. If you should determine that it was increased, then it would be the duty of Horan to give notice to the company of the increased risk. You will recollect the testimony in this case that at the time that this application was made, or at the time the policy was issued, there was this building upon lot No. 6, purchased from Seaman, and in addition to that, there was a little building in the rear, some 16 by 24 feet, which had been used by Seaman as a carpenter shop. That was adjoining the main building of Seaman, just in the rear; when Horan had purchased the property, the carpenter shop was removed from where it was and put over to the other line of the lot, close to Hildebrand's, and was changed from a carpenter shop to a dwelling-house. That possibly may have lessened the risk of fire to the building insured by Horan; it was moved to a greater distance away. You have the testimony with regard to the erection of the building upon this adjoining lot, between Hildebrand and the other house which Horan purchased. You have also the testimony as to the character of the building that was there, and it becomes a question of fact for you to decide as to whether there was any increased risk—that is, increased beyond the risk that existed at the time when the application and policy were effected. You must take into consideration in the first place the erection of the building that was placed there, and the testimony of the witnesses with regard to that; the testimony of the different fire insurance agents; the testimony of Miller and Hill; the testimony of the officers of the Pottsville Fire Insurance Company with regard to the increase of risk, and the amount of additional premium that they would have charged by reason of the increase of risk. Then you must take into consideration whether there was anything by which the risk was lessened, so it would be for you to determine under all the evidence in this case whether, by reason of the erection of one building and the removal of another, the risk of fire at the time that the insurance was effected, was substantially increased or diminished by the erection of the one and the removal of the other. It is a question of fact for the jury to decide, under all the evidence in this case, as to whether there was any increase of risk by fire; and *whether it was counterbalanced by the removal of the building to which he has referred.*"

Verdict for the plaintiff of $1717.50, and judgment thereon. The defendant took this writ of error, assigning for error, *inter alia*, the charge of the Court.

A. W. Schalck, for the plaintiff in error.

A policy of insurance, with its clauses, conditions, and stipulations, is the law of the legal relation between the parties by which their mutual rights and liabilities are to be measured.

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Weisenberger *v.* The Harmony Fire and Marine Ins. Co., 6 Sm. 442.

The increase of risk by the subsequent erection of the new building was conclusively shown, which by the conditions of the policy avoided it.

Where, in the conditions of insurance, it is stipulated that if the risk should be increased by any means within the control of the assured, the policy should be void, the insured has no right to erect other buildings on his own premises so as to increase the risk; if he does so, the policy is forfeited.

Murdock *v.* Chenango Co. Mutual Ins. Co., 2 Comstock, 210.

Calvert *v.* The Hamilton Mutual Ins. Co., 1 Allen, 308.

The policy was avoided by the erection of the new building without obtaining the written consent, paying an additional premium, or giving notice to the company.

Evans *v.* The Tri-Mountain Mutual Ins. Co., 9 Allen, 329.

Any internal or external increase of risk avoids the policy.

Heneker *v.* British American Ins. Co., 13 U. C. C. P. 99.

Lomas *v.* British American Assurance Co., 22 U. C. Q. B. 310.

The Court erred in submitting to the jury the question of increase of risk by the erection of the new building. They should have given binding instructions.

Raby, Ex'r, *v.* Cell, 4 WEEKLY NOTES, 564.

Hoag & Alger *v.* Lake Shore and Michigan Southern R. R. Co., Id. 561

There was no mention in the application of the carpenter shop, which is such a misrepresentation as to amount to a breach of warranty, which works a forfeiture. The ruling of the Court, without the warrant of any evidence to support it, that the company had assumed the risk of the proximity of the shop to the building insured, and that its removal had lessened the risk assumed by the company upon issuing its policy, and that therefore such risk might be set off against the increase of risk by the erection of the new house, is the enunciation of a novel and dangerous doctrine for which there is no precedent, and which is contrary to the principles of law.

D. B. Green (with whom were *M. M. L'Velle* and *Jos. L. Walsh*), for defendants in error.

Whether there was an increase of risk by the erection of the new building was purely a question of fact, and it was for the jury to decide whether the risk was as much lessened by the removal of the carpenter shop, admittedly hazardous, as it was increased by the new building. It was the duty of the Court to submit the question to the jury. The assertion that to off-set the diminution against the increase of risk is a novel and dangerous doctrine is not supported by authority. The omission to mention the shop in the application and plan attached to the survey, which it is contended was such a misrepresentation as avoided the policy, was the act of the company's agent, who examined the premises, and had full knowledge of its existence. On the part of the insured there was neither concealment nor fraud. An insurance company will not be allowed to take advantage of the mistakes or omissions of its agents, notwithstanding the rule that parol statements and negotiations are merged in the written contract.

Beal *v.* Park Fire Ins. Co., 16 Wis. 241.

Where the agent of the company, who is familiar with the premises, fills up the application, and has the assured sign it, the assured is not responsible for any misrepresentation in the survey.

Campbell *v.* Fire Ins. Co., 37 N. H. 35.

Roth *v.* City Ins. Co., 6 McLean, 324.

Howard Fire Ins. Co. *v.* Bruner, 11 Harris, 50.

The local agents of insurance companies, who are authorized to procure and forward the applications, are deemed the companies' agents, and not the applicant's.

Woodbury Savings Bank *v.* Charter Oak Ins. Co., 31 Conn. 517.

Union Mutual Ins. Co. *v.* Wilkinson, 11 Am. Law Reg. N. S. 485.

May 5, 1879. THE COURT. Thomas Horan, by accepting its policy, became a member of the Pottsville Mutual Fire Insurance Company. In his application he warranted his representations of facts and circumstances. Among the statements is, the adjoining buildings within eight rods are used for the purpose of private dwellings. The survey on the back of the application shows a vacant lot, twenty-six feet wide, between the property to be insured and Hildebrand's house. No mention is made in application or survey of the small building called a carpenter's shop. That Horan knew the contents of the application when he signed it, seems to be conceded; and there is no pretence of fraud or mistake, unless against the company, and in which the applicant participated. They talked about the shop, and of erecting a house on the vacant lot, and wittingly omitted both in giving the situation and surroundings. The applicant knew as well as the agent knew, that the company acted on a warranty that no building, save dwelling-houses, was within eight rods of the one to be insured, and that the lot on the east side was vacant. If they were honest, the shop was omitted in the description because it was to be removed. If the applicant colluded with the agent in making a false statement, he shall not profit by the fraud (Smith *v.* Insurance Co., 12 Harris, 320). In the printed argument for defendant in error it is said that, at the time of insurance, a carpenter

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shop stood directly in rear of the house, in very close proximity to it, and admittedly hazardous. If that be so, it was a breach of assured's warranty, and by its express terms the policy was void (Smith *v.* Insurance Co., *supra*). In such case defendant's twelfth point ought to have been affirmed. But the evidence of Davidson is, that it had ceased to be used as a shop before the insurance, and was to be removed and used for a dwelling; it was soon after removed.

It is said that "it was admitted that the erection of the new building increased the risk;" that fact was conclusively proved. Thereupon it is urged that the risk of fire had been very much diminished by the removal of the shop and its change to a dwelling-house, and that it was a question for the jury whether the risk had not been as much lessened by the removal as it was increased by the erection of the new building. This view was adopted by the Court, and so much of the charge as relates thereto constitutes the 11th assignment of error. Some respect should be paid to a contract of insurance. Here the assured warranted that he gave a "full and true exposition of all the circumstances in regard to the condition, situation, value, and risk of the property," and the assurer insured the policy on condition that "if after insurance the risk shall be increased by any means whatsoever, . . . and the assured shall neglect to notify the company of said increased risk," such insurance shall be void. The risk was increased by act of the assured himself; the Court instructed the jury that notice was not given to the Company. This instruction is not here for review, and the argument respecting it cannot be considered. How, then, could there be a recovery on the policy? Is it according to the spirit of the contract, to say nothing of its letter, to set up the removal of a shop which he had warranted was not there? "The purpose of requiring a warranty is to dispense with inquiry, and cast upon the assured the obligation that the facts shall be as represented. Compliance with his warranty is a condition precedent to any recovery upon the contract. It is, therefore, that the materiality of the thing warranted is of no consequence. The assured, by his warranty, engages that whatever the condition of things when he makes his application, the facts shall be as warranted when the policy attaches." (Per STRONG, J., Insurance Co. *v.* Arthur, 6 Casey, 315.) It would be hard to hold Horan to the letter of his application that no shop was near the house to be insured, he having promptly removed it. Justice demands that the warranty be treated as unbroken when the policy attached; it is unconscionable to use its removal as a diminishing of risk and set-off against the increased risk from his violation of the conditions of insurance. The company did not undertake to insure the house on the basis that it was "in very close proximity to" a carpenter shop, and the assured must accept this fact, or the consequences of a broken warranty. In another view the contract was made in reference to the situation and surroundings of the property. For a price paid by one party the other agreed to carry the risk. They did not agree that the assured may build on the adjacent vacant lot, making an unbroken line of buildings, and remove a back building. It might be quite easy to satisfy most persons that the removal lessened as much as the new buildings increased the risk, but it would be hard to satisfy anybody that after such change the risk was the same as contracted for. The contract provides for notice, assent, or cancellation, in case of increased risk. After the change, the assurer, if notified, might have been willing to continue the insurance with or without additional consideration, or might have terminated the policy and refunded a ratable portion of the premium. It is not for the insured alone to change the contract, and the Courts cannot do it for him. A setting up of some real or fancied lessening of risk, as a set-off against the increased risk by building up the vacant lot, could not have been apprehended when the contract was executed. A company which would submit to such imposition would soon be overburdened, and its policies become worthless to their holders.

The proofs of loss are not set out in the paper-book, and the 8th and 9th assignments cannot be considered. The Court having instructed the jury that notice was not given to the company, no other assignments require remark. Judgment reversed, and a *venire facias de novo* awarded.

Opinion by TRUNKEY, J.

Jan. '79, 187. Mar. 3, 1879.

Snyder v. Laubach.

Bills and notes—Lunatic accommodation indorser—Inquisition after date of indorsement—Bona fide holder without notice.

An accommodation indorser of a promissory note, given in renewal of a note for a similar amount indorsed by him while of sound mind, who was found by inquisition to have been a lunatic at the time of indorsement of the renewal note, is liable to a bona fide holder who received the note before the inquisition and without notice of the indorser's lunacy.

Lancaster County National Bank *v.* Moore (28 Sm. 407), and Moore *v.* Lancaster County National Bank (2 WEEKLY NOTES, 674), followed.

Error to the Common Pleas of Lehigh County.

Assumpsit, by Joseph Laubach, assignee for the benefit of creditors of the Dimes Saving

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Institution of Bethlehem, indorsee, against Edwin Snyder, administrator *d. b. n.* of Robert Yost, deceased, on a promissory note indorsed by Robert Yost as accommodation indorser:—

The facts were these: On June 9, 1873, J. H. Lilly borrowed from the Dimes Saving Institution of Bethlehem the sum of $1500, upon his promissory note to the order of Robert Yost, which was indorsed by Yost as an accommodation indorser. To secure Yost against his indorsement Lilly upon the same day confessed judgment to Yost for the amount of the note, which was entered up on the next day. The note was renewed every three months until some time in February, 1875, when Lilly sold the store and lot of ground upon which the judgment was a lien to William H. Buss, who, assuming Lilly's indebtedness, took up the old note and gave the bank in its place his own note for $1500—to Yost's order and with Yost's indorsement, the latter consenting to indorse for him.

At the same time there was a written agreement between Lilly and Buss that the judgment given to secure the old note should remain a lien on the above real estate, as collateral security for future indorsements of the note, it being the same debt. Lilly on his part agreed to indemnify Yost against his indorsements for the note. Yost continued to indorse for Buss up to Feb. 16, 1876, the date of the last renewal. Upon that day, when Buss took the note to Yost for his indorsement, although he noticed that there was something wrong with Yost, he did not from his conversation think him crazy. Buss took the note to the bank, which accepted it and returned the old note cancelled. An inquisition, under proceedings *de lunatico inquirendo*, on April 15, 1876, found Yost a lunatic on that day, and to have been a lunatic five months previous. On May 19, 1876, the bank protested the note for nonpayment, and suit was afterwards brought against the administrator of Yost, the latter having died in 1877. The administrator refused to pay the note on the ground that his intestate was of unsound mind at the time of the indorsement.

There was no evidence to charge the bank with notice of his lunacy. On the contrary, Yost's family had carefully kept his disorder a secret from the world, the public having had no knowledge of his lunacy before the day of the finding of the inquisition.

Upon the trial the defendant offered in evidence the record of the proceedings in lunacy, showing a finding on April 15, 1876, that Yost was then insane, and had been so for five months previous. Objected to. Objection sustained. Exception.

The Court (HARVEY, P. J.) in sustaining the objection, said:—

"The Court is of the opinion that the note in suit is the executed contract of Robert Yost, deceased, and as the offer of the defendant does not propose to show fraud in the inception and consummation of the contract or knowledge on the part of the proper officers of the corporation of the Dimes Saving Institution of Bethlehem, that Robert Yost was of unsound mind at the time of the making of the contract the objection must be sustained. The rule of law appears to be well settled that where a loss must be borne by one of two innocent parties, he who causes the loss must bear it rather than he who suffers it; and under the ruling of La Rue *v.* Gilkyson (4 Barr, 375), Lancaster County National Bank *v.* Moore (28 P. F. Smith, 407, and 2 WEEKLY NOTES, 674), the Court sustains the objection and excludes the proof."

The defendant offered to show knowledge of Yost's insanity on the part of one of the trustees of the bank. Objected to because it did not appear that the trustees were executive officers of the bank under the charter. Objection sustained. Exception.

Verdict in favor of the plaintiff for $1597.87, and judgment thereon.

The defendant took this writ of error, assigning for error, *inter alia*, the refusal of his offers of evidence.

Preston K. Erdman (with whom were *M. C. Kline* and *C. J. Erdman*), for the plaintiff in error.

The question is whether an accommodation indorser, who is a lunatic, is liable on his indorsement. Insanity was found by the inquisition, but the Court below held that the contract was executed, and that insanity was no defence. It is submitted that this is a step in advance of the line of authorities in this State. The cases of La Rue *v.* Gilkyson (4 Barr, 375), Beals *v.* See (10 Barr, 56), and Lancaster County National Bank *v.* Moore (28 Sm. 407), do not establish the rule that an insane man may become liable as an accommodation indorser. The cases are clearly distinguishable, for there the lunatic received the full consideration and benefit of the contract, while in this case the contract is for a future contingent liability, without any consideration whatever. And further, in those cases, the parties seeking to enforce the contract dealt with the lunatic personally, which was no t the case here. The bank cannot plead want of notice, for the intestate was one of the trustees of the bank. The Court ruled out the offer to prove by one of the trustees knowledge of Yost's insanity, on the ground that the trustees were not executive officers of the bank. But by the charter the trustees were required to approve indorsements, securities, etc. Knowledge of a material fact imparted by a bank director to the board, is notice to the bank.

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Bank of Pittsburgh *v.* Whitehead, 10 W. 397.

The charge of the Court that there was not sufficient evidence of notice, was equivalent to an instruction that there was no evidence of knowledge of insanity. The evidence should have been submitted to the jury so as to leave them free to decide.

Cummings *v.* Williamsport, 3 Norris, 472.

Burke *v.* Maxwell, 31 Sm. 152.

W. E. Doster, for the defendant in error.

The distinction between a lunatic maker and a lunatic indorser of a note, however correct, is inapplicable in this case, for here the contract was made originally while the indorser was undoubtedly sane. An evidence of his sanity lay in the fact that he demanded and received security from the maker by way of a judgment. The charter of the bank imposed no duty upon the trustees in regard to indorsement of notes, etc. It is well established that notice to a corporator is not notice to the corporation unless the corporator were constituted an organ of communication between the corporation and parties dealing with it.

Wilson *v.* McCullough, 11 Harris, 440.

Strong expressions of opinion by a Judge to the jury are tolerated, and the Supreme Court will not reverse where the case is left fairly to the jury.

Bitner *v.* Bitner, 15 Sm. 347.

This case is ruled by—

The Lancaster County National Bank *v.* Moore, 28 Sm. 407.

Moore *v.* Lancaster County National Bank, 2 WEEKLY NOTES, 674.

March 24, 1879. THE COURT. However it might have been had the note in suit been an original note indorsed by the alleged lunatic for the accommodation of Buss, yet the case was different when it appeared that it was a renewal of a note for a similar amount upon which he was also an accommodation indorser. There had been several renewals, at each of which as well as the execution of the first note, Yost was unquestionably of sound mind. He had taken and held a judgment against the original maker as collateral security for the note. Yost was clearly liable on the note of which the note in suit was a renewal. There was full consideration therefor, and the case is directly within the decisions of this Court in Lancaster County National Bank *v.* Moore (28 P. F. Smith, 407), and Moore *v.* Lancaster County National Bank (2 WEEKLY NOTES, 674). The assignments of error are not sustained.

Judgment affirmed.

PER CURIAM.

July, '77, 129. Jan. 10, 1879.

City to use of O'Rourke v. Phila. & Reading R. R. Co.

Municipal claim—Paving in Philadelphia—Selection of paver by majority of property owners—Revocation of such selection, prior to award of contract, effect of.

A city ordinance authorized the Highway Department "to enter into a contract with a competent paver, who shall be selected by a majority of owners of property" fronting on the streets to be paved. A majority of such property owners signed a paper selecting the equitable plaintiff as such paver; but before the award of any contract to him, a large number of them signed a formal revocation of such selection, thus leaving the remainder of the signers in the minority; they notified the Highway Department and the plaintiff of the revocation, and opposed the award of a contract to him. Notwithstanding this, the contract was awarded to the plaintiff, who, in the face of notice that his claim would be contested, did the work, and subsequently issued writs of scire facias to recover the cost:

Held (affirming the judgment of the Court below), that the plaintiff was not entitled to recover.

Error to the Common Pleas No. 4, of Philadelphia County.

The facts of this case, and the opinion of THAYER, P. J., in the Court below, were fully reported 4 WEEKLY NOTES, 226, *q. v.*

The plaintiff took this writ of error, assigning for error the entry of judgment for defendant on the point reserved.

David W. Sellers, for plaintiff in error.

The selection was coupled with an interest; it was a contract in writing, *inter partes*, that the plaintiff should secure the contract, and was irrevocable.

Thomas Hart, Jr., for defendant in error.

January 27, 1879. THE COURT. Nothing, we think, can be added to the opinion of Judge THAYER, upon the point reserved in the Court below, and upon that opinion—

Judgment affirmed.

PER CURIAM.

[*Cf.* City to use of O'Rourke *v.* Hays, *post*, p. 468.]

Common Pleas—Equity.

C. P. of McKean Co. Oct. 1879.

Dunlap v. Riddell et al.

Equity jurisdiction—Bill in the nature of a bill to stay waste—Oil lease—Flowing well—Appointment of receiver to take flowing oil, pending an ejectment to decide right of possession under an oil lease—Security.

Motion for appointment of a receiver *pendente lite.*

Hearing on bill, answer and affidavits.

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Bill in equity, setting forth that under a certain oil lease executed by E. B. Welsh, the owner of the fee, lessor, and one Cline, lessee, under whom the plaintiff claims, the plaintiff is entitled to the exclusive right to enter, mine, and bore for oil on the premises in question, and that he had taken possession under the lease for that purpose; that soon afterwards the defendants entered upon the land and began to drill an oil well, and continued until they struck oil, when the well proved to be a "flowing well," and produced, and is still producing large quantities of oil, "flowing from natural causes," without the aid of a pump or other mechanical device; that the defendants receive and dispose of the oil for their own benefit; that the plaintiff, soon after the defendants took possession, brought an action of ejectment against them, which is still pending. The bill prayed the appointment of a receiver to take charge of the oil as it flows from the well, until the determination of the said action of ejectment.

The defendants in their answer admitted the existence of the lease under which the plaintiff claims, and that they knew of its existence when they acquired their title, but they deny its validity and allege that it had then become null and void by reason of non-compliance with its terms on the part of Cline and those holding under him. They also admitted the drilling of the flowing well, and that they receive its production, but averred full title in themselves, and denied the jurisdiction of the Court to grant a receiver pending the ejectment and before final hearing.

C. B. Curtiss, and *David Sterrett*, for plaintiff.

Byron D. Hamlin & Son, for defendant.

Oct. 25, 1879. THE COURT (after reciting the facts substantially as above). There is therefore a serious controversy on the plaintiff's title such a one as might induce us *to refuse an application for an injunction* based upon it. Ought this uncertainty about the result of the action of ejectment to prevent *the appointment of a receiver?* This is one question and it is by no means free from difficulty. The power to stay waste pending an action of ejectment is well settled and has been the subject of considerable legislation in this State. All that is necessary to entitle the plaintiff in an action of ejectment to the writ of estrepement is an affidavit that waste is being committed on the premises sought to be recovered. The writ enables him to prevent the cutting of timber trees and to prevent the removal of the logs and timber from the premises. Quarrying and mining may be stopped, and the removal of coal, etc. etc., are prevented in the same manner. No showing of a title is necessary. It is only necessary that an action be pending for the recovery of land, that waste should be attempted by the defendant, and that security be given to indemnify the defendant against loss by reason of the writ of estrepement. The writ then issues, and all operations on the land by which its value is impaired, are brought to an end. But the defendant may have the writ dissolved if he so desires, not by calling on the plaintiff to make an exhibit of his title, that its value may be estimated before the trial, but by giving bond with sureties to be approved by the Court, or a law judge thereof, conditional to indemnify the plaintiff for all loss to him by reason of the removal of the timber, coal, ore, etc. etc., in case of his recovery in the action. This, as to the ordinary modes of waste, furnishes a complete protection to the plaintiff and provides equally for the case of the rights of the defendant.

The case of petroleum oil is not, however, sufficiently provided for by the statutes relating to waste. An estrepement will doubtless justify the sheriff in arresting the work of drilling an oil well on the land described in it. If the well was finished but the oil could be obtained from it only by pumping, the writ might justify the sheriff in preventing the raising of the oil to the surface; but what shall be done with a flowing stream of oil? The sheriff cannot prevent its coming to the surface, and when there it must be taken care of or lost. To prevent the defendant from taking care of it by virtue of a writ of estrepement is not to prevent but to commit waste.

What then? Shall the defendant, because he is in possession, be allowed to take all that is valuable out of the land in this way, and leave the plaintiff to an action for mesne profits? An action for mesne profits was not designed to furnish a remedy for waste. If it had been, the writ of estrepement would not have been necessary. But mesne profits are the ordinary fruits of tillage, the rents, issues, and profits that result from the usual modes of occupying the lands and tenements in controversy. These must be provided for because the tenant cannot be deprived of these without depriving him of the possession which he is defending in this action. Hence the plaintiff, if he recovers the possession, may recover for the profits which should have been his, but which were necessarily received by the defendant while his possession lasted. Waste, however, stands upon different ground. It is not incident to the occupancy. It is a destruction of the value of lands and tenements. Oil land is valuable for the oil it contains, as coal land is for its coal, or timber land for its timber. Now we can stop the drilling of wells by the writ of estrepement, but if the drill reaches the oil-bearing rock before the sheriff reaches the ground with his writ, the oil will come to the surface without further help from the defendant.

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We must then allow the defendant to receive and appropriate what constitutes the whole value of the land, or we must preserve it for the successful litigant so that his verdict shall not be fruitless when obtained. The application now before us is made for this purpose, and we are asked to appoint a receiver to prevent the defendants from carrying off, not mesne profits of the land, but the whole of the oil, and therefore the whole value, from the land in controversy. In granting it we express no opinion upon the title. The question is whether the plaintiff shall have what he recovers if he gets a verdict. If the trial can be a little delayed the land can be drained of its oil, and its further operation as oil territory be useless. The plaintiff does not claim the soil. His lease is only for oil purposes, and this may be entirely destroyed by simply permitting the defendant to receive the oil as it flows from the open wells. For such an injury trespass for mesne profits is no adequate remedy, for not mesne profits only, but the entire corpus of the subject of litigation is gone.

Such a result could not happen as to waste of any other description, and we think it ought not to be permitted as to petroleum oil. Where we cannot stop the waste we should preserve so far as possible the value of the oil removed, for the real owner. This seems to us to involve no hardship. It is just towards the parties to the litigation and its tendency will be to discourage rash and forcible efforts to seize, or to maintain, the possession of land when the title is a subject of controversy.

For these reasons we are led to the conclusion that we should treat this bill as in effect a bill to stay waste. We appoint the receiver to preserve for the owner the value of the oil that flows without help from the open well on the land in controversy. Since we cannot stop the oil on its way to the surface, we must save it for him to whom the verdict in the action shall give it. But that the defendants' possession may not be interfered with unnecessarily we shall make an order in such manner as enable the defendants to give security precisely as if a writ of estrepement had issued. If the security be given, the order for the appointment of a receiver will become inoperative.

And now, October 25, 1879, on hearing the bill, answer, and proofs, and the arguments of counsel in this cause, on consideration thereof it is ordered, adjudged, and decreed: That E. P. Whitcomb is hereby appointed receiver to take charge of the oil flowing from the open well described in plaintiff's bill, and to dispose of the same from time to time as the Court shall direct, said receiver to give bond with sureties to be approved by Judge W. S. BROWNELL in the sum of three thousand dollars for the faithful performance of his duties. No order to issue to said receiver until the plaintiff shall give bond with surety or sureties to be approved by Judge BROWNELL as aforesaid in the sum of one thousand five hundred dollars conditioned that the said plaintiff shall fully indemnify the defendants against loss and damage by reason of the appointment of said receiver. If the defendants shall within twenty days from and after the filing of this decree give bond with sureties to be approved by Judge BROWNELL as aforesaid in the sum of three thousand dollars conditioned to account for all oil received from the said well from and after the date thereof, to the said plaintiff in case he shall recover in the action of ejectment set out in his bill, then no order shall issue to the said receiver.

Opinion by WILLIAMS, P. J.

Common Pleas—Law.

C. P. No. 2. Sept. 15, 1879.

Cooper v. Wallace et ux.

Affidavit of defence law—Suit for necessaries against married woman—Judgment cannot be taken for want of an affidavit of defence in such a case—Practice.

Rule for judgment.

Assumpsit upon a book account against Wallace and wife, for goods purchased by the wife.

Appended to the copy filed were the averments that the goods were "for the personal wear of the said Sarah A. Wallace," and that they were "sold and delivered for necessaries in the family."

The defendant, Sarah A. Wallace, filed a suggestion that she, being a feme covert, was not bound to file an affidavit of defence.

Harrington, for the rule.

MITCHELL, J. There can be no judgment for want of an affidavit of defence against a married woman in a suit for necessaries. The question of what are necessaries, is for the jury.

Rule discharged.

[See Eisenbery *v.* Negus, 2 WEEKLY NOTES, 445; Williams *v.* Coward, 1 Grant, 21; Scott *v.* Wilmer, 1 WEEKLY NOTES, 41.]

C. P. No. 4. June 9, 1879.

City to use of O'Rourke v. Hays.

Municipal claim—Paving—Failure to comply with conditions of ordinance—A lien filed for paving done under a contract entered into with

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a person not the choice of the property owners, as required by ordinance, is invalid, and is not cured by a subsequent ordinance ratifying "all contracts . . . under which work has been done under resolution or ordinance authorizing the same."

Sur demurrer to replication.

Sci. fa. sur claim for paving on Lehigh Avenue, for which, by an ordinance of city councils, the Highway Department was directed to enter into a contract with a paver to be chosen by a majority of the property owners. Michael O'Rourke was so chosen, but his selection was revoked, after which, however, the department made the contract with him; and he actually did the work and filed his claims. Subsequently councils passed an ordinance, approved December 3, 1878, that "all contracts for paving streets entered into by the Department of Highways, under which work has been done under resolution or ordinance authorizing the same, be and are hereby ratified and approved." The paver thereupon issued a sci. fa. against the property, of which Hays was reputed owner, and the latter pleading, *inter alia*, that O'Rourke was not a paver selected according to ordinance, he replied, setting forth the ratifying ordinance of Dec. 3, 1878, to which the defendant demurred.

Thomas Hart, Jr., for the demurrer.

The contract in question was decided to be void, and the lien invalid, in the case of City to use of O'Rourke *v.* Phila. & Reading R. R. Co. (C. P. No. 4, 4 WEEKLY NOTES, 226; affirmed in Supreme Court, see *ante*, p. 466.)

As against this defendant, the ordinance could not validate the contract, and make that a lien which was none before its enactment. The contract was only to be entered into with one who filled the position of being the choice of the property owners. O'Rourke not filling that position, there was here no contract at all, and this fact is unalterable.

Sellers, contra.

The original ordinance directed the paving and keeping in repair of certain streets, as well as how the contract should be awarded. The city's agent, which is the Highway Department, makes a contract which is defective, and the city ratifies her agent's contract. The lien arises from the doing of the work, and not from the contract. The contract is merely the selection of the workman. It is true, the Supreme Court decided the selection to be erroneous; but as the whole matter of paving rested exclusively with the city, the work done could be adopted, and the vigor of the lien remain. It was entirely *ex gratiâ* that councils gave owners the right to select pavers. The city can direct the contract to be made with a paver selected by property owners, and then recall the privilege and order it to be given to some one else.

Dickinson *et al.* *v.* Peters, 6 WEEKLY NOTES, 458.

The owner of property fronting on a street is liable for paving, which can be ordered at any time by the city; and a lien is given from the time the work is done as a remedy for collecting this debt. Subsequent legislation affecting the remedy only, is permitted and valid.

Bolton *v.* Johns, 5 Barr, 145.

Thomas Hart, Jr., in reply.

In Dickinson *v.* Peters, the original ordinance was repealed.

In Bolton *v.* Johns, the liability was subsisting by reason of a contract between the parties; here the work was done under a contract not ordered by the city, and void.

C. A. V.

June 20, 1879. THE COURT. Judgment for the defendant on the demurrer.

C. P. No. 4. June 17, 1879.

Trotter v. Page.

Implied covenant from the words "grant, bargain, and sell"—Assessment on account of benefit from opening of street is an encumbrance suffered by the grantor, if taking place during his ownership, although no claim be filed before execution of deed—Act of May 28, 1715—What is an encumbrance.

Motion by defendant for judgment on point reserved, notwithstanding verdict.

This was an action upon the covenant arising from the words "grant, bargain, and sell," in a deed from defendant to plaintiff, dated May 31, 1875. Plaintiff was obliged to pay the amount assessed upon the property on account of benefit resulting from the opening of certain streets. The assessment had been made and the streets actually opened, prior to the execution of the deed, although the municipal claim was not filed until Dec. 15 following. The Court (BRIGGS, J.) directed a verdict for plaintiff, reserving the point whether at the time of making the deed there was an encumbrance on the property suffered by the opening of the streets.

D. W. Sellers, for the motion.

Thomas Hart, Jr., contra.

An assessment which became a lien before the execution of a deed, is within the Act of 1715, under which the covenant is implied, although the work was not finished.

Shaffer *v.* Greer, 6 WEEKLY NOTES, 323.

The word "encumbrance" is not confined to cases of lien.

Rawle on Covenants for Title, 4th edit. 94.
Seitzinger *v.* Weaver, 1 Rawle, 377.
McKennan *v.* Doughman, 1 P. & W. 417.

The covenant against encumbrances, extend-

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ing to all adverse claims which may diminish the value of the estate to the tenant, is broken if the land has become liable to be assessed by reason of the action of the proper authorities.

Cochran *v.* Guild, 106 Mass. 29.
Alwy *v.* Hunt, 48 Ill. 45.
Jones *v.* The Aldermen, 104 Mass. 461.
Blackie *v.* Hudson, 117 Mass. 181.
Carr *v.* Dooley, 119 Mass. 294

C. A. V.

July 12, 1879. Judgment for plaintiff on the point reserved.

Orphans' Court.

Sept. 25, 1879.

Bucknor's Estate.

Petition for review—Act of October 13, 1840—Power of Court to correct or amend—Attachment execution—Set-off of debts due by distributee against distributive share—Statute of limitations—Whether suspended by the pendency of proceedings in bankruptcy—Bankrupt Act.

Sur petition for review and demurrer.

The petition of William A. James, administrator, set forth that Archimedes J. Bucknor, Sr., died intestate on the 13th day of December, A. D. 1877, and that letters of administration on his estate were granted to William A. James, the petitioner. The decedent left surviving him a widow and, among other children, Archimedes J. Bucknor, Jr., who had formerly been a member of the firm of Bucknor, McCammon & Co. In October, 1870, the firm were adjudged bankrupts. At this time the decedent was a creditor of theirs for over $13,000, which debt he proved before the register in bankruptcy. Proceedings were continued through several years, but the debts of the firm were never discharged. During the pendency of the bankrupt proceedings, F. F. Milne obtained judgments amounting to over $11,000, against the firm, and subsequently attached the share of A. J. Bucknor, Jr., in his father's estate, summoning the petitioner as garnishee. In November, 1878, A. J. Bucknor, Jr., also died.

Upon the audit of the account of the administrator of A. J. Bucknor, Sr., the Court designated, among others, the amount of the share of A. J. Bucknor, Jr., but refused to order any distribution of it, or consider any of the questions relating to his indebtedness to the decedent's estate, instructing the accountant to retain the full share until after the determination of the attachment suits then pending, when the amount due him would be definitely determined. The petitioner is advised that the adjudication of the Orphans' Court will be set up as conclusive of the amount of the share due A. J. Bucknor, Jr., and remaining in his hands as garnishee, whereas in fact he is entitled to have the Orphans' Court consider and expressly pass upon the question whether or not the debt due to the decedent from the firm of which the said A. J. Bucknor, Jr., was a member, cannot be set off against his share, and the amount actually due him from his father's estate determined with reference to these facts. The petition also alleges, as new matter, the discovery of a due bill of A. J. Bucknor, Jr., to the decedent for $10,000, dated in 1867, which, if an advancement, should still further reduce his distributive share, and concludes with a prayer for a citation on the administrator of Archimedes J. Bucknor, Jr., and all other persons interested, to show cause why the adjudication should not be modified or opened, and the questions above set forth passed upon.

F. F. Milne, the attaching creditor, demurred to the petition on the ground that it does not set forth any error of law or fact apparent on the face of the record which requires a review and modification, nor does it allege any new matter or evidence which was not before the Court at the time the adjudication was made, and which would justify the Court in reconsidering it; that the indebtedness of the distributee to the decedent is barred by the statute of limitations; that there is other property, real estate, out of which this debt can be recovered, if indeed it be recoverable at all, and that these facts being known to the Court at the time, the adjudication is final upon all matters before it while fixing the share of the distributee subject to the rights of an attaching creditor.

Samuel Gustine Thompson, for petitioner.

An attaching creditor stands in the shoes of the distributee.

Strong *v.* Bass, 11 Cas. 333.

The distributee being indebted to the decedent at the time of his death in an amount exceeding his share, is not entitled to anything.

Springer's Appeal, 5 Cas. 210.
Wallace *v.* Keyser, 1 P. F. Sm. 497.
Bouslough *v.* Bouslough, 18 Ib. 495.

The administrator is entitled to retain the share of a distributee who is a member of a firm indebted to the estate, and set off against it the firm debt.

Thompson's Appeal, 6 Wr. 357.
Smith *v.* Smith, 7 Jurist, N. S. 1140.

Proceedings in bankruptcy do not discharge the debt, and the pendency of them suspends the running of the statute of limitations.

Blumenstein on Bankruptcy, p. 240, and cases there cited.

Neither does the statute run against advancements.

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Pilling's Appeal, 3 WEEKLY NOTES, 252.

The adjudication should be opened and the questions determined because of mistake.

Act of 13th October, 1840, Br. Purd. Dig. p. 1109, pl. 49.
Bishop's Appeal, 10 Barr, 471.
George's Appeal, 2 Jones, 261.
Riddle's Appeal, 7 Harr. 431.

A petition to review is founded on equitable principles, and is never allowed to stand on strict law and against equity.

Bishop's Appeal, 2 Cas. 470.
Stevenson's Appeal, 8 Ib. 324.
Baggs's Appeal, 7 Ib. 514.
Metz's Appeal, 11 S. & R. 204.
Kimber's Appeal, 13 P. F. Sm. 322.
Nevin's Appeal, 7 Phila. 506.
Russell's Appeal, 10 Cas. 258.
Dennison *v.* Goehring, 6 Barr, 403.
Bessinger's Estate, 5 WEEKLY NOTES, 320.
Howell's Estate, 5 Ib. 430.

M. Arnold, for demurrer.

It is well settled that a petition for a review will not be granted unless there is some error in fact or law apparent upon the face of the record. The Act of 1840 did not change the principles, it simply limited the time in which a review can be allowed to five years.

In this case the petitioner is virtually asking for a new trial to admit evidence which was known and could have been presented at a former hearing. The first account was adjudicated on October 24, 1878, reopened and readjudicated November 14, 1878, and confirmed absolutely November 30, 1878; the second account was adjudicated on February 24, 1879, and confirmed absolutely March 6, 1879. The attachment was levied on January 24, 1878, and was brought to the attention of the Court at the time of the audits, and the share of the distributee was awarded subject to it.

The indebtedness which is sought to be set off against the share of the distributee is barred by the statute of limitations.

Levering *v.* Rittenhouse, 4 Whart. 130.
Wallace *v.* Keyser, 1 P. F. Sm. 493.
Hughes's Appeal, 7 Ib. 179.

Proving a debt under the provisions of the Bankrupt Act does not toll the running of the statute, or prevent bringing suit. If the decedent had wished to preserve his right of petition intact against the running of the statute, it was his duty to have brought suit; now that more than six years have elapsed since the right accrued, it is too late either to bring suit or use the claim as matter of set-off.

Oct. 4, 1879. THE COURT. The petition in substance avers, that when distribution of the balance shown by the accounts of the petitioner as administrator of A. J. Bucknor, deceased, was awarded, all questions with regard to the distributive share of A. J. Bucknor, Jr., were excluded from consideration, and left to be determined in the attachment executions which had issued against said share in the hands of the petitioner as garnishee upon judgments in the Court of Common Pleas No. 2 against the firm of Bucknor, McCammon & Co., of which A. J. Bucknor, Jr., was a member. And that, notwithstanding such exclusion, and though, in point of fact, the indebtedness of the said A. J. Bucknor, Jr., exceeds his distributive share so attached as aforesaid, the attaching creditor now sought to take advantage of the form of the adjudication, and claimed that, by reason thereof, all inquiry into the amount of such share was precluded, and that the question of set-off could not be considered by the Court in which the attachments were pending. The petition further avers, that such was not intended to be the meaning of the adjudication, which it prays may be so modified as to avoid such effect, or that a rehearing may be had, and the question as to the real amount of said share be determined by the Auditing Judge, upon evidence to be produced for that purpose.

The attaching creditor, who has been brought in by citation, and who did not appear at all before the Auditing Judge, demurs to the petition; 1st, because it shows no error apparent on the face of the record, and alleges no new matter arising, or evidence discovered since the adjudication was filed; and 2d, because the petition shows that the indebtedness sought to be charged against the distributive share was barred by the statute of limitations at the time of the death of the decedent.

It must be conceded that the petition could not be supported under the Act of 13th of October, 1840. But the power of the Orphans' Court to correct or amend its decrees when injustice will result by suffering them to stand, does not depend entirely upon this Act; and where no rights have changed in consequence of the decree, this power of correction or amendment will be liberally exercised, notwithstanding the fact that error does not appear on the face of the record, or that new matter is not averred or shown. (See Curry's Estate, 1 Leg. Gaz. Rep. 484; Garwin's Appeal, 2 Am. Law J. 253; George's Appeal, 2 Jones, 260; Bishop's Appeal, 2 Casey, 470; Metz's Appeal, 11 S. & R. 204; Whelan's Appeal, 20 Smith, 410.)

The demurrer admits that it was not intended by the Auditing Judge to determine any question as to the amount of the distributive share which had been attached; but that it was intended to leave all matters relating to such share for the consideration of the Court in which the attachments were pending.

We must take care, therefore, that this intention is not defeated by the use of unguarded terms in making a distribution which thus ap-

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pears to have been purely formal. The right of the attaching creditor to recover depends, or should depend, solely upon whether, when the decedent died, there was a valid subsisting indebtedness to him on the part of his son, the defendant in the execution, equalling or exceeding his distributive share in the father's estate.

This is the real question of the case. Upon this point the petition avers, that in October, 1870, A. J. Bucknor, Jr., was indebted to the decedent, upon a note given by the firm of which he was a member, for $13,203.39, and also upon his individual due bill for $10,000; that in the month mentioned the said firm had gone into bankruptcy, and their debt to the decedent was duly proved, in accordance with the Act of Congress; that the proceedings in bankruptcy continued with more or less activity until April, 1876, but that no discharge of the bankrupts was ever applied for or granted, and the decedent died in December, 1877.

It is contended that the running of the statute of limitations was not affected by the proceedings in bankruptcy; that the indebtedness to the decedent was barred at the time of his death, and that the distributive share of the son cannot be reduced thereby.

The Act of Congress of March 2, 1867, § 21 (Revised Statutes, § 5105) provided, that "no creditor proving his claim shall be allowed to maintain any suit at law or in equity against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced, or unsatisfied judgments already obtained, shall be deemed to be discharged and surrendered thereby." This Act, so far as it provided for a total surrender of the right of action, was amended by Act of June 23, 1874, which declared, that "a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt where a discharge *has been refused* or the proceedings have *been determined without a discharge.*"

As to the debts provable, but not actually proved, in the Bankruptcy Court, the Act of 1867, § 21 (Revised Statutes, § 5106), provides that "no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt *until the question of the debtor's discharge* shall have been determined, and any such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the Court in Bankruptcy on the question of discharge, *provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge.*"

It will be observed that this proviso does not apply to the case of a creditor who has proved his debt; his right of action is absolutely taken away until a discharge *has been refused*, or *until the proceedings have been determined without a discharge.* And what, it may be asked, in case of a creditor who has not proved his debt, constitutes such "unreasonable delay" on the part of a bankrupt "in endeavoring to obtain his discharge" as will permit the creditor to proceed with his action?

The Act of 1867, § 29 (Revised Statutes, § 5108), provided that the application for discharge might be made at any time after the expiration of six months from the date of adjudication, or if no debts have been proved, or if no assets have come to the hands of the assignee at any time after sixty days, and within one year from such date. But, in this respect, the law was changed by Act of 27th of July, 1868 (Revised Statutes, § 5112), which provided that after January 1, 1869, no discharge should be granted where the assets were less than fifty per cent. of the debts proved, "*unless the assent, in writing, of a majority in number and value of creditors proving their claims is filed in the case at or before the time of the hearing of the application for discharge.*"

In such case it cannot be said, that the mere failure of the bankrupt to procure the required assent of creditors shows "unreasonable delay" on his part. We certainly cannot say so as a matter of law when the case comes before us on demurrer.

With the right of action thus taken away or suspended, it would be most unjust that a vigilant creditor, seeking to obtain his share of the bankrupt's assets, and doing all in his power to establish his debt, should be subject to the running of the statute of limitations; and deprived of his claim, because he did not do what the supreme law of the land said he should not do, viz., bring suit before a discharge had been refused, or the proceedings in bankruptcy had been determined without a discharge.

The maxim *lex nemini facit injuriam* applies to such a case, and saves the debt from the operation of the statute. All analogies favor this view. The death of the debtor suspends the running of the statute; so does the interruption of the administration of justice caused by war or rebellion, etc. etc. etc. (See also Blumenstein on Bankruptcy, 240.)

We are not called upon, however, to decide these questions; that will be done by the Court of Common Pleas when the attachment executions are disposed of. All that we now do is to amend the adjudication as asked by the petition, so that it may not be used to preclude investigation in the proper court.

Let a decree be prepared accordingly.

Opinion by PENROSE, J.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, NOV. 20, 1879.* [NO. 30.

Supreme Court.

Jan. '78, 104. March 24, 1879.

North Penna. R. R. Company v. Kirk.

Railroad company—Negligence—Contributory negligence—Accident to deceased while upon his own property—Province of Court and jury—Damages for death of adult son—Evidence—Errors and appeals—Act of April 4, 1868, § 2.

Where there is some evidence of negligence by the defendants, and also evidence of facts from which the jury might infer contributory negligence by the plaintiff, the evidence on both questions must be submitted to the jury.

The son of the plaintiff was employed in the business of his father, who owned a lumber and coal yard upon the line of the defendants' railroad. A siding connected the railroad with the yard, and passed into the plaintiff's warehouse. The defendants left a lumber car upon the siding after the period when their rules required them to remove it. This car was struck by one of defendants' coal trains, and forced down an incline into the warehouse. The plaintiff's son, who had hastily entered the warehouse upon hearing the approaching train, was crushed against the doors of the warehouse and killed. There was evidence to show that the brake of the lumber car was defective, and also that the nearest car of the coal train was not provided with an effective brake:

Held, that it was properly left to the jury to determine under the evidence, whether defendants were guilty of negligence, and whether the deceased contributed to the accident by negligence on his part.

The deceased was twenty-eight years of age, and, having been unsuccessful in business upon his own account, had returned to his father's house shortly before the accident. At the time of his death he was rendering services in his father's business without compensation. It was in evidence that he intended to remain with his parents, and that his services and advice were of value to them:

Held, it was for the jury to decide, whether there was a reasonable expectation of pecuniary advantage accruing to the plaintiff which was defeated by the loss of his son.

At the close of the plaintiff's evidence, the defendants moved for a nonsuit unless the Court should be of opinion that they would thereby be precluded from offering any evidence if the motion should be overruled, in which event the motion would not be made. The Court expressed the opinion that the defendants would be precluded from offering evidence. This ruling was excepted to:

Held, that the expression of the opinion of the Court upon a motion in form so peculiar was not such a ruling as entitled the plaintiffs in error to an exception and a review in the Supreme Court.

A servant of the defendants was asked by them, as a witness: "Did you omit to do anything you could have done to prevent this accident?"

Held, that this question was properly rejected.

It is inadmissible to set up in evidence against a claim for damages for causing the death of an adult son, the fact that the parent suing had taken out a policy of insurance upon the life of the son, which had been paid.

Error to the Common Pleas of Montgomery County.

Case, by Elias Kirk and Rachel his wife against the North Pennsylvania Railroad Company to recover damages for the death of their son, Morris Kirk, aged twenty-eight years, caused by the alleged negligent use by the defendants of a certain railway siding at Abington station, Pennsylvania.

Upon the trial, before Ross, P. J., it appeared that the deceased had been in business upon his own account, but was unsuccessful, and had returned to his parents' home a few months before the accident which caused his death. During this time he had been rendering services of various kinds in his father's business, for which no compensation was paid to him. Elias Kirk testified that when Morris returned from Maryland he said he would stay and help the witness and do anything he should be required to do. Mrs. Kirk testified that the services of Morris were "of great value," and that she "considered his advice of more value than that of any others."

The facts relating to the accident, as stated in the opinion of the Supreme Court, were as follows:

"Elias Kirk had a coal and lumber yard on the line of the railroad. A siding ran from a railroad track to a warehouse on Kirk's land. It was about two hundred and fifty yards in length. The company had built that part of the siding extending from the track to the line of their right of way. The rest of it had been built by Kirk. It was the usage of the company to deliver cars consigned to Kirk upon the siding, and at stated intervals to deposit upon it cars forming part of and detached from their own trains. The key of the switch was in the possession of John Quinn, who was in the company's employment at the time of this occurrence. During the afternoon of the twelfth of March, 1874, a flat lumber car was standing on the siding, about one hundred yards distant from the railroad track and about one hundred and fifty yards from the warehouse. It had no effective brake, and the mooted question, whether it had been sufficiently blocked, was left to be found affirmatively by the jury. From the track to the point where the car stood the grade of the siding ascended, from that point it descended over and along a series of coal-bins, and from the bins was ascending again towards and until it reached the warehouse. The car, with a load of lumber consigned to Mr. Kirk, had been transported from Williamsport, and placed on the siding five days before the accident. About four o'clock three flat and fif-

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teen coal cars were detached from a freight train of the defendants on its way to Philadelphia. The switch was changed, and the cars ran by their own gravity upon the siding, at the rate of three or four miles an hour. The flat car standing on the track was struck by the foremost of the approaching cars so as to start it, and force it on the down-grade over the coal-bins and on the up-grade to the door of the warehouse, which was shut and barred, and which was broken open. Morris Kirk, who was sitting in his father's office when the sound of the approaching train was heard, hurried towards the warehouse and entered it, and was found afterwards fastened between a leaf of the door which the entering car had broken and a partition within the building, standing upright dead. When the cars entered on the siding, the brakeman was not on the car nearest to that struck, but on one further back. He was called as a witness and testified: 'I had two brakes; the brake on the flat held the cars; there was only one brake on; there was no brake on the last car of my train' (the one nearest to the standing car), 'that is, it was not down; if it had been a good brake, I could have checked the train better from the hind car, but that was not so good as the one I was on.'

"There was testimony that the car struck by the detached train belonged to the Northern Central Railroad Company; that it had been unloaded the day it was received; that a rule of the North Pennsylvania Company required that it should be taken away at the end of twelve hours, and that it had remained on the siding five days. When the collision occurred, a portion of the detached train was still on the main railroad track."

At the close of the plaintiff's testimony, the defendants moved for a nonsuit, unless the opinion of the Court was, that if such motion was overruled, the defendants would be precluded from offering testimony. The Court ruled, that if the motion was pressed, the defendants would be precluded from offering testimony. The motion was then withdrawn, and an exception was taken by the defendants. (1st, 2d, and 3d assignments of error.) The defendants in their testimony proposed to ask the brakeman of the colliding train: "Did you omit to do anything which you could have done to prevent this accident?" Objected to. Objection sustained. Exception. (4th assignment of error.)

The defendants further offered to prove by the plaintiff, Elias Kirk, "that he had a policy of insurance in the Penn Mutual Life Insurance Company for $5000 on the life of his son Morris and had received the insurance money; for the purpose of showing that he is to that extent indemnified for the pecuniary loss." Objected to; objection sustained. Exception. (5th assignment of error.)

The plaintiffs presented the following points, *inter alia*, which were affirmed by the Court.

(5) It is the duty of a common carrier to provide a vehicle in all respects adapted to the purposes of carriage and so constructed as to be able to encounter the ordinary risks of transportation. It must be perfect in all its parts, in default of which he becomes responsible for any loss that occurs in consequence of any defect, or injury which it may have caused. *Answer*. This is true.

(6) When the carriage is proved to have been defective at the time of the injury, and that the defect caused the loss, the *onus* is then necessarily shifted to the carrier. *Answer*. This is true. (6th assignment of error.)

The defendants presented, *inter alia*, the following points, all of which were refused by the Court.

(1) That as a matter of law the undisputed evidence shows contributory negligence on the part of Morris Kirk, the decedent, and plaintiffs cannot recover.

(2) That the evidence does not show negligence by the defendants, and plaintiffs cannot recover.

(5) That the evidence does not show such a relation between the said Morris Kirk and the plaintiffs, as entitles them to recover in this suit.

(8) That if the jury find from the evidence that Morris Kirk lost his life while lawfully engaged on or about the roads, works, depots, or premises of the railroad company, or in or about any train or car therein or thereon, although he was not an employé of the said company, the plaintiffs cannot recover. *Answer*. We decline to affirm this point, and in the language of Chief Justice THOMPSON we reply, that such a construction of the second section of the Act of April 4th, 1868, would, beyond a question, deny compensation for death by negligence in almost any conceivable case. (R. R. Co. *v.* Keller, 17 P. F. S. 300.)

(7th, 8th, 9th, and 10th assignments of error.)

Verdict and judgment for the plaintiffs for $3100; afterwards reduced, upon the argument of a motion for a new trial, to $3050.

The defendants took this writ, assigning for error the ruling upon their motion for a nonsuit, the overruling of their question to the brakeman and their offer of evidence, and the answers of the Court to the plaintiffs' and defendants' points, *ut supra*.

G. R. Fox and *A. D. Swartz*, for plaintiffs in error.

This case is governed by the Act of April 4, 1868, § 2 (Purd. Dig. 1094, pl. 6), which enacted that in cases of this kind, "only such compensa-

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tion for loss and damage shall be recovered as the evidence shall clearly prove to have been pecuniarily suffered or sustained." A parent is allowed to recover for loss of service of a *minor* child from the time of his death to the day on which, if he had lived, he would have attained his majority; a parent should not be able to recover on account of the death of a son who was of age, unless it was established that the family relation in point of fact continued to exist, and that his parents received pecuniary advantage from his services.

Penna. R. R. Co. *v.* Zebe, 9 Casey, 318.
Caldwell *v.* Brown, 3 Sm. 453.
Penna. R. R. Co. *v.* Bantom, 4 Id. 495.
R. R. Co. *v.* Rowan, 16 Id. 303.
Birmingham *v.* Doon, 3 Brews. 69.
R. R. Co. *v.* Adams, 5 Sm. 499.

The evidence is clear that the negligence of the deceased contributed to the injury, and it was the duty of the Court to decide this question as a matter of law upon the undisputed facts.

R. R. Co. *v.* Armstrong, 2 Sm. 282.
Gerety *v.* R. R. Co., 31 Id. 274.
Waters *v.* Wing, 9 Id. 211.
R. R. Co. *v.* Feller, 4 WEEKLY NOTES, 162.

The defendants' motion for a nonsuit should not have been refused, and the Court should not have ruled, that if they insisted on their motion for a non-suit, and it was refused, they would be precluded from giving any testimony in defence. There is no such law or practice.

Smyth *v.* Craig, 3 W. & S. 14.
Eckert *v.* R. R. Co., 4 Hand, 502.

The plaintiffs' son at the time of the injury was engaged on or about the roads, works, and premises of the railroad company, and was thus an employé, and as such he could not recover.

Act of April 4, 1868, P. L. 58.
Mulherrin *v.* R. R. Co., 31 Sm. 376.
Kirby *v.* R. R. Co., 26 Id. 506.

The answer to the 8th point, and the reference to R. R. Co. *v.* Keller, as authority, have no relation to the point, but refer to the other section of the Act of April 4, 1868.

H. R. Weand and *B. E. Chain*, for the defendants in error.

The question whether the evidence showed the existence of the family relation between the deceased and his parents was properly submitted to the jury, as was also the question as to the reasonable expectation which his parents had of receiving pecuniary advantage therefrom.

Penna. R. R. Co. *v.* Adams, 5 Sm. 499.
Penna. R. R. Co. *v.* Keller, 17 Id. 300.
Central R. R. Co. *v.* Barron, 5 Wall. 90.
Penna. R. R. Co. *v.* McHugo, 35 Leg. Int. 62.

The Court made no mistake in refusing a nonsuit, and in warning the defendants that if they demurred to the evidence they would be precluded from putting in a defence.

Bevan *v.* Ins. Co., 9 W. & S. 187.
Baker *v.* Lewis, 9 Casey, 301.
Express Co. *v.* Wile, 14 Sm. 201.

What is negligence is always a question for the jury, where the measure of duty is ordinary and reasonable care.

R. R. Co. *v.* McElwee, 17 Sm. 310.

It is alleged that deceased contributed by his negligence to produce his own death, but no testimony has been given to show this, nor is there any testimony that deceased ever heard the noise of a train approaching; but even if he had heard the approaching train, it could not possibly be considered contributory negligence when he entered a private building connected with his own business. At the very most it was a question for the jury. It was gross negligence on the part of the defendants below to leave an empty car with defective brakes for five days on a siding when, by the rules of the company, freight cars are allowed to stand but twelve hours.

The 1st section of the Act of 1868 had no application to the case; and the 8th point was withdrawn, and not pressed in the Court below. The Judge stated that, although withdrawn, as his answer was written he would read it with the others.

May 7, 1879. THE COURT. This action was brought by Elias Kirk and his wife, the plaintiffs below, to recover damages for the injury they sustained by the death of their son, caused, as they alleged, by the negligence of the servants of the North Pennsylvania Railroad Company. At the trial the Court was asked to charge the jury that the evidence did not show such a relation between the deceased and the plaintiffs as to entitle them to recover. It had been shown that the son was twenty-eight years of age when the accident happened. He had been away from home at intervals after he attained his majority, and had been in business on his own account. He had returned, however, to his father's house, and for some months had been rendering services of various kinds in his father's business, for which no compensation was paid him. Elias Kirk testified that when Morris returned from Maryland, he said he would stay and help the witness, and do anything he should be required to do. Mrs. Kirk said the services of Morris "were of great value," and that she "considered his advice of more value than that of any others." In clear and forcible terms, that were characteristic of the whole charge, the jury were instructed positively that unless they found that the parental and filial relation was subsisting, and that there was reasonable ground to believe that it would continue to subsist between the plaintiffs and their deceased son, they could find only nominal damages. There has been no departure from the rule laid down in the Penna. R R. Co. *v.* Adams (5 P. F. S. 499). The words "parents" and "children," in the Act of

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the 26th of April, 1855, are used to indicate the family relation, in point of fact, as the foundation of the right of action, without regard to age. And "if there be a reasonable expectation of pecuniary advantage from a person bearing the family relation, the destruction of such expectation by negligence occasioning the death of the party from whom it arose will sustain the action." The charge was in every way unobjectionable, and the question was one which it was the province of the jury to determine.

Was there evidence of negligence on the part of the defendants? [The Court here stated the facts as reported *supra*.] Upon these general facts the charge against the defendants rested. Although they had no property in the car that was struck, it was under their control. The right to remove it from the siding existed exclusively in them. They had brought it from Williamsport, and had left it standing in its defective state. And there was testimony, as has been seen, that the nearest car of the entering train had also a defective break. The force of the collision produced by the speed of the train was sufficient to drive the car to the warehouse door, and to break the scantling by which it was fastened. It was for the jury, in considering all the facts, to ascertain whether they made out the charge or not. What is negligence, is always a question for a jury when the measure of duty is ordinary and reasonable care, and the standard of the degree of care shifts with the circumstances. (Westchester and Philadelphia R. R. Co. *v.* McElwee, 17 P. F. S. 311.) The facts which the testimony tended to prove were substantial, and no standard applicable to them has been judicially settled that would have justified the Court in peremptorily disposing of the cause.

Leaving the question whether the testimony established a case on which the jury ought to pass, the defendants insisted that it was the duty of the Court to declare, as matter of law, that the undisputed evidence showed contributory negligence on the part of Morris Kirk. This request was properly declined. The fact that the deceased left the office and went hastily to the warehouse was undisputed, certainly, but the purpose inducing him to do this was not affirmatively shown. The jury were told that if he acted negligently, and that negligence in the slightest degree contributed to the result, the verdict should be and must be for the defendants. The Court said: "Did he act with ordinary prudence and responsible care under the circumstances, in going into the warehouse and opening those doors? If he did not, then there can be no recovery by the plaintiffs." There was no direct proof that Morris Kirk heard the approaching train, and none that his purpose was to save the property of his father. The inferences necessary to make out contributory negligence might perhaps have been legitimately drawn by the jury from the facts shown. But surely they could not properly be drawn by the Court. On this branch of the case, the answers to the third and fourth points of the defendants were emphatic instructions that there could be no recovery if the jury should find that the negligence of Elias Kirk or his agents contributed to the injury, or if they should find that the car that was struck was left standing on Mr. Kirk's siding without being effectively blocked or braked. Certainly the defendants have no reason to complain that upon this point they were treated with injustice.

At the close of the plaintiffs' evidence in chief the defendants moved for a nonsuit, unless the Court should be of opinion that they would thereby be precluded from offering any evidence if the motion should be overruled, in which event the motion would not be made. The Court expressed the opinion that the defendants would be precluded by such a motion made and overruled. An exception was taken, and a bill sealed, under which the first and second errors have been assigned. The expression of the opinion of the Court on a motion in a form so peculiar, was not such a ruling as entitled the defendants to an exception and a review here. On cross-examination the defendants proposed to ask William Daub, the brakeman, this question, "Did you omit to do anything you could have done to prevent this accident?" The rejection of this question is the subject of the fourth assignment of error. It was competent to prove all that was done by the witness. But it was for the jury to decide whether by acts done or duties omitted he had been guilty of negligence.

In the fifth assignment error is alleged to have been committed in rejecting an offer to prove by Elias Kirk that he had a policy of insurance on his son's life. The admission of this testimony would have been a violation of what is understood to have been the principles of construction uniformly applied to the Acts of 1855 and 1868. In the Penna. R. R. Co. *v.* Keller (17 P. F. S. 300), the defendants in the Court below took the ground "that any recovery must be strictly limited to a pecuniary consideration for a loss actually shown to have resulted from the negligence of the defendants." Chief-Justice THOMPSON said: "The construction contended for would, beyond a question, deny compensation for death by negligence in almost every conceivable case. . . . But there is another aspect of it which will result from the principle insisted upon, viz., that the test of the right to recover being 'the pecuniary damages clearly proved to have been suffered' (Act of the 4th of April, 1868), it will follow that all those who from youth, old age, or other circumstances are non-producers, may become

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the victims of negligence without compensation to survivors. Nay more, the corollary of the postulate would prevent compensation where the survivors are actually benefited by the death either as gainers by the distribution of the property of the deceased, or by the riddance of a troublesome charge. The controversies that would arise if this were the rule, would be repugnant to the sensibilities of every person."

It was admitted at the argument that the answers to the fifth and sixth points of the plaintiffs, relating to the duties of common carriers, were abstractly accurate. The objection made to them was that they had no application to the cause on trial. There was nothing in them to confuse the issue or mislead the jury.

In the eighth point of the defendants, they asked for instructions that if the jury should find that Morris Kirk lost his life while lawfully engaged on or about the roads, works, depots, or premises of the company or about any train or car therein or thereon, although he was not an employé of the company, the plaintiffs could not recover. The point was refused, for which the tenth error was assigned. The evidence scarcely tended to show that the death occurred under any of the conditions stated in the point. It would seem that everything which the defendants could properly ask was accorded. In answering their sixth and seventh points, the Court charged that there could be no recovery if the jury should find that the deceased voluntarily placed himself in the position of danger in which he was killed, for the purpose of saving property or protecting it from injury.

The eleventh assignment of error was not pressed.

Judgment affirmed.

Opinion by WOODWARD, J.

SHARSWOOD, C. J., and PAXSON, J., dissent, upon the ground that there was not sufficient evidence of negligence to submit to the jury.

May, '79, 9. May 20, 1879.

Albert v. Miller.

Evidence, improper admission of—When it should be withdrawn from the jury.

Incompetent evidence which strongly tends to prejudice a party and impair the credibility of a witness, after argument upon it by counsel, is not deemed as effaced from the mind of the jury by its withdrawal from their consideration. It should be withdrawn before the argument, and in such manner as to leave it reasonably certain that it did not taint the relevant testimony.

Error to the Common Pleas of Lebanon County.

Assumpsit, by Henry Miller against William B. Albert and Edward J. Backenstose.

Service of the writ of summons was accepted by Albert, and "non est inventus" returned as to Backenstose.

The facts appearing upon the trial, before HENDERSON, A. L. J., were as follows: In the year 1874, Miller, Albert, and Backenstose formed a partnership for the purchase and sale of horses and mules. In the month of June, 1874, this partnership was dissolved, and Albert and Backenstose gave to Miller their note for the sum of $1099.37, which when due was paid.

Plaintiff alleged that this note was for the amount of money invested by him in the partnership only, and that there were profits of the concern amounting to $2905.08, of which he was entitled to one-third, and for which this suit was brought.

Defendant alleged that at the time of the settlement there were many debts of the firm outstanding; that Miller had agreed to take the sum of $1099.37 in full for all moneys invested in the firm, and for his share of the profits; that the unsold stock was to be held by Albert and Backenstose, who were to assume payment of all the firm debts; and finally, that all loss on notes then due the partnership was to be paid equally by the three.

During the trial the plaintiff offered to prove that Backenstose, the other defendant, had absconded, and that Albert had told the plaintiff (who was the witness) that Backenstose had absconded by his (Albert's) advice, and that he gave him money to go away. This offer was made for the purpose of showing collusion between Albert and Backenstose, and to establish the defendant's liability, in connection with other evidence. The offer was objected to by defendant as incompetent and irrelevant. The Court admitted the evidence, saying "the offer is not at all definite, and if it fails to establish a liability on the part of the defendant, Albert, we will exclude it from the jury." The evidence thus admitted was withdrawn by the Judge from the jury, at the opening of his charge, after the speeches of counsel.

Verdict and judgment for plaintiffs. A motion for a new trial having been overruled, the defendant took this writ, assigning for error the admission of the above evidence.

Wm. M. Derr, for plaintiff in error.

The very offer in this case, and the manner in which it was worded, was of such a kind as showed that the evidence was irrelevant and incompetent. It should never have been permitted to go to the jury, and when it was admitted should have been immediately excluded and withdrawn from them. As it is, in this case the evidence was so long before the jury that

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their judgment was biassed, and the withdrawal came too late.

Nash *et al. v.* Gilkeson *et al.*, 5 S. & R. 352.
Shaeffer *v.* Kreitzer, 6 Binney, 431.
Ingham *et al. v.* Crary *et al.*, 1 Penna. 389.
D. & H. Canal Co. *v.* Barnes *et al.*, 7 Casey, 197.
Huntingdon R. R. Co *v.* Decker, 1 Norris, 119.

Josiah Funk and *J. Meyer Light*, contra.

Had any injustice been done in this case, a new trial would have been granted below. In the progress of a trial, irrelevant evidence will sometimes creep in, but the positive instructions of the Judge to the jury to disregard it are sufficient to insure the fact that no mischief will ensue. We must presume that the jury heeded the instructions of the Court.

Miller *v.* Miller, 4 Barr, 319.
Unangst *v.* Kraemer, 8 W. & S. 401.

It is only when the illegal testimony received inevitably tends to prejudice the minds of the jury, that the error is not cured by the Court telling them, after the argument has closed, not to consider the testimony.

Huntingdon R. R. Co. *v.* Decker, 1 Norris, 124.

June 12, 1879. THE COURT. For the purpose of showing collusion between Albert and Backenstose, Miller himself, the witness, was allowed to prove that Backenstose had absconded, and that Albert admitted he gave him money and advised him to leave. On cross-examination, he said: "Backenstose was accused of forging notes, and Albert told him he should clear out, and gave him some money." This testimony, given by the first witness called, remained before the jury till after the proofs and arguments on both sides had closed. Thus during the whole trial the defendant was held up as having conspired with Backenstose to defraud the plaintiff; a falsehood so artfully introduced that in the attempt to repel it, the plaintiff could say that Backenstose had fled under the charge of a high crime, by advice and aid of the defendant. The issue was one of fact, each party a witness in his own behalf, and Backenstose a codefendant upon whom process was not served. It is not easy to conceive of anything better calculated than that impertinent stuff to bias the jury against Albert, both as party and witness. In one view he was presented as a colluder, in the other as an accessory of crime. His codefendant was first presented as an absconding debtor, not as a forger. The plaintiff knew the proposed testimony had no relation to the issue, and had he informed his counsel of the whole truth, of course the offer would not have been made. Incompetent evidence which strongly tends to prejudice a party, and impair the credibility of a witness, after argument upon it by counsel, is not deemed as effaced from the mind by its judicial withdrawal from consideration. It should be withdrawn before the argument, and in such manner as to leave it reasonably certain that it did not taint the relevant testimony. (Railroad and Coal Co. *v.* Decker, 1 Norris, 119, and cases there cited.)

Judgment reversed, and *venire facias de novo* awarded.

Opinion by TRUNKEY, J.

May, '79, 54. May 7, 1879.

Moore v. Hershey.

Lunatic—Liability on commercial paper—Consideration in contract of lunatic—Lis pendens—Evidence.

Where a note is made by a lunatic and indorsed over by the payee, it is competent for the lunatic or his committee to defend against the indorsee, either by showing that he had knowledge of the lunacy or that the note was originally obtained fraudulently or without proper consideration.

Where the indorsee of a promissory note has taken the stand to prove that he is a bona fide holder, upon notice by defendant's counsel to prove the consideration paid by him for the note, it is proper upon cross-examination to ask such questions as will tend to discover whether the indorsee knew that the note was originally obtained for a worthless consideration. Such evidence is also admissible if offered by defendant.

Quære—Whether a lis pendens is constructive notice of a man's mental condition?

Error to Common Pleas of Lancaster County.

Assumpsit, by John M. Hershey, against George H. Moore, on a promissory note for five hundred dollars. Plea non assumpsit.

On the trial the following facts appeared:—

The note in suit was made on June 8, 1872, by George H. Moore, and was drawn to the order of David L. Witmyer, and by him indorsed either on the same or following day to the plaintiff.

Three days before this transaction, viz., on June 5, 1879, a petition for a commission *de lunatico inquirendo* had been duly filed, to ascertain whether the said George H. Moore was a lunatic or not. Proceedings were instituted in accordance with this petition, and an inquisition held June 21 and 28, 1872, which found that the said George H. Moore was a lunatic, and had been so for the space of three years. This finding of the inquisition was confirmed by the Court August 19, 1872, and a committee appointed who conducted the defence in this suit. Notice had been given by defendant's counsel to plaintiff that he would be required to prove the consideration paid by him for the note in suit.

At the trial, before LIVINGSTONE, P. J., the plaintiff having proved the signature to the note, and given it in evidence, was called as a wit-

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ness in his own behalf. He testified that he gave for the note his order on Solon L. Cheny for $375.00, and his own note for $82.09. He added that Witmyer told him what the note was given for. "He told me it was given to lift a judgment." On cross-examination he was asked by defendant's counsel, "Did you not know, at the time you took this note from Witmyer, that the consideration of it was a patent right?" Objected to by plaintiff as not being cross-examination; objection sustained; exception (1st assignment of error).

He was then asked by defendant's counsel, "Did you ever tell anybody that you dealt in patent-right notes; bought them for half price; you bought one of George Moore's; you knew he got no value for it, but you got it cheap, and you were going to make him pay for it?" Objected to by plaintiff as not cross-examination; objection sustained (2d assignment of error).

The defendant then offered "to prove that George H. Moore, the defendant, on January 10, 1872, gave a judgment bond to Aaron H. Danner, for $3000, payable April 1, 1872, and entered to November Term, 1871, No. 232, in the Court of Common Pleas of Lancaster County, and assigned by said Danner to David L. Witmyer, May 21, 1872, and satisfied by said Witmyer June 12, 1872; that on February 19, 1872, an affidavit and petition were filed, alleging that said judgment was obtained by fraud, and that there was no consideration for the same, and a rule was thereupon granted to open the same; which rule was pending at the time of the entry of satisfaction as aforesaid; that said judgment was given by said Moore in pursuance of an arrangement about a worthless patented wash boiler, and that said Moore received no consideration for said judgment; that said Witmyer procured from said Moore six notes for $500 each, all like the one in suit, which is one of them, for said judgment; that said note was given while proceedings in lunacy against said Moore were pending; that said Witmyer subsequently to the date of said note had the whole six notes, and offered them for discount or sale; that said Hershey attended the inquest June 21, 1872, and once in a conversation with a person said that he often dealt in patent-right notes; that he bought them for half price, and made money on them; that he bought one of George Moore's; that he knew Moore had no value for it, but he got it cheap, and would make him pay for it."

This offer being objected to by plaintiff, was disallowed (as a whole) by the Court; exception (3d assignment of error).

Defendant presented the following points:—

(1) It was not competent for the defendant to bind himself by a promissory note given by him while the proceedings in lunacy against him were pending which resulted in finding him a lunatic for three years back, and before the commencement of the proceedings in lunacy. *Answer*: Defendant having made and put in circulation the negotiable note in suit, three days after proceedings in lunacy were commenced, which resulted in finding him a lunatic, and the payee having indorsed said note to plaintiff, who is an innocent holder for value (having no actual notice of the proceeding in lunacy, or of the lunacy of Moore, or of any taint whatever concerning said note), would be bound to pay said note, notwithstanding the fact that the inquest finds said Moore to have been a lunatic for three years prior to its date.

(2) It is incumbent on the plaintiff to show that the defendant, a lunatic, as found by inquisition, received value for the note in suit, and there being no such proof, the defendant is not bound by said note. Refused.

(3) Under the whole evidence in the case the verdict should be for the defendant. Refused.

In the general charge the Court said, *inter alia*: "We prefer to adhere to the rule as stated in Diamond *v.* Lawrence Co., that the doctrine of constructive notice or notice per *lis pendens*, does not apply to commercial paper not yet due, in the hands of an innocent holder for value, and therefore now say to the jury, that constructive notice, by the mere fact that proceedings in lunacy were commenced three days before the making of the note in question, which is a negotiable note—commercial paper, and which is held by plaintiff as an indorsee for value, who, as the testimony shows, has purchased it from the payee for value, without having actual notice of the proceedings in lunacy, or of the lunacy of George H. Moore (if he was then a lunatic), prior to purchasing it, is not such notice as would prevent his recovery in this action, and that plaintiff is therefore entitled to their verdict for the amount of the note with interest from its maturity."

Verdict for plaintiff, under the direction of the Court, and judgment thereon. The defendant took this writ, assigning for error the rejection of his offer, the answers to points, and the charge of the Court.

Thomas E. Franklin and *H. M. North*, for plaintiff in error.

Since the plaintiff was called to prove that he was a bona fide holder for value, we were entitled to inquire into the consideration.

Markley *v.* Swartzlander, 8 W. & S. 172.
Covanhovau *v.* Hart, 9 H. 495.
Byles on Bills, 92–103.

While the indorsee of a negotiable note is not bound to inquire into its consideration, he is bound to ascertain the status of the maker; and if the maker is a lunatic, in regard to whom pro-

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ceedings had, at the time of the making of the note, been already commenced to have him declared a lunatic, the holder is required to show affirmatively that the lunatic has given the note for a fair and valuable consideration, for the benefit of his estate.

Hicks *v.* Marshall, 15 Hun, Sup. Ct. 327.
Surles *v* Pipkin, 62 N. C. 513.

After proceedings in lunacy commenced, the plaintiff ought not to be permitted to recover without proof of any consideration having been received for the note by the lunatic; or where gross fraud and imposition had been practised upon him.

Lancaster Co. Bank *v.* Moore, 28 Sm. 414.

The note of an insane person, or of a perfectly imbecile, which he has been induced to sign by fraud and imposition, is void in the hands of an innocent indorsee.

Sentance *v.* Poole, 3 C. & P. 1.
State Bank *v.* McCoy, 19 Sm. 204.
Lincoln *v.* Buckmaster, 32 Vermont, 658.

As to the applicability of the doctrine of lis pendens, see—

Winston *v.* Westfeldt, 2 Am. Law Reg. 619, O. S.

H. C. Brubaker, for the defendant in error.

Judgment will not be reversed, because a party is not permitted to ask a question when it is apparent from the testimony of the witness that he would not have given the answer sought.

Daniel *v.* Daniel, 3 Wr. 212.

Negotiable paper in the hands of a third party, who is an innocent and bona fide holder for value, cannot be assailed by allegations of fraud or lunacy.

Lancaster Co. Bank *v.* Moore, 28 Sm. 414.
Diamond *v.* Lawrence Co., 1 Wr. 353.

June 23, 1879. THE COURT. The question how far a lunatic shall be held liable upon his contract is not free from difficulty. A man may be mad without showing it; and he may show it and yet drive a thrifty bargain. A lunatic has been held liable for necessaries (La Rue *v.* Gilkyson, 4 Barr, 375; Baxter *v.* Portsmouth, 2 C. & P. 178). In Beals *v.* See (10 Barr, 56) it was held that an executed contract for the purchase of goods could not be avoided by proof of insanity at the time of the purchase, unless the vendor had been guilty of fraud, or had knowledge of his mental condition. In Lancaster County National Bank *v.* Moore (28 Sm. 407) the present plaintiff in error was held upon his promissory note discounted by the bank without knowledge of his insanity. It is a just rule that where a lunatic obtains the property of another person, who in good faith deals with him in ignorance of his lunacy, he shall not keep both the property and the price. But there must be a limit to the civil responsibility of persons of unsound mind, otherwise their property would be at the mercy of unscrupulous and designing men.

The defendant below was sued upon his promissory note in favor of David L. Witmyer, and by him indorsed to the plaintiff. The latter claims to be a holder for value, and stated when on the witness stand that he gave $477.09 for it. The plaintiff was then asked certain questions upon cross-examination as to his knowledge of the consideration, which upon objection were ruled out by the Court, and form the subject of the first and second specifications of error. The objection that the questions referred to were not proper cross-examination was not well taken. The plaintiff had taken the stand to prove that he was a bona fide holder, upon notice by the defendant's counsel to prove the consideration paid for the note. It certainly affected the bona fides of his holding if he knew the note had been obtained from Moore upon a worthless consideration, and in this view the questions referred to in the 1st and 2d specifications ought to have been allowed. The defendant after offering in evidence the record of the inquisition of lunacy in the case of George H. Moore, the finding of which covered the time at which the note in suit was given, made the offer of evidence contained in the 3d specification. The offer was substantially to prove: 1st. That Moore received no consideration for the note; 2d. That the note was given pending the proceedings in lunacy; and 3d. That the plaintiff had admitted in conversation that Moore had not received value. We think this offer as a whole ought to have been received. The rejection of the second branch was not material, as the record of the inquisition already in evidence showed that the proceedings were commenced at a date anterior to the note. But the remaining matters embraced in the offer were material. They went to the consideration of the note and to the plaintiff's knowledge of it. I know of no case in which it has been held that a lunatic, when sued upon his contract, may not show want of consideration. The most that has been decided is that when a man deals fairly with a lunatic and without knowledge of his lunacy, he is entitled to recover the value of what he honestly parted with. It was held, however, by the learned Judge of the Court below that as this was commercial paper, and the plaintiff a holder for value, the consideration could not be inquired into. It is doubtful if this rule, even if applicable to the facts of this case, would exclude the evidence referred to, as said evidence tends to show plaintiff's knowledge of the want of consideration. But we are not called upon to decide this question, as we place our ruling upon the broad ground that the principle of commercial law above referred to does not apply to the case of commercial paper made by madmen.

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If it did we would soon have before us this state of things. It is well known that there are a large number of lunatics under restraint in this State who are possessed of large estates. It would be easy for a designing knave to obtain the paper of such person for a large amount. The making of it might even be a source of delight to the unfortunate lunatic. If such paper can be protected in the hands of a holder who has paid value however trifling, this helpless class would have little protection. A principle that renders such results possible must be essentially and radically wrong. We believe that none such exists. On the contrary, the true rule applicable to such cases is, that while the purchaser of a promissory note is not bound to inquire into its consideration, he is affected by the status of the maker, as in the case of a married woman or a minor. In neither of these cases can he recover against the maker. In the case of a lunatic, however, he may recover, provided he had no knowledge of the lunacy, and the note was obtained without fraud, and upon a proper consideration. But the lunatic or his committee may defend upon either of these grounds. This rule affords reasonable protection to the estates of lunatics, and can do no serious injury to commercial interests, as it is believed the amount of such paper that can be floated in the face of such a rule will be inconsiderable.

In the view we take of this case, the fact that the lunatic has been so found by inquisition is not very important. Such finding is at most but prima facie evidence of what it asserts, and may always be rebutted by strangers to the proceeding. And I doubt the application of the doctrine of *lis pendens* to such cases. A *lis pendens* is undoubtedly constructive notice in questions of title and property, but that it should be so as to a man's mental condition is very much to be doubted. But we do not decide this point, not regarding it as essential.

There is nothing in the foregoing inconsistent with what was decided in The Bank *v.* Moore, *supra*. The questions now ruled were not raised in that case.

The defendant's second point (5th assignment) presents the principle I have just discussed. If the facts were as assumed in said point, its conclusion of law should not have been affirmed.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by PAXSON, J.

[See Snyder *v.* Laubach, *ante*, p. 464.]

Jan. '75, 30. March 7, 1879.

Harvey v. Vandegrift.

Deeds, construction of—Extrinsic evidence to explain—Not admissible when subject-matter exists which satisfies the terms of the conveyance—Fishery—Words in a deed "as heretofore conducted" construed in relation to—Practice—Court cannot be convicted of error for the admission of evidence under exception, unless such admission be assigned for error—Cure of this defect by a point equivalent to a motion to strike out such testimony.

The rule which allows the giving of extrinsic evidence to explain a deed as to the extent of the subject sold has no application where a subject-matter exists which satisfies the terms of the instrument of conveyance.

H. owned land on a river front by title derived from P. & L., the deeds for his property containing no reference to any servitude on it; V. owned an adjoining tract by title from same parties intermediately through T.; in the deed from P. & L. to T. there was a grant of a fishery "to the distance of 28 perches down the river from the place of beginning;" the deed from T. to V. also contained a grant of the same right of fishery "as it has heretofore been conducted."

In an action by V. against H. to recover damages for injury to his fishery by the erection of a wharf on H.'s land:

Held, that the words "as it has heretofore been conducted" referred only to the *manner* in which the fishery had been conducted and had no reference to its *extent*.

On the trial, parol evidence was admitted, under exception, to explain the words in the deed, "as it has heretofore been conducted," and to show that plaintiff's right of fishery extended in front of and beyond defendant's land; this admission of evidence was not assigned for error, but the Court was asked to charge the jury, as a matter of law, on the construction of the words in question:

Held, to be equivalent to a motion to strike out the testimony already given, and that the refusal of the Court so to charge was error.

Error to the Common Pleas of Bucks County.

Case, by J. Vandegrift against J. L. Harvey and R. Eyre, to recover damages for injury to a right of fishery alleged to be in plaintiff, by the erection of a wharf on defendant's land fronting on the Delaware River. On a previous argument of this case the judgment was affirmed by an evenly divided bench (reported 1 WEEKLY NOTES, 629). An order for a reargument was granted on motion of plaintiff in error (2 WEEKLY NOTES, 79).

The *narr.* averred that the plaintiff was possessed of a lot of ground adjoining land of J. L. Harvey and others, and fronting on the river Delaware, together with a "fishery in the said river Delaware, on and adjoining said land, and on and adjoining other lands above and below the land of said plaintiff, extending a long distance, to wit, thirty perches up from said land along the shore of said river and thirty perches

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down said river from land of said plaintiff, along the shore of the said river Delaware." Plea, Not guilty.

On the trial, before WATSON, P. J., the following facts appeared: The title of both parties to their respective lots of ground was derived under J. Paxson and L. D. Vandegrift, to whom a large tract of land, known as the McElroy farm, fronting on the Delaware, and containing 238 acres and 96 perches, had been conveyed by deed, dated March 18, 1835, by the heirs of J. McElroy, "together with the right and privilege of fishing and landing the ferryboats on the bank of the said river to the distance of 28 perches down the same below the place of beginning." J. McElroy had received the same premises in 1792 from the executors of J. Kidd, his deed containing the same words as above in regard to a fishery, etc., with the additional words, "on the land sold and conveyed to the said Corvasier;" Corvasier owned the land immediately below the Dunk's Ferry Road. On March 26, 1838, Vandegrift and Paxson conveyed to C. Tyson a tract of 14 acres of land immediately adjoining the Dunk's Ferry Road, and fronting on the Delaware, "together with all our right and privilege of the fishery *as it has heretofore been conducted*, and landing the ferryboats on the bank of the said river to the distance of 28 perches down the same below the place of beginning." On Oct. 21, 1841, Tyson conveyed ten and three-quarters acres of this lot to A. Wilson; this latter tract came by several mesne conveyances, to be vested in the defendant Harvey; it had a front of about 550 feet on the river, but only extended about 15 feet below high-water mark. The defendant also owned, by mesne conveyances from Paxson and Vandegrift, a tract of seven acres, immediately adjoining to the east his ten and three-quarters acres tract and also fronting on the river; his title-deeds for this tract contained no reference to any right of fishing in front of it. (See Plan.)

The plaintiff, J. Vandegrift, claimed title as follows, viz.: by deed from Tyson, of same date as deed to A. Wilson, for a tract of three and a quarter acres, being the rest of the fourteen acre lot; this tract consists of a small piece of land along Dunk's Ferry Road and the flats in front of the tract granted to Wilson on the same day (and now owned by Harvey), between low-water mark and Wilson's line, 15 feet below high-water mark. This deed (to Vandegrift) contained the following clause in regard to the fishery and ferry right: "together with all the right of the said C. Tyson in the fishery and the privileges thereto belonging, as it has heretofore been conducted, also the privilege of landing the ferryboats on the bank of the said river, to the distance of 28 perches down the same below the place of beginning, together, also, with the ferry." In 1870 Harvey built on his seven-acre tract a wharf extending out into the river some distance below low-water mark, and this suit was brought for injury done by this erection to plaintiff's alleged right of fishery.

Under objection and exception by defendant, testimony was given on behalf of plaintiff—in explanation of the words "as it has heretofore been conducted" in plaintiff's deed from Tyson—that the head of the fishery owned by Vandegrift and his predecessors in title was at the upper line of the McElroy tract, *i. e.*, that it extended up the river in front of and beyond Harvey's seven acre tract. Testimony was then given that the wharf interfered with plaintiff's ability to draw his nets.

The defendant presented *inter alia* the following points:—

(1) The legal construction of the grant of the fishery to the plaintiff contained in the deed of Paxson and Vandegrift to Tyson is, that such grant extended along the front of the 14 acre tract, and 28 perches below the lower line on the land of Corvasier, and no further. There being claim to an actual grant, it must be reasonably certain; there is no room to suppose that the grantor parted with a privilege not appurtenant to the land conveyed. *Answer*. We cannot instruct you as requested in this point. The grant in the deed is of "our right and privilege of the fishery as it has heretofore been conducted," and it is granted as an appurtenance of the land conveyed. Parol evidence has properly been received to show how the fishery had previously been conducted, and it is for your consideration in determining the extent of the preous use of the defendant's land for the purposes of the fishery. (1st assignment of error.)

(5) The grant to Vandegrift, and those under whom he claims title, is not notice sufficient to affect a subsequent purchaser, as Harvey was, of a title of other lands of Paxson and Vandegrift, and unless the jury find that he had notice at the time of taking title of a fishery on this land, such as to put him on inquiry, and there was no description filed in the Prothonotary's office of a fishing place on the same, he took clear of such fishery. *Answer*. We cannot so charge. The deeds and user were sufficient notice. (2d assignment of error.)

The Court in its general charge said *inter alia* as follows: The extent of the fishery is no further defined by the deeds than "as heretofore conducted." It is, therefore, necessary to resort to parol evidence to show how and to what extent it has heretofore been conducted—in other words to identify the subject-matter of the grant, just as we find it necessary to do in every other case by parol testimony. Be the description of the premises never so particular, [if] it is not of itself sufficient to identify them, parol testimony

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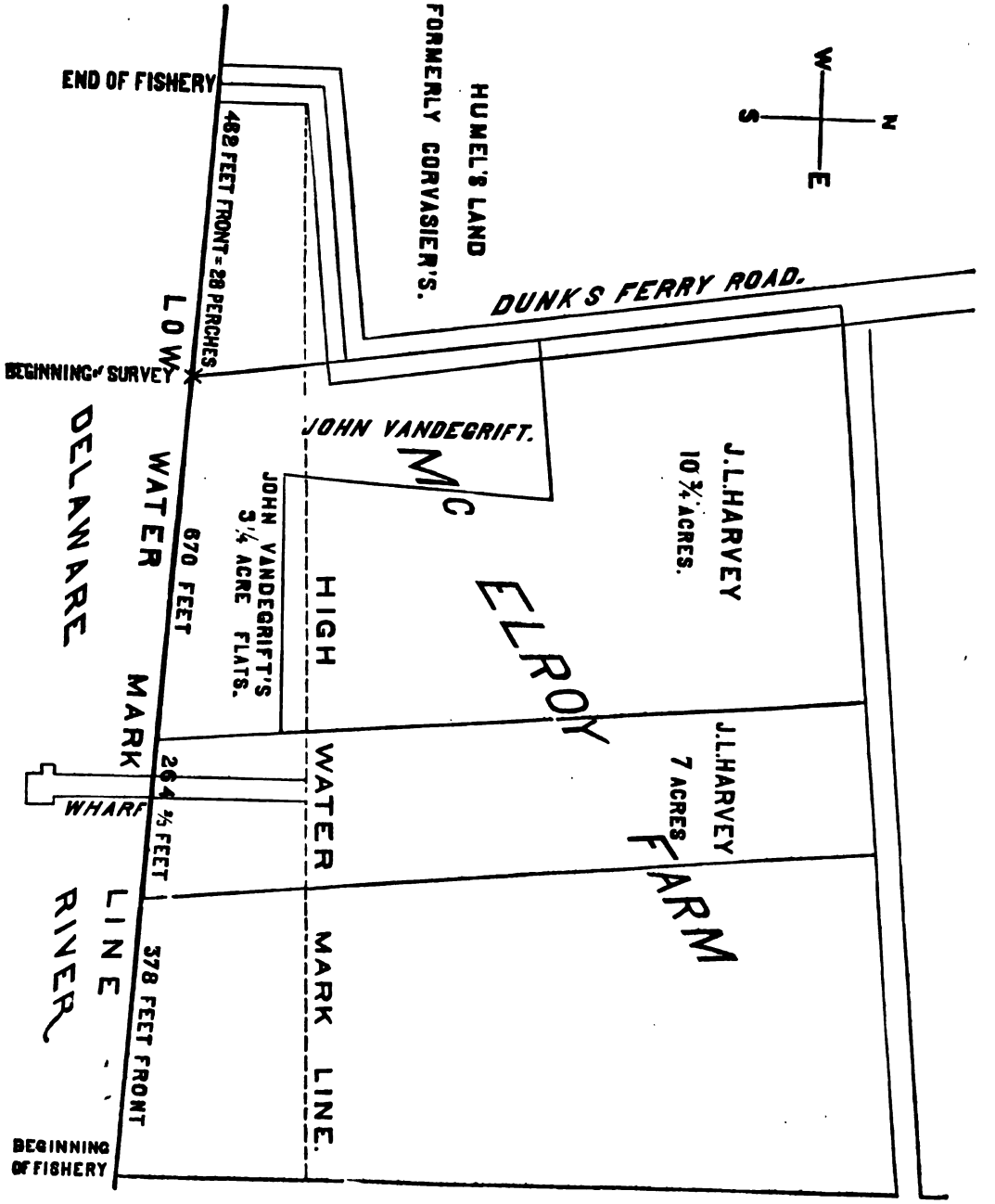

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must be resorted to, in order to show where and what they are. This is the purpose of such testimony here. It is for you to determine, from its consideration, what was the extent of the fishing right conveyed by these deeds and vested in the plaintiff. (9th and 10th assignments of error.)

Verdict for plaintiff, for 6 cents damages and 6 cents costs, and judgment thereon. Defendant took this writ, assigning for error *inter alia* the answers to points and the portions of the charge above given, and the submission to the jury of the *extent* of the fishery. (12th assignment of error.)

H. Yerkes and *G. W. Biddle*, for plaintiff in error.

Extrinsic evidence is not admissible to explain the extent of the subject sold, when a subject-matter exists which satisfies the terms of the instrument of conveyance.

Starkie on Evidence, *692-3.
Doe d. Sir A. Chichester *v.* Oxenden, 3 Taunton, 147, and 4 Dow, 65.

The words "as heretofore conducted" have no reference to the extent of the fishery, but apply only to the *manner* in which the fishery had been conducted.

G. Lear (with him *H. Lear*, *Geo. Ross*, and *L. L. James*), for defendant in error.

The extent of the fishery is not defined in any of the deeds, and there is no statement where its beginning was; the expression "28 perches below the place of beginning" means below the beginning of the survey and not of the fishery. It is, therefore, necessary to resort to extrinsic evidence to show what was granted by the deed.

Tiley *v.* Moyers, 7 Wr. 404.
Collins *et al. v.* Rush, 7 S. & R. 147.
Hoffman *et al. v.* Danner *et al.*, 2 Harris, 25.
Scott *v.* Sheakly, 3 Watts, 50.
Broom's Maxims, 300.
Lycoming Ins. Co. *v.* Sailer, 17 Sm. 108.

May 7, 1879. THE COURT. The plaintiff below is the owner of a tract of three and a quarter acres of land on the river Delaware, in Bucks County, a few miles below Bristol. He is also the owner of certain rights of fishery appurtenant to said land. The defendant owns the tract adjoining on the east, and in the year 1870 built a wharf in front of his land, extending out into the river over one hundred feet below low-water mark. The plaintiff contends that this wharf obstructs his right of fishing, and brought this action in the Court below to recover damages therefor.

No servitude upon the land of the defendant appears in his line of title. No reference to it is found in his own deed or in the mesne conveyances from Amos Wilson. By ascending the stream of title, however, until he reached John Paxson and Levi D. Vandegrift, under whom both parties derive title, he would have ascertained that when they conveyed to Charles Tyson the 14 acre tract, known as "Dunk's Ferry," they included the fishery in controversy by the following description: "Together with all our own right and privilege of the fishery, as it has heretofore been conducted, and landing the ferry boats on the bank on the said river, to the distance of 28 perches down the same below the place of beginning." This 14 acre tract had a river front of about 550 feet, but only extended fifteen feet below high-water mark. Tyson conveyed three and a quarter acres of said tract to John Vandegrift, including the entire front between low-water mark and fifteen feet below high-water mark. The deed from Tyson to Vandegrift contained the following in reference to the fishery: "Together with all the right of the said Charles Tyson in the fishery, and the privileges thereunto belonging, as it has heretofore been conducted, also the privilege of landing the ferry boats on the bank of the said river, to the distance of twenty-eight perches down the same below the place of beginning, etc."

In the prior conveyance by the heirs of McElroy to Paxson and Vandegrift of the large tract of which the premises of both the plaintiff and the defendant form a part, the fishery is described as follows: "Together with the right and privilege of fishing, and landing the ferry boats on the bank of the said river to the distance of 28 perches below the place of beginning." The 28 perches below was land formerly belonging to Corvasier, and was so referred to in the grant of the fishery contained in the deed of these premises from John Kidd to John McElroy.

Assuming that the defendant was affected with notice of the grant of the fishery, as set forth above, we are led to consider the extent of said grant. Just here the difficulty in the case arises. There is nothing in the language employed that in terms imposes any servitude upon the land of the defendant. The Court below admitted parol evidence to show the extent of the fishery. Against the objection of the defendant witnesses were permitted to testify that the shore in front of defendant's land, and for a considerable distance beyond the pier, had been used by the plaintiff, and his predecessors in the fishery, for hauling the seine and other purposes connected with said fishery. The admission of this evidence was not assigned for error, and whatever our view of its competency may be, the Court below cannot be convicted of error in admitting it. But by the defendant's first point, the learned Judge was called upon to construe the language of the deed containing the grant of the fishery, and to define the extent thereof as a question of law. This he declined to do, and instructed the jury that "the grant in the deed is of 'our right and privilege of the fishery as it has heretofore

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been conducted,' and it is granted as an appurtenance to the land conveyed. Parol evidence has properly been received to show how the fishery had previously been conducted, and it is for your consideration in determining the extent of the previous use of the defendant's land for the purposes of the fishery." The effect of this point was to withdraw from the consideration of the jury the parol evidence which had been previously admitted in regard to the extent of the fishery. It was the equivalent of a motion to strike it out. The correctness of the answer of the Court must be measured, therefore, by the competency of the evidence referred to.

It is undoubtedly true that where the subject matter of a grant is insufficiently described in a deed, parol evidence may be given to show precisely what was intended to be conveyed. It is said in Starkie on Evidence, p. 692, that "in general, when there is any doubt as to the extent of the subject matter devised by will, or demised, or sold, it is a matter of extrinsic evidence to show what is included under the description as parcel of it." The same principle is ruled in Scott *v.* Sheakly (3 Watts, 50); and Hoffman *v.* Danner (2 Harris, 25). And in such case it is well decided that the question of the extent of the grant must go to the jury. But was there any such ambiguity in the case in hand, as to bring it within the rule above stated? The authorities are equally clear that the rule which allows extrinsic evidence to explain the extent of the subject sold, has no application when a subject matter exists which satisfies the terms of the instrument of conveyance. (Starkie on Evidence, 693; Chichester *v.* Oxenden, 3 Taunton, 147.) The right of fishing granted by the deed to Paxson and Vandegrift, was the right of fishing 28 perches down the river below the place of beginning. That is to say, in addition to the right of fishing opposite and upon their own land, they were granted the privilege of fishing 28 perches further down the river upon the land formerly of Corvasier, which was thus made servient to the fishery. There is no ambiguity here. The extent of the grant is clearly defined, and no extrinsic evidence is needed or would be admissible to extend it. The grant of the fishery contained in the mesne conveyance from Paxson and Vandegrift to the plaintiff, varies the phraseology somewhat, but the substance remains the same. It carried the right to the fishery *as it has heretofore been conducted*, and to use the shore for 28 perches below the place of beginning, for the purposes of fishing and landing the ferry-boat. The words I have italicized were not in the original grant, and much stress has been laid upon them as bearing upon the extent of the fishery, and as opening the door to the admission of the extrinsic evidence referred to. We are to construe these words according to their ordinary and known signification. They are not terms of art. In what light would the defendant, standing upon a fee-simple title, with no word therein to indicate that his grantor had fastened a servitude upon the land he had thus acquired, yet affected with notice of the grant of the fishery, regard or be bound to regard the language referred to? The words "as heretofore conducted," have no necessary relation to the extent of the fishery. Among the many definitions of the verb "conduct," given by Worcester, the only one that has any possible application to this case is "to carry on, to manage, to regulate." Hence, if the defendant had found this grant in his investigation of his title, he would have ascertained, 1st, that the plaintiff had the right of fishing on his own front of about 670 feet at low-water mark, and for the distance of 28 perches below on land of Corvasier; and 2d, that the fishery was to be conducted, *i. e.*, carried on, managed, or regulated, as heretofore. What was there in the language of the grant, or in what was omitted therefrom, to warn the defendant that it fastened a servitude upon *his* property which would practically destroy it as a river front? If there had been no attempt to describe the fishery, there would have been more plausibility in the plaintiff's claim. But it is described, and there is a subject matter which fully satisfies the terms of the grant. Having fixed a precise boundary for the lower end, there was nothing to put the defendant upon notice that the upper end of the fishery extended indefinitely up the river. On the contrary, he had the right to assume that it stopped where the plaintiff's land ends.

It is manifest that the extent of the fishery was before the parties when the grant was made. They extended it 28 perches below the plaintiff's land; if they had intended to carry it up the river beyond the land of the plaintiff, it is probable such intention would have been expressed by appropriate language.

We are of opinion that there was no such ambiguity in the grant of the fishery as required extrinsic evidence of its extent; that in view of the defendant's first point, it was the duty of the Court to declare the proper construction of the grant as a matter of law, and that the grant of said fishery to the plaintiff was not notice, either actual or constructive, to the defendant, that the fishery extended up to and beyond his pier. This sustains the 1st, 2d, 9th, 10th, and 12th assignments of error. Those that remain need not be discussed.

Judgment reversed.

Opinion by PAXSON, J.

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Oyer and Terminer.

Oct. 1879.

Commonwealth v. William Rusk.

Criminal Practice—Prisoner on trial for murder is in custody of Court, and cannot be admitted to bail during adjournments between the daily sessions of the Court.

The defendant being on trial upon the charge of murder, and the Court being about to adjourn until the next morning, the defendant's counsel moved the Court to permit the defendant to depart on bail until the next morning session.

BRIGGS, J., after consulting with ALLISON, P. J., refused the application, and said: When a trial for homicide has begun, the defendant is in the custody of the Court, and must so remain until the verdict is rendered and the prisoner discharged by due course of law, unless it shall appear to the Court during the trial, or the District Attorney shall so state to the Court, that the case is not one of murder, when it is in the discretion of the Court to admit the defendant to bail. Such was the uniform practice of the Judges of the Court of Oyer and Terminer as that Court was organized prior to the adoption of the new Constitution.

Common Pleas—Law.

C. P. No. 2. October 18, 1879.

Burkhart v. Haviland.

Affidavit of defence law—Amendment of copy.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on promissory notes.

The copy filed was as follows:—

$90.44. Phila., Dec. 10th, *1879.*

Three months after date I promise to pay to the order of Charles H. Fox, Esq., $90.44, at 2030 Market Street, without defalcation for value received.

Due March 10–13, '79. HENRY HAVILAND.

[Indorsed]
CHARLES H. FOX.

Then followed the copy of another note, and an allowance of credit.

The affidavit of defence alleged: "by the copy filed the action appears to be prematurely brought, a copy having been filed of a note dated *December 10th, 1879;*" then followed allegations going to the merits, one of which was as follows: "Payments were to be made as the coal was sold, and *when the notes fell due* payment was accordingly not demanded," etc.

Albert J. Guilbert, for the rule.

The date of the first note should be 1878. It appears on the face of the copy filed, that the note became due on March 10–13, '79. The affidavit admits that both notes are due, and goes to the merits.

A slight clerical error apparent on the face is amendable, and when the affidavit goes to the merits the Court will consider the defence.

Guth *v.* Anderson, 3 WEEKLY NOTES, 133.

In Jones *v.* Gibson (3 WEEKLY NOTES, 329), the error was not apparent, and the affidavit did not go to the merits.

F. H. Janvier, contra, relied upon—

Guskey *v* Sparter, 1 WEEKLY NOTES, 470.
Jones *v.* Gibson, 3 Id. 329.
Held *v.* Clemens, Id. 475.

Rule discharged.

C. P. No. 3. Nov. 1, 1879.

Eagen v. Wilkins.

Landlord and tenant—Payment of taxes by tenant—Act of April 16, 1879—Appeal nunc pro tunc.

Rule for appeal *nunc pro tunc.*

This was a proceeding in a Magistrate's Court for the recovery of possession of a certain tenement and of $28 rent due September 1, 1879, on a lease by plaintiff to defendant.

Plaintiff alleged that the rent thereof was in arrear and unpaid, and there were not sufficient goods or chattels on the premises to pay and satisfy said debt, except such as are by law exempt from levy and sale, and that defendant refused, after notice, to render and deliver up possession.

Defendant entering no appearance, judgment was entered for plaintiff.

Osbourn, Assistant City Solicitor, in support of the rule, produced depositions showing that a considerable portion of the rent had been paid to the tax collector by the defendant for taxes charged against the premises; and cited—

Act of 16th April, 1879, sect. 2 (P. L. 24).

THE COURT (LUDLOW, P. J.). This case is peculiar, and it would be unjust to permit the tenant to be ousted, when the very rent, or a great portion thereof, for non-payment of which suit had been instituted, had been paid. Under the Act of 1879, it is made the duty of the City Solicitor to defend a case in which the landlord refuses to allow a deduction for amount paid for taxes. The City Solicitor had no notice here, and under these peculiar circumstances, and because it is the duty of a public officer to defend the tenant, we make the rule absolute.

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C. P. No. 3. Nov. 8, 1879.

Horstman v. Kaufman.

Attestation of a notary public is invalid unless accompanied by his notarial seal.

Rule to show cause why the appointment of a commissioner, under the Act of March 11, 1879, should not be vacated.

The affidavit set forth the facts necessary for the appointment, and was in all respects according to law, except that the notary public omitted his seal.

Mayer Sulzberger, for the rule.

Isaac I. Sharp, contra.

THE COURT (YERKES, J.). An affidavit sworn to before a notary has no validity unless a notarial seal has been affixed.

Rule absolute.

C. P. No. 4. May 3, 1879.

Commonwealth to use of Kulp v. Myers et al.

Affidavit of defence law—Administrator's bond with copy of adjudication of the Orphans' Court not an instrument within the Act.

Rule for judgment.

Debt on bond. Plaintiff filed a copy of an administration bond, given by defendants to the Commonwealth, conditioned that Joseph Myers, administrator *d. b. n. c. t. a.* of Caspar Stingham, deceased, do file an inventory, etc., and pay over unto the persons entitled, such sums as the Orphans' Court shall decree, etc. With this bond plaintiff filed a copy of an adjudication of the Orphans' Court, awarding a balance of $365.68 to be paid by Joseph Myers, administrator, etc., to Joseph Kulp, administrator of Mrs. Ann Kulp.

Defendant filed an affidavit suggesting that an administration bond was not within the affidavit of defence law.

Simpson, Jr., for the rule, cited—

Slocum *v.* Slocum, 8 Watts, 367.

A. Thompson, contra.

Rule discharged.

[See Com'th to *use, etc., v.* Laws, *ante*, 80.]

C. P. No. 3. Oct. 18, 1879.

City v. Greaves.

Municipal claim—Lien covering the intersection of streets—Striking off claim—Practice.

Rule to strike off municipal claim.

This claim was filed Nov. 27, 1875, for water pipe against lot of ground situate in the 27th Ward, registered in the name of Sarah B. Greaves, and described as being all that portion of Forty-eighth Street as laid down on the confirmed plan of the city (80 feet wide), between Baltimore Avenue and Warrington Avenue, containing in front on Baltimore Avenue 96 feet 11¾ inches.

T. Horace Tharp, for the rule.

The claim is for water pipe laid across intersection of streets which are upon the confirmed plan of the city. Municipal assessments cannot be made upon land taken for a public highway.

City *v.* Collom, 1 WEEKLY NOTES, 404.

City *v.* Cuthbert, 4 Id. 263.

City *v.* Sutter, 6 Casey, 53.

Francis A. Osbourn, Assistant City Solicitor, contra.

There has been no actual dedication on opening Forty-eighth Street to the public, and no appointment of a jury of view. There is no certainty that the street lines will not be revised and the street changed in location or width. If it is ultimately occupied by the city, the former owner cannot be injured by the claim continuing until disposed of by *sci. fa.* or expiration of lien.

THE COURT. We do not strike these claims off in the first instance.

Rule discharged.

C. P. No. 4. Oct. 18, 1879.

Bayersdorfer v. Hart.

Practice—Attachment under Act of March 17, 1869—An action begun under said Act is not terminated by dissolution of attachment but proceeds as if begun by a summons—Affidavit of defence law applicable to such a case, where an attachment was served, or an appearance entered.

Rule to strike off judgment.

This action was commenced on January 20, 1876, by attachment under the Act of March 17, 1869, returnable to the first Monday of February, 1876. On January 29, a rule to dissolve the attachment was made absolute. On February 10, plaintiff filed a copy of book entries, and on the 26th of the same month judgment was entered for want of an affidavit of defence.

The affidavit in support of the present rule disclosed an excuse for the delay in taking it.

Tim, for the rule.

A dissolution of the attachment puts the plaintiff out of Court. The direction in the 4th section of the Act 1869 to "proceed in like manner as in a case of summons for debt regularly issued," is not applicable to a case where it appears that the attachment was improperly issued, and was subsequently dissolved.

The Atlas Works v. The Blair Iron and Steel Co., 6 Pitts. Leg. Journ. (N. S.) 61.

The defendant will lose his right to proceed upon the bond, if the action is allowed to proceed to judgment when the attachment has been dissolved.

Moyer, contra, cited—

Act March 17, 1869, § 4 (Purd. Dig. 54, pl. 77).

Loewenstein *v.* Sheetz, 7 Phila. 361.

C. A. V.

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November 1, 1879. THE COURT. The 4th section of the Act of March 17, 1869, enacts that in case of personal service of the attachment upon the defendant, or an appearance to the action by him, the Court shall proceed in the case in like manner as in a case of summons for debt regularly issued and duly served, and in case there shall not be a personal service or appearance the plaintiff may proceed in like manner as in cases of foreign attachment.

It thus plainly appears that in all cases where the writ has been personally served, or where the defendant has appeared, the proceeding is assimilated in all respects to an action commenced in the usual manner by a summons, but when the writ has not been served personally, and the defendant has not appeared, the course of proceeding is to follow that which is provided in the case of foreign attachment. If the proceeding in case of personal service or appearance is to be the same as in the case of actions commenced by an ordinary summons, it is clear that the right to judgment for want of an affidavit of defence is necessarily incident to it in all cases which are within the affidavit of defence law of 1835 and its supplements. Nor does it militate against this construction that the plaintiff is required before issuing the attachment to give a bond conditioned for the payment of all legal costs and damages in case he shall fail to prosecute his action with effect. If the attachment is not dissolved and the plaintiff fails to recover a judgment, the defendant has an action upon the bond for all costs and damages sustained. If the attachment should be dissolved, and the plaintiff should nevertheless recover, doubtless the defendant could not proceed upon the bond, for that, by the words of the statute, is forfeited only in case the plaintiff shall fail in his *action*.

The language of the Act is, "shall fail to prosecute his *action* with effect and to recover a judgment against the defendant." Yet the defendant would not be without remedy if injured by a wanton or malicious attachment. For such an abuse of civil process he has his remedy at common law. The defendant's argument against the plaintiff's right to judgment for want of an affidavit of defence, proceeds upon the supposition that, in a case where there has been a personal service or appearance, the action falls if the attachment is dissolved—a supposition totally at variance with the provision contained in the 4th section of the Act. The proceeding is analogous to the case in which a defendant is arrested upon an insufficient affidavit to hold to bail, in which case he is discharged by the Court upon common bail, but being in Court the action proceeds in its regular course.

Rule discharged.

Opinion by THAYER, P. J.

Orphans' Court.

Oct. 20, 1879.

Wallington's Estate.

Statute of limitations—Widow's claim of $300—When barred—Laches.

Sur exceptions to adjudication.

At the audit of the account of the executor of Samuel E. Wallington, the following facts appeared:—

The decedent died in September, 1869, and on the 29th of the same month letters testamentary were granted to his executor.

The estate proved insolvent, the principal creditor being the executor, who held two due-bills of the decedent made to him, amounting to $307.16. The decedent had not lived with his wife for fourteen years prior to his death, but when about to die she came at his request and remained till his death. No account had been filed by the executor until April 28, 1879, when he did so in answer to petition by the widow for a citation to order him so to do. About the same time she also filed a petition for the setting aside of her $300, to which exceptions were filed by the accountant. On May 14, 1879, the account came before the Court (ASHMAN, J.) for audit. It was contended that the due-bills which were made three years before the decedent's death were now barred by the statute of limitations, and therefore the accountant could not claim credit for them.

The claim of the widow was also presented for her $300 allowance. The Court allowed the claim of the accountant to the amount of the two due-bills, holding that on the authority of McClintock's Appeal (5 Cas. 360), they were not barred, and disallowed the widow's claim for her $300 as she had not presented it for ten years, long after the estate had been absorbed by the indebtedness of the estate.

To the ruling of the Court exceptions were filed by the widow.

B. F. Wagner, for the exception.

McClintock's Appeal is not in point; there the statute had a year to run before decedent's death; here there have been ten years since his death, and no account filed during that time.

If these due-bills are debts, then is the widow's claim also a debt, and one which has precedence above all others.

H. McIntyre, for the accountant, was not called upon by the Court.

Oct. 25, 1879. THE COURT dismissed the exceptions, and confirmed the adjudication. (No opinion.)

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, NOV. 27, 1879.* [No. 31.

Supreme Court.

May, '79, 143, 144. May 19, 1879.

Columbia Conduit Co. v. Commonwealth. Same v. same.

Taxes—Construction of words "transportation company" in Act of April 24, 1874, sect. 4, and Act of March 30, 1877, sect. 5—How taxes on dividend estimated—Contributions by stockholders not to be deducted.

A company flowing petroleum through pipes from place to place is a "transportation company" within the meaning of the Act of April 24, 1874, sect. 4 (P. L. 70) and the Act of March 30, 1877, sect. 5 (P. L. 8), and, as such, is liable to the tax imposed by the said Acts.

The Act of April 24, 1874 (P. L. 70), imposes upon transportation companies an annual tax "at the rate of nine-tenths of one mill upon the capital stock for each one per cent. of dividend made or declared by such company:"

Held, that contributions made by the stockholders to supply losses incurred by the company cannot, in computing the tax, be deducted from the actual amount of taxable dividend received and divided among the stockholders.

Error to the Common Pleas of Dauphin Co.

These two cases were appeals to the Common Pleas of Dauphin County by the Columbia Conduit Company of Pennsylvania against the decision of the Auditor General and State Treasurer, in settling the accounts of the said company with the Commonwealth, as follows:—

First, for tax on the capital stock for the year ending the first Monday of November, 1876, imposed under the provisions of the Act of April 24, 1874, sect. 4 (P. L. 70), enacting—

"That every railroad company, canal company, steamboat company, slackwater navigation company, *transportation* company, street passenger railway company, and every other company . . . . operating any railroad, canal, slackwater navigation, or street passenger railway, or device for the transportation of freight or passengers, or in any way engaged in the transportation of freight or passengers, shall be subject to and pay a tax annually . . . . at the rate of nine-tenths of one mill upon its capital stock for each one per cent. of dividend made or declared by such company."

Second, for tax on the gross receipts from March 20, 1877, to June 30, 1877, imposed under the Act of March 20, 1877, sect. 5 (P. L. 8), providing, *inter alia*, that the same companies mentioned in the Act of April 4, 1874, sect. 4, "shall pay annually . . . . a tax of eight-tenths of one per centum upon the gross receipts."

The Columbia Conduit Company was incorporated by the Act of April 25, 1872 (P. L. 1150), for the purpose of purchasing and selling oil, boring for oil, storing oil, and laying down tubes or pipes through which to transport oil from place to place. The company did lay down such pipes, and engage in the business of transporting oil through them.

The cases were tried by PEARSON, P. J., without a jury. The facts involved and the grounds of appeal appear at length in the following opinion by PEARSON, P. J.:—

The facts established in the first of these cases, No. 230, November Term, 1877, present two prominent points: First, is the defendant a company on which a tax is imposed by the 4th section of the Act of April 24, 1874? and secondly, if taxable, at what amount should that tax be rated?

The statute, after enumerating various other companies, speaks of "transportation companies" "and every other company now or hereafter incorporated by or under any law of this Commonwealth," and after providing for other companies incorporated by other States doing business here, goes on to say, "or device for the transportation of freight or passengers, or in any way engaged in the transportation of freight or passengers, shall be subject to and pay a tax into the treasury of the Commonwealth annually, at the rate of nine-tenths of one mill upon its capital stock for each one per cent. of dividend made or declared by such company." It is conceded in the argument that the principal, and probably all the business of this company is in flowing petroleum or oil from place to place mentioned in the charter of incorporation, by means of pipes, through which the oil or petroleum flows, or is pumped, and is thus moved by flowing or pumping, according to the character of the grade from the oil wells to the place of manufacture, and probably the prepared oil from thence to the points on the railroad for shipment. It is contended that this moving of petroleum by means of pipes is not "transporting," and therefore that this is not a transportation company. The defendants' counsel contends that to *transport is "to carry,"* and that this transit company does not *carry*, but the petroleum flows—we consider this too narrow a construction. If we look into the dictionary for the meaning of the word "*transport*"—Webster defines it "to carry or convey from one place to another," again "to remove from one place to another," and throughout all of the derivations from the word transport we find the same part of the definition "to remove;" as transported is, *inter alia* de-

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fined, "removed." This petroleum is certainly *removed.* To look into the origin of the word composed of *trans* "over" "from one place to another," and *portus* "moving or carrying," and *portatus* "bearing or bringing." This is going into too much refinement, but such was the character of the argument. We must construe words not according to their original etymology, but by the common parlance of the country. In the present case we have a much better guide—the words of the charter of incorporation, the 3d section of which authorizes the company to transport petroleum, and for that purpose to lay down pipes from the points named, and for the purpose of transportation of petroleum, oil, etc., may lay down pipes or tubing.

Again the 4th section gives like authority: to lay down pipes or tubing to supply the refinery with oil. Again, in the Act of March 12, 1872 (P. L. 23), we find similar language used in regard to the transportation of petroleum in certain counties; they are authorized to lay down pipes, tubing, etc., to transport petroleum. This being the general language used by the Legislature in regard to the removal of petroleum from place to place by means of pipes, why shall we not believe that the same was meant when the tax is laid on all transportation companies?

Again, this 4th section of the Act of 1874, in speaking of the companies to be taxed, also says, after enumerating certain kinds of companies, "*or* DEVICE for the transportation of freight or passengers, or in any way engaged in the transportation of freight or passengers." Under this language we cannot doubt that this is a company engaged in the transportation of freight within the Act of Assembly.

The second is a question of greater difficulty. In assessing this tax on the capital stock the State officers have no other data than the report made by the company officers, under oath, as required by law. The return shows very clearly that between the 15th day of February and the first Monday of November, the sum of two hundred thousand dollars was received and divided among the stockholders, on a capital of $350,000. All of this was paid over from month to month, during the year 1876, as made. The return shows, however, that during the year the corporation met with losses, which, although they did not reduce the dividends, had to be made up by the stockholders, who furnished petroleum from time to time to cover the evaporation and supply the place of that which was burned, amounting in all to $89,429.58, the net profits for the year being only $110,570.42. Can the Court allow a credit for that loss, or, under the words of the statute, must we tax the capital stock according to the "dividends made or declared by the company?"

If the tax was imposed on the net profits there would be no difficulty. The sum which the stockholders were obliged to pay would be deducted. The profit to them is lessened by that much. Such is not the form of the assessment or the words of the statute. It is not even a tax on dividend, but on the "*capital stock, measured by the amount of dividend* made or declared." The dividends in the present case were not only made and declared, but actually paid over to the stockholders. They preferred receiving their dividends, and making up the loss by evaporation or fire by delivering more petroleum, and if they chose to transact their business in that way it did not lessen the amount of dividends, yet it did of clear profit at the end of the year. The stockholders need not receive their dividends until the end of the year, and can then have the losses paid before the dividend is declared. That course was not pursued here; but, on the contrary, the dividends were all paid over, and the losses afterwards voluntarily made up by contribution of the stockholders. Sometimes dividends are so declared in order to ostensibly increase the value of the stock for the purpose of speculation by sales. Be the object what it may, the dividends in the case under consideration were actually made and declared, and that fixes the tax on the capital stock. We therefore report against this corporation and in favor of the Commonwealth, as per report filed with this opinion.

In No. 15 of January Term, 1878, a claim for taxes on the gross receipts of the company, we consider it perfectly clear that this is a corporation embraced in the 5th section of the Act of March 20, 1877. The law, after enumerating various kinds of companies, goes on to say, "and every other company now or hereafter incorporated by or under any law of this Commonwealth;" again it speaks of "other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freight or passengers," "shall pay to the State Treasurer, for the use of the Commonwealth, a tax of eight-tenths of one per centum upon the gross receipts of said company."

That this is a corporation engaged in the transportation of freight we consider sufficiently proved in the former part of this opinion, and that the pipes used are a device to move the petroleum required by the company for manufacturing, within the terms of its charter, we cannot doubt. It is, therefore, taxable on its gross receipts within the words of the statute. The report of the secretary shows that the gross receipts from March 20, 1877, to June 30, 1877, were $200,022 between those periods. It is most probable that this embraced a later time in

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the year, to judge of the report made in regard to the other tax. The settlement charges the company with a tax of $1600.18, which, from aught that has been shown, is the correct amount. The report and payment were not in time, therefore the company is subject to a penalty of ten per cent., with which it is charged. There is no provision for interest for non-payment of this tax; the penalty seems to be substituted. The five per cent. commission must also be charged. For the whole amount of indebtedness see the calculation filed.

The defendant took these writs, assigning for error the findings and decisions of the Court, as contained in the foregoing opinion.

J. S. Black (with him *Eugene Snyder*), for plaintiff in error.

The tax imposed on the dividend should have been under the *fifth* section of the Act of April 24, 1874. The defendant below was not properly a "transportation company."

The amount contributed by the stockholders to the loss incurred should be deducted from the amount of taxable dividend.

Lyman D. Gilbert, Deputy Attorney-General (with him *Henry W. Palmer*, Attorney-General), for the Commonwealth.

Defendant was a "transportation company," and "used a device for the transportation of freight."

The tax was properly assessed upon the whole amount of the dividend.

Commonwealth *v.* Cl. P. & A. R. Co. 5 Casey, 370.
Phœnix Iron Co. *v.* Commonwealth, 9 Sm. 104.
A. & O. Telegraph Co. *v.* Commonwealth, 16 Id. 57.
Commonwealth *v.* P. F. W. and C. R. R. Co. 24 Id. 83.
Catawissa R. R. Co.'s Appeal, 28 Id. 59.

June 2, 1879. THE COURT. We affirm these judgments upon the opinion of the learned President of the Court below.

Judgment affirmed.

PER CURIAM. PAXSON, WOODWARD, and STERRETT, JJ., absent.

Oct. & Nov. '76, 110. Nov. 19, 1878.

Stephens v. Monongahela National Bank of Brownsville.

Promissory note—Liability of accommodation maker and indorser—Indorser and surety—Release of levy—National banks—Section 5200 Revised Statutes U. S.—Jurisdiction of actions by and against national banks—Limitation of time for recovery or set-off of usurious interest—Set-off not confined to excess over legal rate.

One who makes or indorses a negotiable note for the benefit of another is liable to third persons even with notice of want of consideration. As maker he places himself in the situation of a principal, and cannot escape by alleging that he is a surety. As indorser, after demand and notice, he is more than a surety; for while a surety may call upon the creditor to pursue the principal debtor on pain for neglect that the surety will be no longer bound an indorser cannot release himself by calling upon the holder of a protested note to sue the maker.

If a judgment creditor relinquish his levy upon personal property, leaving the same with the debtor, his debt is not paid, nor is the lien upon the debtor's land postponed to a junior judgment.

Section 5200 of the Revised Statutes of the United States, limiting the amount of liabilities of any person, firm or company to a national bank, is a rule laid down to regulate the loans of the bank for its own best interest, not to regulate its customers A violation of this section exposes the bank to loss of its franchises at the suit of the Comptroller of the Currency, but a contract, otherwise lawful, with a national bank, is not void though purposely made in evasion of this section.

The statute of limitations applies to the right of set off for usurious interest paid, and to the remedy for its recovery.

The State and Federal Courts have concurrent jurisdiction in actions by and against national banks.

Bletz *v.* Columbia National Bank, 6 WEEKLY NOTES, 1, followed.

When there has been a series of renewal notes given to a national bank for the continuation of the same original loan, the taint of usury in the first transaction follows down the descent through the whole line, and when the bank sues to recover its debt on the last of the series of renewal notes, the borrower is entitled to credit for all the interest he has paid from the beginning on the loan, and not merely to the excess above the lawful rate.

Overholt *v.* Bank, 1 Norris, 490, followed.

Error to the Common Pleas of Greene County.

Assumpsit, by the above-named bank against Barzilla Stephens upon a note in form as follows:—

$10,575. October 10, 1874.

Twenty-five days after date I promise to pay to the order of R. S. Long, ten thousand five hundred and seventy five dollars at the Monongahela National Bk. of Brownsville, without defalcation, for value received.

BARZILLA STEPHENS.

[Indorsed]
R. S. LONG.
BARZILLA STEPHENS.
AZ. STEPHENS.

Plea, non-assumpsit, and afterwards set-off, to which plaintiffs replied the statute of limitations.

The following facts appeared: Defendant's brother, Israel Stephens, and R. S. Long, were partners as dealers in Western cattle, and in the conduct of their business were large borrowers at the plaintiff bank in Fayette County, Pa. Israel Stephens died in July, 1874. At his death the bank held a note, dated April 7, 1874, at

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six months, for $10,500, made by Israel Stephens, and indorsed by Long, it being the last renewal of a note dated in 1872, for $10,000, which with its renewals had been discounted at 9 per cent. The bank also held two other notes, one for $9500, of which Israel Stephens was the maker, and Long and others the indorsers, and the second for $14,600, made by Long, and indorsed by Israel Stephens and others. These three notes amounted to $34,600. The paid capital stock of the bank was $200,000, and the amount of the notes exceeded by $14,600 one-tenth of the amount of capital stock paid in.

After the death of Israel Stephens, in July, 1874, Long went West to look after the affairs of the firm, expecting to sell their cattle, and be home with the money by the last of October. At Long's request, Barzilla Stephens, the defendant, who had no interest in the business, but who had always indorsed for the firm, undertook to renew the note for $10,500, due October 10. Accordingly he wrote his name below that of R. S. Long upon a bit of paper, and, with no writing upon the paper other than the two signatures, took it to the bank to renew the $10,500 note of Israel Stephens. In this shape the bank declined it, but the teller having written upon the blank side of the paper the body of the note now in suit, above set forth, Barzilla Stephens having signed as maker, and Azariah Stephens as an additional indorser, it was accepted by the bank in renewal of the $10,500 note, the discount, $75, being included in the amount of the new note. Upon the maturity of the note Long failed to meet it, and in April, 1875, the bank brought suit in the Common Pleas of Greene County, at Nos. 50, 51 and 52 June Term, 1875, against Barzilla Stephens, R. S. Long, and Azariah Stephens respectively.

At the trial of this suit against Barzilla Stephens, in April, 1876, before WILLSON, P. J., defendant offered to prove that R. S. Long was the real debtor for the money borrowed on the note in suit; that defendant was an accommodation maker or surety for Long and Israel Stephens, and that plaintiff knew that fact; that plaintiff had recovered judgment against Long at No. 51 June Term, 1875, on this note, issued execution, levied on his personal property, but had stayed the execution, and permitted it to die in the sheriff's hands, notwithstanding notice from defendant to proceed and collect the judgment from Long. Objection by plaintiff, to the several offers, sustained. Exception. (Assignments B, C, D, and E.)

Defendant further offered to prove that the note in suit was one of several notes discounted by plaintiff under an agreement between Israel Stephens and plaintiff to discount said notes for R. S. Long and Israel Stephens to evade section 5200* of the Revised Statutes of the United States; that said loans were in excess of plaintiff's power and authority to make. This for the purpose of showing that the note in suit is void. Objection by plaintiff sustained. Exception.

Defendant further offered to prove that the original of the note in suit was discounted by plaintiff for Israel Stephens in 1872, and from time to time thereafter renewed at 9 per centum per annum, being 3 per cent. in excess of the lawful rate in Pennsylvania. This for the purpose of showing that defendant is entitled to set off the amount of interest so taken and charged on said note and its renewals. Objection by plaintiff sustained, the Court saying: "The defendant is entitled to credit for all the interest charged, taken or reserved on the note in suit if said interest exceeded 6 per cent. per annum. As to prior transactions the defendant would only be entitled to defalk the excess charged above the legal rate. As stated the offer is refused." Exception.

Defendant further offered to prove that plaintiff had discounted other notes for Israel Stephens, beginning in 1866, and continuing till 1873, at 9 per centum per annum. This for the purpose of showing that defendant is entitled to a set-off against the note in suit for the interest so paid. Objection by plaintiff. The Court referred to the ruling in the last recited offer, and said: "In addition we hold that the defendant cannot go back more than six years in claiming a set-off for excess of interest paid by Israel Stephens in prior or other transactions with the plaintiff bank. So far we will admit the evidence of defendant. Exception by defendant."

Defendant asked the Court to charge (5) If the jury believe that the plaintiff knowingly violated any prohibition contained in the National Bank Act at the time it took the note in suit and the prior notes of which it was the last renewal, then no action can be here maintained upon such contract made in violation of the United States statute. *Refused.*

(8) That plaintiff being a national bank organized and doing business under an Act of Congress, this Court is without jurisdiction over the case. *Refused.*

(9) That the Federal Courts have exclusive

* Sec. 5200. The total liabilities to any association, of any person, or of any company, corporation, or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same shall not be considered as money borrowed.

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jurisdiction over suits by and against national banks. *Refused.*

Verdict and judgment for plaintiff, $8592.96, being for face of the note, less $75, interest paid upon it, and $1907.04, excess of interest over 6 per cent. paid to the bank by Israel Stephens in his transactions with it since April 7, 1870. Defendant took this writ, assigning for error the rulings of the Court on the offers of evidence and the answers to points, above given.

A. A. Purman (with whom was *P. A. Knox*), for plaintiff in error.

The note was an accommodation note, and Barzilla Stephens, the maker, was a surety.

Baker *v.* Martin, 3 Barb. S. C. Rep. 634.

The seizure of Long's personal property was a payment to the extent of the value of the property, and this is so independent of the form of the contract.

Rees *v.* Berrington, W. & T. Lead. Cases in Eq., 4th Am. ed., vol. 2, 1867.
Aldrich *v.* Cooper, Ib. 228.
Love & Son *v.* Brown Bros., 2 Wr. 307.
Hunt *v.* Breading, 12 S. & R. 41.
Davidson *v.* Patton, 13 S. & R. 346.
Com. *v.* Haas, 16 S. & R. 252.
Sitgreaves *v.* Bank, 13 Wr. 364.
Com. *v.* Miller, 8 S. & R. 452.
Bank *v.* Fordyce, 9 Barr, 275.
Pain *v.* Packard, 13 Johnson, 174.
Cope *v.* Smith, 8 S. & R. 110.
Bank *v.* Gibson, 1 Watts, 143.
Wilson *v.* Glover, 3 Barr, 404.

The defence of payment by seizure and notice is as effective after judgment as before.

Com. *v.* Miller, 8 S. & R. 452.
Pott *v.* Nathans, 1 W. & S. 155.
Talmage *v.* Burlingame, 9 Barr, 21.

The note in suit was void if the facts are as stated in defendant's offer to show an illegal combination to evade Sec. 5200 Rev. Stats. U. S.

O'Hare *v.* Bank, 27 Sm. 102, and cases cited.
Fowler *v.* Scully, 22 Sm. 466.
Bank U. S. *v.* Owens, 2 Peters, 538.
Dill *v.* Ellicott, Taney's C. C. Dec. 233.
Bowman *v.* Bank, 3 Grant, 36.
Mechanics S. & L. Co. *v.* Conover, 5 Phila., 18.
Biddis *v.* James, 6 Binney, 321.
Sylvester *v.* Girard, 4 Rawle, 185.
Kepner *v.* Keefer, 6 Watts, 231.
Farrar *v.* Barton, 5 Mass. 395.
Cope *v.* Rowland, 2 M. & W. 149.
Brown *v.* Duncan, 10 Barn. & Cress. 93.
Chitty on Contracts, 8th Am. ed., 372, 596, notes.
Deering *v.* Chapman, 22 Maine, 488.
Woodruff *v.* Hinman, 11 Vt. 592.
Filson *v.* Himes, 5 Barr, 452.

The entire interest upon the note and the notes of which it was a renewal was forfeited.

Rev. Stats. U. S., Secs. 5197, 5198.
Overholt *v.* Bank, 1 Norris, 490.

Defendant was entitled to set off usurious interest on his other transactions with the bank, and the statute of limitations does not apply to set off of interest so paid.

Brown *v.* Bank, 22 Sm. 212.
Lucas *v.* Bank, 28 Sm. 232.

The National Bank Act prescribes penalties and forfeitures for its violation. Unless a borrower can set up as a defence in the State Courts all forfeitures incurred by such bank in its dealings with him the State Courts have not jurisdiction in such cases as this. It has been decided that the State Courts have not jurisdiction over an action to enforce a penalty against a national bank. What distinction is there between enforcing a penalty in favor of a plaintiff against a national bank and enforcing a forfeiture in favor of a defendant against such bank? No State will enforce the penal code of another State or jurisdiction.

Haney *v.* Sharp, 1 Dana (Ky.), 442.
Ward *v.* Jenkins, 10 Metcalf, 583.
1 Kent's Com. 403.
Bingham *v.* Claflin (Wis.), 7 Natl. Bankruptcy Reg. 412.
Voorhees *v.* Frisbie (Mich.), 8 Ib. 152.

Sayers & Sayers, contra.

The note in suit is commercial paper in the hands of the bank as a *bona fide* holder for value. He who puts himself in the front of a negotiable instrument must abide the consequences.

Knight *v.* Pugh, 4 W. & S. 448.
Appleton *v.* Donaldson, 3 Barr, 386.
Walker *v.* Bank, 12 S. & R. 382.
Beebe *v.* Bank, 7 W. & S. 376.
Byles on Bills, 322.

Plaintiffs' cashier and teller testified that neither they nor the directors knew of a partnership between Long and Stephens. If more than $20,000 was lent to the firm we fail to see what effect it would have under the ruling in O'Hare *v.* Bank (27 Sm. 102).

Defendant is barred by his failure to sue for excessive interest within six years, and this disposes of the claim of set-off.

Lucas *v.* Bank, 28 Sm. 233.

There is no conflict of jurisdiction. No doubt a suit by a borrower to enforce a penalty under an Act of Congress would have to be brought in the Federal Court, but because a Federal statute is interposed in a suit between individuals or between corporations and individuals amenable to State and National laws, is certainly no reason why such interposition should defeat a just claim cognizable by the Courts of any State.

Kent's Com., vol. 1, 403.

January 6, 1879. THE COURT. The maker of a negotiable note undertakes to pay it, according to its tenor, to any holder to whom it may be due. An accommodation maker is equally liable, except to the payee. In respect to third persons the law considers him just in the character he has assumed, and will not permit him to allege that the paper to which he gave his name was an imposition, nor to gainsay its reality by

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proof that it was a fiction. It shall be taken *pro veritate* that he was the drawer; for *de veritate* that was the very thing he was intended to be. (Bank of Montgomery Co. *v.* Walker, 9 S. & R. 229.) "We assume this broad principle that the man who draws a promissory note, for the purpose of negotiation, must stand to it. He has placed himself in the situation of a principal, and shall not afterwards escape by alleging that he was a surety." (Walker *v.* Bank, 12 S. & R. 382.) The fact that the holder knew he had received no value, will not relieve him, for, by placing himself in front, the holder had a right to suppose that he was willing to abide the consequences (*Ibid.*) The payee of an accommodation note may sell or discount it, or pledge it as collateral security for an antecedent debt, for he has a loan of the maker's credit without restriction. (Appleton *v.* Donaldson, 3 Barr, 381.)

By indorsement of a negotiable note, without qualification, the indorser promises that if the maker and previous indorsers do not pay it at maturity, when duly called upon and notified, he will, and this promise is to his immediate indorsee and every subsequent one. The indorsee of accommodation paper takes more than the rights of the payee, and can recover of the maker, because the note was given for this very purpose. So is an accommodation indorser liable to subsequent indorsees. The principle is a general one that the person making, or indorsing a negotiable note for the benefit of another, is liable to a third person, even with notice of the want of consideration, but is not to the person for whose benefit the paper was signed. (2 Parsons on Bills and Notes, 27; Byles on Bills, 237.)

An indorser is something more than a surety, and is liable in the first instance as a drawer. As between makers and indorsers, the relation of principal and surety exists, and each prior party is a principal for each subsequent party. In an action by one who has paid the holder, extrinsic evidence may be admissible to show that the maker, in fact, is surety for the indorser. Every surety for another is discharged from this secondary obligation if the creditor does not hold the principal debtor to his primary obligation with proper strictness. The rights and duties of indorsers and sureties are so alike, that most acts which will discharge the one will also the other. But there are some distinctions important to observe, lest a principle exclusively applicable to one be perverted. For instance, without due demand and notice, at the maturity of a note, an indorser will be discharged; a surety continues liable upon his contract though the creditor sleeps. A surety may spur the creditor into activity by notice to pursue the principal debtor, on pain, for neglect, that the surety will be no longer bound—not so an indorser. The latter cannot call upon the holder of a protested note to sue the drawer, and if he refuses, thereby relieve himself, for, if he wishes instant recourse to the principal, it is his duty to pay the note and sue for himself. (Beebe *v.* West Branch Bank, 7 W. & S. 375.)

It is well settled, sustained by authorities cited by counsel for plaintiff in error, that when the property of the principal has been taken in execution by the creditor, the lien thus acquired cannot be relinquished without discharging the surety to an extent corresponding with its value. It is more than doubtful that, in Pennsylvania, such result would follow a withdrawal of the execution before levy, though it was once so held in England. The distinction between the lien of the writ and lien of the levy, seems to be that the latter is a technical satisfaction of the judgment. But it is now settled that if a judgment creditor relinquish his levy upon personal property, leaving the same with his debtor, his debt is not paid, nor the lien upon the debtor's land postponed to a junior judgment. He may leave the goods in the debtor's hands, release his levy, and abandon his writ without affecting his right, as an older lien-holder, to claim the proceeds of sale of the debtor's land. Only when the goods by the seizure have been lost to the debtor is the judgment satisfied. (Campbell, Bredin & Co.'s Appeal, 8 Casey, 88.)

Long kept his goods, and no part of the judgment against him was satisfied by relinquishing the levy, and staying the writ. Were he the principal debtor, his surety might be released because of the creditor's duty to hold the levy for the benefit of the surety. A barren levy is no payment in fact, and the levy of the goods of a surety, given up, is no bar to recovery against the principal. Stephens stands just as he placed himself upon the face of the note, and indulgence to the payee, who indorsed it, will not prejudice the holder. A composition accepted from the indorser would not relieve the maker further than the sum paid to the holder. (Love *v.* Brown.) Specifications of error B, C, and E, were rightly rejected.

It was earnestly pressed that the Court erred in rejecting the offer to prove an agreement between the bank and Israel Stephens to violate section 5200 of the Revised Statutes U. S., which declares that, "The total liabilities to any association of any person, or of any company, corporation, or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in;" and that the loans in pursuance of said agreement were in excess of the authority and

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power of the bank to make. No principle is better settled than that an action cannot be maintained on a contract, the consideration of which is either wicked in itself, or prohibited by law. This has been often discussed, and recently in an able opinion by the present Chief-Justice, in Fowler *v.* Scully (22 P. F. Smith, 456), a case relied on in support of the offered testimony. Not stopping to remark upon the rule, nor upon distinctions between cases within and without, we come to the consideration of the statute, to ascertain if the alleged agreement prevents recovery of the money loaned.

The powers conferred upon banks must be distinguished from regulations for their business. An act done without authority, and forbidden, is not like one which violates a regulation. In Fowler *v.* Scully the action was upon a mortgage, showing on its face that it was taken to secure loans to be made and "to avoid the necessity of procuring the additional indorsement to said paper of a third party." It was held that (1) under section 5136 banks have power to loan money on personal security, but not upon other; (2) section 5137 authorizes them to take mortgages to secure debts personally contracted; (3) they are prohibited, by necessary implication, from lending money on the security of a mortgage. The reasoning in support of these conclusions seems unanswerable, yet so close was that case to the border, beyond which a contract will not be held void for illegal consideration, that two-fifths of the judges believed it on the other side, and dissented from the judgment. Here the note was in the power of the bank to take, and the security was personal. Nothing on the face of the note, nor in the plaintiff's evidence shows a taint of illegality. It appears as clear as any transaction within the conceded powers of the bank. The statute has many provisions for regulation of banking business. Some sections as 5197 and 5198 relating to interest, contain clauses of forfeiture and penalty for violation. But everywhere it has been held that the bank may recover the money actually loaned upon a usurious contract. Other sections, as 5201 and 5208, for violation, subject the bank to appointment of a receiver. Nearly all the sections, including 5200, relating to liabilities of any one person to the bank, are vindicated by the provisions in section 5239, which declares that a wilful violation of any provision shall forfeit the rights, privileges, and franchises of the association. Such violation can only be determined by suit brought by the Comptroller of the Currency in the proper court of the United States. And in case of such violation, every director, who participated in, or assented thereto, shall be personally liable for all damages in consequence of the violation sustained by the bank, its shareholders, or any other person. Until the forfeiture be determined in the mode provided, the bank may do business; and no person, by a conspiracy to evade its regulations, may escape liability for borrowed money loaned by the bank upon personal security in the manner authorized. In O'Hare *v.* Second National Bank of Titusville (27 P. F. Smith, 96) it was said, per AGNEW, C. J., "Evidently the limitation of the indebtedness to the one-tenth in the 29th section (5200 R. S.) was intended as a general rule for conducting the business of the bank; as a rule laid down from experience to regulate its loans for its own best interest, and those of stockholders and creditors, not a rule to regulate its customers. It was, as remarked in Fowler *v.* Scully, a regulation to prevent these associations from splitting on the rock which has ruined so many banks, to wit, that of lending too much of their capital to one person or firm. The intention being to protect the association and its stockholders and creditors from unwise banking, we cannot suppose it was meant to injure them by forbidding recovery of the injudicious loans. We should not interpret the section so as to carry its prohibition beyond its true purpose, and thus cause it to destroy the very interest it intended to protect by regulation. To do so would be, as said by the Court below, to demand a penalty in favor of an individual for an offence against the country, and invite to dishonesty under the pretence of a regard for the law." If this language was not strictly necessary to a disposition of that case, it is apposite here, and demonstrates that a contract purposely made in evasion of that section is not void. Of course we have considered the offer as true, namely, that there was a conspiracy between the bank and the borrower to violate the statutory regulations. The question is whether the note is invalid on general principles of policy, and not one of equity and justice between the parties. The public good is the ground of relief to a defendant who proclaims his own turpitude in the wilful violation of a statute, and his shame in refusing payment of what he justly owes; not his worthiness. The bank is treated as a conspirator, but the fact is unmistakable that it was its officer. It is not the intendment of the statute to provide a way by which an unfaithful officer and dishonest stranger may empty the vaults of the bank, work its ruin to the great loss of its shareholders and creditors, and the receiver of its money, wrapped in the mantle of public policy, escape liability.

Error is assigned to the rulings of the Court limiting set-off of excess of interest, paid on the other transactions, to a period within six years preceding the trial. While it may be true, that neither time nor contract will sanctify or legalize the taking or holding of usurious interest by a national bank, it is just as certain that the remedy

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for the owner to receive it back is by a personal action. The right of action accrues the very instant the usury is paid. That it is barred in six years by the Act of 27th March, 1713, is too plain for remark. It is difficult to imagine a case where the statute does not begin to run from payment of the usurious money, for the owner almost necessarily has knowledge of the facts from the first. In case of fraud, the statute runs from its discovery. Not a tittle was shown to toll the statute at law or in equity.

The rulings of the learned Judge upon the question of jurisdiction need no vindication. They accord with the doctrine in Bletz *v.* The Columbia National Bank (6 WEEKLY NOTES, 1).

But one other point requires special notice. Since this cause was tried in the Court below, it has been decided, that where there has been a series of renewal notes given to a national bank for the continuation of the same original loan, and the bank sues to recover its debt on the last, the borrower is entitled to credit for all the interest he has paid from the beginning on the loan, and not merely to the excess above the lawful notes. All interest paid or charged and put into the notes must be credited. (Overholt *v.* National Bank of Mount Pleasant, 1 Norris, 490; Cake *v.* Bank, 5 WEEKLY NOTES). Nothing can be added to the opinion of SHARSWOOD, J. in Overholt *v.* The Bank. The rulings upon offers of testimony, answers to points, and charge, so far as inconsistent with the principles of that case are erroneous. And for this—

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by TRUNKEY, J. WOODWARD, J., absent.

May '78, 191. May 12, 1879.

Third National Bank of Philadelphia v. Miller et al.

Usury—Forfeiture of interest—Act of Congress (Rev. Stat. U. S., Sect. 5198)—National banks—Suit nominally on note held as collateral for overdrafts—What interest chargeable.

A national bank, by charging usurious interest on overdrafts upon it, loses the right to recover any interest at all.

Where a note was held by a national bank as collateral for overdrafts upon it, and a suit is brought upon the note, the action, though nominally upon the note, is actually to recover those overdrafts as against the makers of the note as sureties. Such sureties are entitled, in case usurious interest has been charged, to defalcate all the interest charged as against the total amount of overdraft claimed.

The fact that monthly and stated accounts had taken place between plaintiff and the bank from whom the overdraft was due, cannot preclude such sureties from setting up an illegal charge of usury.

The fact that the bank from whom an overdraft was due charged its customers usurious interest in the same transactions in which it agreed to pay usurious interest to the plaintiff, does not preclude a defence of usury by sureties for an overdraft.

Error to the Common Pleas of Cumberland County.

Debt, by the Third National Bank of Philadelphia, against A. G. Miller, James B. Orr, Joseph M. Means, O. M. Blair, administrator of Thomas P. Blair, deceased, H. G. Skiles, Henry Snyder, and John A. Ahl, President and Directors of the Farmers and Mechanics' Bank of Shippensburg, makers of the following promissory note:—

$20,000. Shippensburg, Penna., Nov. 22, 1873.

One day after date, we jointly and severally promise to pay to the order of J. Hiram Hubley, cashier, twenty thousand dollars, without defalcation, value received. This note to be held as collateral by Third National Bank of Philadelphia for the payment of any overdrafts by the Farmers and Mechanics' Bank of Shippensburg, Penna.

Signed, A. G. MILLER, President.
JAMES B. ORR,
J. M. MEANS,
T. P. BLAIR,
H. G. SKILES,
HENRY SNYDER,
JOHN A. AHL.

The Farmers and Mechanics' Bank of Shippensburg, Penna., about 1868, opened an account with the Third National Bank of Philadelphia. Each bank kept debit and credit sides of the account. The Farmers and Mechanics' Bank was in the habit of sending to the Third National Bank, and the Third National Bank to the Farmers and Mechanics' Bank, notes for collection, checks and drafts on other banks, currency, and other cash items, all of which were respectively charged and credited in the accounts kept by each bank with the other. The Third National Bank was also in the habit of discounting for the Farmers and Mechanics' Bank notes taken by the latter, the latter charging the parties for whom they had them discounted the amount of discount charged thereon by the Third National Bank. The Farmers and Mechanics' Bank also issued drafts on the Third National Bank, which were credited and charged in the several accounts.

At the end of every month, the Third National Bank sent to the Farmers and Mechanics' Bank an account current as kept by it during the past month. The latter, after examining the account and comparing it with its own, would report that it agreed with its books, and what the balance was. With this balance the account for the ensuing month would open, and so on from month to month. The last report made was in

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March, 1875, for the month of February, 1875, shortly after which the Farmers and Mechanics' Bank failed.

About September, 1873, the Farmers and Mechanics' Bank began to become indebted to the Third National Bank, and, in November, the overdraft became so heavy, that, in order to secure the same and its continuance, the note in question was given. The note was duly indorsed by J. Hiram Hubley, cashier, and delivered to the Third National Bank. This action was brought to recover the amount of the overdraft, viz., $12.403.27. On the average daily balance due by the Farmers and Mechanics' Bank for each month interest would be charged and entered on the account. The interest thus charged and included in the overdraft amounted in all to $7893.30, and was in excess of the legal rate. It was admitted that, of this amount, $1324.15 had been recouped by defendants in a former suit against the makers of a note given to secure the overdraft, due on account of a certain series of notes discounted by the Third National Bank for the Farmers and Mechanics' Bank.

On the trial, before HERMAN, P. J., plaintiff requested the Court to charge the jury, *inter alia* :—

That the Act of Congress providing that excess of interest, if demanded by a national bank, "shall be deemed a forfeiture of the entire interest which the note or bill . . . . carries with it, or which has been agreed to be paid thereon," destroys the interest-bearing quality of the note only while it is running, but that, from the date of its maturity, interest is chargeable. *Refused.*

That no excess of interest had been charged on the very note in suit, and that, therefore, there had been no forfeiture of interest. *Refused.*

That, at the end of each month, the accounts between the two banks became settled, and that, therefore, the amount of usurious interest charged had been paid in law; and that, therefore, the only remedy is an action under the Act of Congress for the penalty incurred by taking usurious interest. *Refused.*

That, as far as the transactions in discounting notes was concerned, the Farmers and Mechanics' Bank paid no illegal discount, nor had agreed to do so, but was a mere agent for the party from whom it took the notes. *Refused.*

The Court instructed the jury that, under the Act of Congress (Rev. Stat. U. S., Sect. 5198), the charging of usurious interest by a national bank destroyed the interest-bearing character of the debt; and that they must deduct $1324.15, the amount of interest already recouped, from $7893.30, the aggregate amount of interest; and that the balance of $6569.15 must be deducted from the total amount sued for, viz., $12,403.27.

He instructed them, therefore, to find for the plaintiff for the amount of $5834.12.

Verdict and judgment for plaintiff accordingly.

The plaintiff took this writ, assigning for error the refusal of the Court below to affirm the plaintiff's points.

J. H. Graham (with him *Duncan M. Graham* and *John Hays*), for plaintiff in error.

The Act of Congress is intended only to destroy for usury the interest-bearing quality of a note while it is running. After maturity interest is chargeable.

Lucas *v.* Gov't National Bank, 28 P. F. Smith, 231.
Overholt *v.* National Bank of Mt. Pleasant, 1 Norris, 493.
Cake *v.* First National Bank of Lebanon, 5 WEEKLY NOTES, 244.
Ludwick *v.* Huntzinger, 5 W. & S. 60.

The defendants have not paid, nor agreed to pay, any illegal interest. Their note was merely given as collateral for the balance of an account. They cannot, therefore, set up the defence of usury.

Brown *v.* Second National Bank, 22 P. F. Smith, 213.
Bly *v.* Second National Bank, 29 P. F. Smith, 457.
American Sewing Machine Co.'s Appeal, 2 Norris, 203.

The settlement of their accounts between these two banks monthly constituted an account stated. The amount of the illegal interest had been, therefore, settled and paid in law.

Bevan *v.* Cullen, 7 Barr, 283.
Thompson *v.* Fisher, 1 Harris, 313.
Sargeant's Heirs *v.* Ewing, 12 Casey, 164
Sargeant's Ex. *v.* Ewing, 6 Casey, 83.
Killam *v.* Preston, 4 W. & S. 14.
Van Amrimge *v.* Ellmaker, 4 Barr, 281.
Phillips *v.* Tapper, 2 Barr, 325.
Bainbridge *v.* Wilcocks, Baldwin, 536.

As regards the transactions concerning the discount of notes, the Farmers and Mechanics' Bank paid no usurious interest, but was a mere agent for those for whom it had the notes discounted.

W. Trickett (with him *J. M. Weakley*, *F. E. Beltzhoover*, *W. F. Sadler*, and *Lemuel Todd*), contra.

Under the Act of Congress, the payment at any point of time in the history of a debt of excessive interest, or the stipulation so to do in future, destroys its interest-bearing character.

The defendants, although they have never agreed to pay usurious interest, are entitled to defalk the forfeited interest as against the plaintiff.

Campbell *v.* Sloan, 12 P. F. Smith, 482.
Brown *v.* Second Nat. Bank, 22 P. F. Smith, 210.
Overholt *v.* National Bank, 1 Norris, 494.
Hartman *v.* Danner, 24 P. F. Smith, 40.
Cake *v.* First National Bank, 5 WEEKLY NOTES, 244.
Mitchell *v.* Emery, 4 Id. 236.
American Sewing Machine Co.'s Appeal, 2 Norris, 203.
Price's Appeal, 4 WEEKLY NOTES, 207.

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The monthly settlement of accounts was analogous to the renewal of an old note tainted with usury. In such cases it has been always held that the usury will taint the new note also.

Campbell *v.* Sloan, *supra.*

Bly *v.* Second National Bank, 29 P. F. Smith, 457.

The fact of the Farmers and Mechanics' Bank charging an illegal rate for discounting notes, cannot preclude defendants from defalking against plaintiffs the illegal interest charged by it on the discount of the same notes.

May 26, 1879. THE COURT. We have examined with care the several errors assigned in this case. It is unnecessary to discuss them separately. A statement of the principle upon which the cause turned will show, we think, that no error was committed by the learned Court in their rulings and charge to the jury. Though the action was nominally on a promissory note given by the defendants, yet, as it was expressed on its face that it was to be held as collateral by the plaintiffs for the payment of any overdrafts by the Farmers and Mechanics' Bank of Shippensburg, it was actually a suit to recover those overdrafts, against the defendants as sureties. It cannot be disputed that the defendants would be entitled to the benefit of whatever defence would be available to the Farmers and Mechanics' Bank. The plaintiffs, being a national bank, by charging more than six per cent. interest on these overdrafts, lost the right to recover any interest at all. The point, then, does the Act of Congress forfeit interest beyond the maturity of the note sued on, does not arise. No recovery was had on the note; it was evidence merely of the obligation of the defendants to meet and answer the liability of the Farmers and Mechanics' Bank on the overdrafts. Admitting that the monthly accounts were stated accounts, that certainly never has been held to preclude a defendant from setting up an illegal charge of usury. Nor can the fact that the Farmers and Mechanics' Bank charged illegal interest to their customers on the notes discounted for them by the plaintiffs affect their right to set up, as against the plaintiffs, their violation of the Act of Congress, under which alone they have any right to do business at all.

Judgment affirmed.

PER CURIAM. PAXSON, WOODWARD, and STERRETT, JJ., absent.

Common Pleas—Equity.

C. P. No 3. May 10, 1879.

Sheppard et al. v. Stuart et al.

Trade-marks—Equitable jurisdiction of State courts to enjoin infringement of—Use of the word Excelsior as applied to a specific article—Previous use of the word by other parties—In what way a device must indicate "true origin or ownership"—Ferguson v. *Davol Mills, 7 Phila. 256, considered—What is abandonment—Customs of trade—Laches.*

Motion to continue preliminary injunction.

Hearing on bill, answer and affidavits.

The bill, filed by Isaac A. Sheppard & Co. against Stuart, Peterson & Co. alleged that the complainants, as manufacturers of stoves and ranges, had been accustomed for many years to place the word "Excelsior" on a certain kind of range made by them, which word, as placed on such ranges, the complainants claim, by continuous use, came to be a trade-mark. In 1864, the complainants first began to manufacture these ranges; they advertised extensively, and it came into general use. Parties advertising houses for sale would name the Excelsior range as one of the conveniencies; over 40,000 were sold in fifteen years. In 1877, they alleged, the defendants made ranges having similar characteristics, and placed upon them the words "New Excelsior" and "Improved Excelsior," thereby intending to deceive purchasers. The bill also alleged that the defendants have placed the words "Excelsior ranges" on their sign, and have advertised that they have "Excelsior" ranges of different kinds and sizes, and make the plates and pieces for all "Excelsior" ranges. All of which is a cause of injury to the business of the complainants. The bill prayed an injunction and account.

The defendants answered that the word "Excelsior" had been used to designate a stove manufactured in Philadelphia long before 1864, and that it was also used by a firm in Troy, N. Y., as the name of a range very similar to the one manufactured by complainants, and therefore it could not be used as a trade-mark by Isaac A. Sheppard & Co. The defendants denied that by using the words "New Excelsior" and "Improved Excelsior," they intended to deceive the public; and they also further answered that there were no special marks of similarity between their ranges and the ranges manufactured by complainants. As to manufacturing plates and pieces to fit all "Excelsior" ranges, the defendants disclaim any intention to infringe upon

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the complainants' rights. They make plates and pieces to fit all ranges. The defendants allege that even if the complainants ever had a right to the use of the word "Excelsior" as a trade-mark, they lost it by abandonment, *i. e.*, by allowing certain dealers who sell these ranges to place their own names on plaintiffs' "Excelsior" ranges.

Numerous affidavits were read by both sides, many of which were conflicting.

Leonard Myers, for the rule.

The affidavits show that there was no other range of any description manufactured in or near Philadelphia called the "Excelsior" until Stuart, Peterson & Co. began to manufacture them in 1877, and no range of the kind having this mark was made elsewhere. The plaintiffs had used the word continuously for fifteen years, and by so doing they gained a trade-mark in the word as applied to their ranges.

Browne's Law of Trade-marks, §§ 611–13.
Cox's American Trade-mark Cases, § 674.
Filley *v.* Fassett, 44 Mo. 173.
Rowley *v.* Houghton, 2 Brew. 303.
Wortherspoon *v.* Currie, 23 Law Times Rep. 443.
Ford *v.* Foster, 7 Ch. App. Cases, 611.

The word "Excelsior" served to designate complainants' manufacture as effectually as names ever serve to distinguish things. The public associated it with the article on which it was placed, and this is the true index of "origin and ownership" within the meaning of trade-mark law.

Del. & Hudson Canal Co. *v.* Clark, 13 Wall. 311.
Wamsutta Mills *v.* Allen *et al.*, 6 WEEKLY NOTES, 189.
Fertilizer Co. *v.* Woodside, 1 Hughes, 115.
Browne's Law of Trade-marks, § 190.

The fact that complainants have other ranges with different names should not prevent them from being protected in the use of this.

Colman *v.* Crump, 70 N. Y. 573.

Where a manufacturer has habitually stamped his goods with a peculiar mark or brand, a court of equity will restrain another party from adopting it for the same kind of goods, especially where the sale of the manufactured articles was confined to a particular section of the country.

Corwin *v.* Daly, 7 Bosw. 222.
McLean *v.* Fleming, 6 Otto, 245.
Colman *v.* Crump, *supra*.
Coddington's Digest of Trade-marks, § 1059.

But suppose plaintiffs had allowed others to use this trade-mark on goods of their *own make* (which is not even asserted), the consent of a manufacturer to the use or imitation of his trade-mark by another may perhaps be justly inferred from his knowledge and silence, but such a consent whether express or implied when purely gratuitous may certainly be withdrawn, and when implied it lasts no longer than the silence from which it springs. It is in reality no more than a revocable license, and does not destroy the owner's exclusive rights.

Amoskeag Co. *v.* Spear, 2 Sandf. 599.
Lockwood *v.* Bostwick, 2 Daly, 521.
McCardel *v.* Peck, 28 How. Pr. Rep. 120.
Coddington on Trade-marks, 441, § 1184.
Winsor *v.* Clyde, 9 Phila. 513.
Newman *v* Alvord, 51 N. Y. 189.
Lee *v.* Harley, 5 Ch. App. Cases, Law R. 155.

George W. Thorn (with him *Preston K. Erdman*), contra.

The plaintiffs had no right to the exclusive use of the word "Excelsior," as it had been used long before by manufacturers of stoves and ranges.

Cox's Trade-mark Cases, §§ 194, 226.
Fetridge *v.* Merchant, 4 Abb. Pr Rep. 150.
Wolfe *v.* Goulard, 18 How. Pr Rep. 64.
Stokes *v.* Landgraff, 17 Barb. 608.

The word "Excelsior," as used by the complainants, is not a trade-mark, but a fancy name used to indicate a particular kind of a stove; it does not indicate origin or ownership.

Cox's Trade-mark Cases, § 608.
Ferguson *v.* Davol Mills, 2 Brews. 314.
Del. & Hudson Canal Co. *v.* Clark, 13 Wall. 311.
Stokes *v.* Landgraff, *supra*.

The plaintiffs, by their long delay in bringing this bill, and by allowing others to affix their names upon plaintiffs' "Excelsior" ranges, have lost any equitable rights that they otherwise might have had.

Kerr on Injunctions, § 205.
Cox's Trade-mark Cases, § 717.
Isaacson *v.* Thompson, 20 Weekly Rep. 196.
Amoskeag Co. *v.* Garner, 55 Barb. 151.
Flavel *v.* Harrison, 17 Jurist, 368.

C. A. V.

June 3, 1879. THE COURT (after stating the facts). The defendants deny that the use of the words "New Excelsior" and "Improved Excelsior" is either intended or calculated to deceive the public or to induce them to purchase as and for the ranges of the plaintiffs. It may be that the defendants did not intend to deceive the public; but it can scarcely be said that these devices were not calculated to do so. What other idea is suggested by the words "New Excelsior" and "Improved Excelsior," than that a newer improved "Excelsior" is made? It can be neither a "New Excelsior" nor an "Improved Excelsior," without suggesting an important and valuable change in the old "Excelsior." Of what use can these names be unless they call to mind the old "Excelsior?" And of what use would that be unless it also recalled the usefulness and popularity of the old? It should not be forgotten in this connection that the defendants say their "object was simply to produce a light cheap range which could be sold in competition with the cheap range of the plaintiffs."

If this were otherwise it may not be said that the assumption of the name "Excelsior" was not

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calculated to deceive the public and injure the plaintiffs. It may be that the defendants did not intend to injure the plaintiffs; but if their conduct produced injury, they must be held to have intended that injury. In Hine *v.* Lart (10 Jur. 106), it was held, refusing a motion to dissolve an injunction, that defendants having made so complete a copy of plaintiffs' mark, must be taken to have done so with an intent to gain an advantage to which they were not entitled. Judge PAXSON, in Dixon Co. *v.* Guggenheim (7 Phila. R. 408), cites English cases which held that "A man, though not intending an injury to another, should not be allowed to adopt the marks by which the goods of another are designated, if the effect of adopting them would be to prejudice the trade of such other person. It is not necessary to aver or prove wrongful intent on the part of another." If, therefore, the plaintiffs are entitled to use the word "Excelsior" as a trade-mark, it would follow that the defendants should be enjoined.

The defendants contend that the plaintiffs are not entitled to claim the word "Excelsior" as applied to their ranges as a trade-mark, because: (1) Hicks, Wolf & Co., of Troy, New York, have used the same word upon flat top ranges since 1861 continuously. (2) The word is a fancy title for stoves of various kinds in the trade generally. (3) Orr, Painter & Co. made and sold similar ranges with the word "Excelsior" upon them. (4) The ranges of defendants have improvements. (5) That defendants' ranges are different. (6) The word Excelsior as used by plaintiffs does not indicate that they are owners of the ranges. (7) The plaintiffs have placed other names upon some of their ranges. (8) The plaintiffs have put the names of buyers upon the ranges in near connection with the word "Excelsior," and have thereby abandoned the word to general use. (9) Defendants have been making them for two years, and the plaintiffs did not forbid them until about a year ago.

The first and second reasons may be disposed of by the remark that the evidence shows that the ranges referred to were not the same as plaintiffs'. The plaintiffs do not claim property in the word "Excelsior." Their claim is that they have first appropriated that word to a specific article of their manufacture.

To the third it may be said that it does not appear that plaintiffs permitted or acquiesced in the use of the word Excelsior by Orr, Painter & Co.; or that they knew of such use of it as would imply acquiescence or permission.

It is perhaps sufficient to say that no improvement in the range or difference in appearance would justify the defendants in the use of the word "Excelsior." If the improvements and changes make a different kind of range they would have the right. But the improvements and changes have not substantially altered the character and appearance of defendants' ranges from that of the plaintiffs'.

It is also contended that the word "Excelsior," as used by the plaintiffs, is not a trade-mark, but a fancy name to indicate a particular kind of stove, because it does not indicate origin or ownership. To sustain this position many authorities were cited, but that which was most relied upon was Ferguson *v.* Davol Mills (7 Phil. 256), in which ALLISON, P. J., says: "The simplest case of a trade-mark is the name and address of the claimant, and it is absolutely requisite that a device or symbol should perform the office of a finger board; should indicate the name and address of the manufacturer to invest it with the attribute and entitle it to the protection of a trade-mark." This language is clear, vigorous and decisive; and there can be no doubt that the cause was determined upon this principle alone. It will be seen from an examination of the authorities cited by the learned Judge, that he is not fully sustained by them in this advanced position. They affirm only that a trade-mark should indicate the "true origin or ownership of the article offered for sale." The learned Judge was justified, perhaps, in thus giving a sensible form to what was before a meaningless phrase, adopted and continued in almost every trade-mark case without necessity, without application to the cases, and without definition or explanation.

In the Dixon Co. *v.* Guggenheim (7 Phila. 408), Judge PAXSON adopts as "well sustained by reason and authority," the doctrine of "true origin or ownership." In justice to him it should be observed that it was not raised in the case before him, and his attention was not directed to its full import. In his very able and carefully prepared opinion he cites the decisions which declared "Revere House," "New York Hotel," "The Captain's Live and Let Live Oyster and Dining Rooms," to be trade-marks. He also says: "The name of a newspaper is a trade-mark;" and with proper judicial indignation, adds: "Can it be supposed that if some one were to commence the publication in this city of a 'Public Ledger' of the same size, price and style as the one published by Mr. George W. Childs, that a Court of Equity, upon a proper application, would not promptly arrest the career of such a piratical craft by an injunction?" And yet neither of these words indicate "origin or ownership."

It is not now important to ascertain how and where this doctrine originated. It has been followed as an axiom. And yet to the thoughtful it must always have been a perplexing enigma.

It is submitted that in neither of the cases cited by Judge ALLISON is the question of "true origin

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and ownership" raised, or discussed, or defined. The question raised and decided was that words which designated the article itself, or its attributes, were not trade-marks. This is so in all the cases which we have been able to examine. As illustrative of all we may take the language of C. J. DUER in Amoskeag Co. *v.* Spear (2 Sand. S. C. R. 599): "A mark can only be protected as a trade-mark when it is used merely as indicating the true origin and ownership of the article offered for sale; never when it is used to designate the article itself." We may be allowed in this connection to say that we have not been able to find any case except Ferguson *v.* Davol Mills, in which the doctrine of "true origin or ownership" is distinctively avowed.

It might, perhaps, be useful at this stage to ascertain what a trade-mark is, and what it indicates. In Stokes *v.* Landgraff (17 Barb. 608), STRONG, J., says: "The principle is well settled that a manufacturer may, by priority of appropriation of names, letters, marks, or symbols of any kind to distinguish his manufacture, acquire a property therein, as a trade-mark."

"The right of trade-mark is said to be best termed an exclusive right arising from first use." (Bouvier.)

"The rule sometimes laid down on this subject is: that if a name, sign, mark, brand, label, word, or device of any kind, can be advantageously used to designate the goods, property, or particular place of business of a person engaged in trade, manufacture, or any similar business, he may adopt and use such as he pleases, which have not before been appropriated." (Story's Equity, § 951.)

"The physiology of the thing called a trade-mark must be examined and carefully analyzed. It has an individuality of nature. Meaningless in itself, when placed in a certain juxtaposition, it involves an idea. It virtually says that the vendible object to which it is attached is the workmanship or the selected article of the owner of the mark. It is intended to strike the eye, and sometimes the ear by its sound when spoken of, and thus excite inquiry. It should possess such salient features as might at once arrest attention, and put the intended purchaser on the alert." (Browne on the Law of Trade-mark, § 88.)

In the Amoskeag Manuf. Co. *v.* Spear, Chief Justice DUER says: "Every manufacturer has an undoubted right to distinguish his goods by a peculiar mark or device, in order that they may be known to be his."

How is a mark or device to indicate "true origin or ownership;" or to indicate the name and address of the manufacturer? In and by itself alone this is impossible. It is only by use as the device of him who distinguishes his goods by it in order that they may be known as his, that it can ever indicate "true origin or ownership."

In Allegheny Fertilizer Company *v.* Woodside (1 Hughes, 115), GILES, J., says: "But it is argued that the name adopted ('Eureka') did not sufficiently indicate 'origin or ownership' to be regarded as a trade-mark. This was a mistake. It served to distinguish the complainant's manufacture quite as effectually as names ever serve to distinguish things."

In the Meriden Britannia Co. *v.* Parker (39 Conn. 450), the trade-mark consisted of the words "1847, Rogers Bros., A 1." The Rogers Bros. were superintendents of the petitioners. The respondents contended that the said trade-mark did not indicate the true origin of the goods: *Held*, that the representation that the Rogers Bros. were the manufacturers was true in a certain sense, but that the petitioners were in another sense the manufacturers. "Like all other symbols and devices used as trade-marks its import was not at first perhaps fully understood. The effect as well as the value of a trade-mark is the work of time and expense. This probably was no exception to the rule. However this may be it seems to have been well understood by the trade at the date of this petition, that goods bearing that stamp were manufactured by the petitioners:" *Held*, that the trade-mark sufficiently indicated the origin and ownership of the goods.

In the Delaware and Hudson Canal Co. *v.* Clark (13 Wallace, 311), STRONG, J., says: "Hence the trade-mark must either by itself or by association point distinctly to the origin or ownership of the articles to which it is applied. The first appropriator of a name or a device pointing to his ownership, or which by being associated with articles of trade has acquired an understood reference to the originator or manufacturer of the articles, is injured whenever another adopts the same name for similar articles."

In other words, the evidence must show the first appropriation of the device by the claimant; its application by him to his goods or business; and that the trade or public recognize the article or business by that device as made or sold by him, or belonging to him. In no other way can a mark or device indicate "true origin or ownership."

The evidence in this case is conclusive that the plaintiffs first appropriated the word "Excelsior" to a specific article of their manufacture; that they have continuously used it for the last fifteen years, during which time they have made and sold more than forty thousand; that the whole trade recognized them as the makers of the articles to which the word "Excelsior" was attached. This device therefore pointed out the

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"true origin and ownership" of the goods, and thereby became a trade-mark.

It would be useless to waste time in collating the single and collective words and devices which have been held as trade-marks. The word "Excelsior" alone has been repeatedly held to be a good trade-mark. In Winsor *v.* Clyde (9 Phil. 513; affirmed by the Supreme Court), "Keystone Line" was held to be a good trade-mark.

It is further contended that inasmuch as the plaintiffs, at the request of a few purchasers, placed another name upon a few of their ranges, and erased the word "Excelsior," they thereby abandoned their right to the use of the word as a trade-mark. These instances can only be regarded as special contracts for the goods without the trade-mark. They can in no sense be regarded as a representation to the public of the abandonment of the trade-mark and the adoption of another. It is the purchaser who changes the name, and it is nowhere held that the purchaser of an article protected by a trade-mark is bound to maintain the name upon the article. He buys for use and consumption, and may retain the mark or not as he pleases.

The province of a trade-mark is to bring seller and buyer together, that the one may sell his merchandise, and the other obtain the particular goods the reputation of which has won his confidence. When this is done the office and object of the trade-mark is accomplished. The seller has no longer any control over or interest in the article. It belongs wholly to the purchaser, and with it the incident, the trade-mark. As he may consume or destroy, or alter or change the article, so may he its name. What he may do himself, he may do by another; what he may do by another he may do by the seller. If he can do this after purchase, he may certainly contract to have it done before purchase. This is a matter in which the general public can have no interest, and therefore have no interest or concern which should be considered. It in no way affects the usefulness of the article.

But why should it be held that the manufacturer must place the trade-mark upon all of his goods? He may prefer, for his own advantage and the protection of the public, to place it only upon his best, and leave the inferior nameless or give them another name. Honesty and fair dealing and his own interest would suggest this. And if this be done it should not be regarded as an abandonment.

The evidence discloses the fact that the plaintiffs in some cases when requested by dealers, placed the dealer's name upon the range in proximity to the word "Excelsior." It is shown, however, that this is a custom of the trade known to and acted upon by all dealers and manufacturers. It is proved that even when the names of dealers were thus placed upon the ranges, they were still known and recognized by the trade, dealers and manufacturers, as ranges made by the plaintiffs.

It is contended that this was permitting those dealers to hold themselves out as the manufacturers of such ranges, and was therefore an abandonment.

It must be observed that there is nothing in connection with the names of these dealers to indicate that they are the manufacturers, and there is no evidence that any one ever supposed they were the manufacturers. On the contrary, there is ample evidence even in the affidavits of the defendants, that they were still regarded as manufactured by the plaintiffs. Why then should we force the inference that these names indicated the names of the manufacturers, for the benefit of one who wrongfully appropriates to himself another's industry, enterprise and property.

In considering acts from which acquiescence or abandonment are or may be inferred, it should not be forgotten that a trade-mark is property. In all cases of litigation it may fairly be said to be valuable property. The man who lends his horse frequently, or permits another to use it, is never said to have abandoned his horse to the public, or to acquiesce in any claim to use the horse at pleasure. Much less can these acts justify the stranger who breaks into the stable and steals the horse.

What injury can arise from this practice? Who can be deceived or betrayed into any error or injury thereby? The public who buy for consumption have the article they expected and bargained for, with its name, the trade-mark upon it. They have in addition, as a further security, the name and endorsement of the dealer. They therefore have no cause of complaint, and the public who do not purchase have no right to complain. What is it to the man who does not buy, or want to buy, that these names may possibly indicate that the owners of the names have the right to manufacture the ranges?

Such acts do not denote abandonment. The owner of a store does no injury to his right of property in his store, or its contents, or his business, by permitting the names of some of his employés to be placed on the inside or outside of the building, as is customary in this city. The rights of property are not so easily frittered away.

It might be that acts like these might betray a person into a violation of the right of property in a trade-mark. If they did he would be excusable, but it would confer upon him no right to further use the mark against the protest of the owner. The defendants made no such pretence as this. They do not pretend that they were

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induced to believe that plaintiff had conferred upon these dealers the right to manufacture the range and use the trade-mark. On the contrary, they have shown by their own evidence that they knew all about the matter, and that it was done in pursuance of a well-established custom of their trade. How can the probability that the public might believe these dealers to be the manufacturers with the right to use the trade-mark, give the defendants the right to use the trade-mark when they know the fact to be otherwise?

In considering a question of trade-mark the customs of trade should not be ignored. The true doctrine, perhaps, should be to consider it in the light and in aid of such customs. What the custom of trade allows the law should allow; for such customs must be for the general good as well as the good of the special trade. Commercial custom made a promise in writing to pay in thirty days a promise to pay in thirty-three days. It is suggested then that the custom, which the plaintiffs recognized, should not work a forfeiture, especially when no one was thereby betrayed into the belief that any one, other than the plaintiffs, had manufactured the articles.

An explanation of this custom may be found in the fact that the ranges as made both by the plaintiffs and defendants are not complete for use as they make and sell them. They are not ranges to the public or to the consumer until they are set up and encased in brick, as the movements of a watch are not a watch until encased. It is the dealer who makes them fit for use. It is his trade and business to build in the ranges. When the range is completed it is his manufacture. The plaintiffs and defendants have furnished him with only one of the component parts—one of the materials.

The manufacturer of the movements of a watch may have a trade-mark for his own work; it is or may be, so far as he is concerned, a completed work. Can it be said that he loses his right to that trade mark because he permits another manufacturer, whose business it is to extend his work to make it fit for use, to place his name upon the thing called a watch? Why then should it be said that the plaintiffs lose their right to their trade-mark for the article they furnish to the trade because they permit the dealer, who uses their article to furnish for the public a completed range, to place his name upon it.

To the plaintiffs and the defendants the dealers are the public. The evidence shows that they are the sole purchasers. And it also shows that no dealer or other person has been deceived by the dealer's name upon the ranges into believing that he was the manufacturer of the parts made by the plaintiffs. On the contrary the evidence of the respondents shows that even when such names are upon the ranges they are still recognized and regarded as the ranges of the plaintiffs.

It would therefore be stretching an inference to the bounds of probability to infer from such a license that plaintiffs had abandoned their right in the trade-mark to the community.

Even if we are altogether in error in all this, it will be observed that it is conceded that the exercise of this custom of the trade by the plaintiffs was simply a license. It needs no citation of authorities to show that a license is not an abandonment—not even evidence of abandonment. It is perhaps the highest evidence of the assertion of the right and acquiescence therein. This doctrine was recognized in Winsor *v.* Clyde (9 Phil. 513).

It has been strongly urged that the plaintiffs have lost their right of action by their delay in bringing suit, or in asserting their claim. It may be that even a wrong-doer may sometimes successfully defend upon this ground. It must, however, be such a delay as would lead a reasonable person to suppose that the owner had abandoned his device, or such as induced the defendants to act, or under such circumstances as required the owner to assert his right. Even in such cases the title in the trade-mark is not lost or deemed abandoned, but the owner is estopped from asserting it to prevent another from using the device. It is evident, therefore, that each case must be decided upon its own facts. There can be no fixed rule, and time is only a matter of evidence to be considered with all others. There is no evidence in this case that the defendants were encouraged or misled into their wrongful acts, or that the plaintiffs were silent when they were called upon to speak. The evidence shows that they moved with as much celerity as was consistent with a proper vindication of their right. The delay seems to have been no greater than was necessary for a prudent, careful preparation for the legal conflict.

The conclusions to which we have come are, that the plaintiffs have a right to the word Excelsior as a trade-mark; that the defendants have wrongfully used that trade-mark to the injury of the plaintiffs, and should be enjoined therefrom.

The motion to continue the special injunction is therefore allowed.

Opinion by FINLETTER, J.

[The Supreme Court of the United States decided, on Nov. 17, 1879, that the Acts of Congress relating to trade-marks are unconstitutional.]

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Common Pleas—Law.

C. P. No. 1. Sept. 16, 1879.

Miller v. Kern.

Ground-rent—Action of covenant against terre tenant—Act of June 12, 1878—Covenant lies against the assignee of land charged with ground-rent, who took title prior to the Act—The Act is not retroactive.

Sur demurrer to plea.

Covenant sur ground-rent deeds for arrears of rent due by a terre tenant of the land.

The declaration averred, that one Schofield was the original covenantor in two deeds, each reserving a yearly rent of $60 per annum, payable in May and November, dated respectively Oct. 28, 1869 and November 22, 1869; that by sundry mesne conveyances the land out of which the rents issued became vested in W. H. Kern, the present defendant on May 30, 1877, and that he is still the owner.

The claim was for $180, being the amount in arrears from May 1, 1878.

The defendant pleaded *inter alia* the Act of June 12, 1878. To this plaintiff demurred.

J. W. Patton, for the demurrer.

The right of the grantee of the rent to sue the assignee of the land is settled by—

Hannen *v.* Ewalt, 6 H. 11.
Royer *v.* Ake, 3 Pen. & W. 464.

The Act of April 25, 1850 (P. L. 13), also provides for an action of covenant against the assignee of the land. The validity of this Act has been repeatedly sustained.

Taggart *v.* McGinn, 2 H. 155.

The Act of June 12, 1878, does not apply simply to the *remedy or mere form of action.* It attacks the right of the owner of the rent or his assignee to recover at all. It destroys the personal liability of the grantee of land subject to ground-rent (except in the event of an express assumption on his part), and entirely changes the law as announced in the decided cases.

The defendant having taken title to the land *cum onere*, prior to its passage, the Act cannot operate retrospectively to destroy the plaintiff's right.

Merriman *v.* Moore, 7 WEEKLY NOTES, 425.

If the Act be construed to affect rights vested before it was passed, then it may be urged that it is unconstitutional.

Journeay *v.* Gibson, 6 Sm. 60.
Underwood *v.* Lilly, 10 S. & R. 101.

Charles Gilpin and *Hood Gilpin*, contra.

The Act is simply one affecting the remedy of the covenantee against the assignee of the covenantor, a terre tenant, and it is, therefore, constitutional. The covenantee must sue either the original covenantor or proceed against the land itself.

If the Act of June 12, 1878, is inoperative at all, it is only so as to the sixty ($60) dollars of rent accruing before it went into effect.

The plaintiff's right of action is founded upon the Act of April 25, 1850. Before that Act was passed, there was no such thing known in law as an action of covenant for arrears of ground-rent against the assignee of the lessor for life, years, or in fee. The only remedy was by an action of debt. This was the law in England until 32 Hen. VIII., c. 34.

Lewes *v.* Ridge, Cro. Eliz. 863.
Irish *v.* Johnston, 1 Jones, 488, 489.

And was likewise the law in Pennsylvania until the Act of April 25, 1850.

Irish *v.* Johnston, *supra.*
Wilson *v.* Brechemin, Brightly R. 445.
Maule *v.* Weaver, 7 Barr, 329.
Taggart *v.* McGinn, 2 H. 155.

The law remained unchanged until a revolution was finally consummated in the passage of the Act of June 12, 1878. The Act of 1850 gave an action of covenant where none before existed. The Act of 1878 merely changed the character of the evidence by which the plaintiff could recover in a suit upon the remedy given by the Act of 1850, and such laws have been declared to be constitutional.

Towler *v.* Chatterton, 6 Bing. 258.
Dwarris on Stat., 681, 682.
McFarland *v.* Commissioners, 12 S. & R. 297.
Foster *v.* Gray, 10 Har. 1.
Evans *v.* Montgomery, 4 W. & S. 218.
Taggart *v.* McGinn, *supra.*

As to the $120 of rent accruing after the passage of the Act of 1878, the right of the plaintiff to the different portions of said rent did not accrue until said proportion fell due and could not therefore be taken away by the Act of 1878.

Merriman *v.* Moore (*supra*), is a decision in the case of a mortgage, and does not apply in the case of a ground-rent.

C. A. V.

Oct. 4, 1879. THE COURT. The case of Maule *v.* Weaver (7 Barr, 329), decided at the December Term, 1847, denied to the owner of a ground-rent a right to maintain an action of covenant against one who had not bound himself under seal to perform the covenants of the deed. GIBSON, C. J., says, "How it came to be thought by the profession at an early day, and to be handed down to the present, that an action of covenant might be maintained against the grantee in a deed poll, under any circumstances, or against any one else, who had not sealed it, I cannot imagine." The same doctrine is asserted in the concluding portion of the opinion in Irish *v.* Johnston (1 Jones, 488), decided September Term, 1849, in which the Chief Justice says, the

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assignment of even a lease for years, was not clogged at common law with liability to an action of covenant by the landlord for payment of rent, for no man who has not sealed the deed can be thus sued. The case of Weidner *v.* Foster (2 Penrose and Watts, 23), decided in 1830, seems to have recognized the contrary doctrine. In Irish *v.* Johnston, it is said, the matter in Weidner *v.* Foster, passed *sub silentio*, the point having been neither made nor decided. But the argument before the Court in part rested on the position that there was neither privity of contract or estate between the parties, and therefore there could be no recovery. And in the opinion of the Court, by ROGERS, J., the rule is laid down, that an assignee is only liable in respect of his possession, for he bears the burden only while he enjoys the benefit. But under an absolute assignment, the assignee is liable before he takes possession, for by the assignment the title and possessory right pass, and the assignee becomes possessed in law. Hannen *v.* Ewalt (6 Harris, 10), was an action of covenant by the assignees of the lessor against the assignees of the lessee, for arrears of ground-rent, decided September, 1851. In the Court in Error it was urged that the action should have been debt not covenant. On this point the ruling of the Court is against this proposition as a valid defence on the part of the assignees of the lessee, holding that the defendants were bound by privity of estate for covenants in law to pay the rent reserved. That the covenant was one running with the land, and that the liability of the assignee is created by the acceptance of an assignment, whether possession is or is not taken. This case is ruled on general principles, clearly stated in the opinion of the Court, no reference being made to the cases of Maule *v.* Weaver and Irish *v.* Johnston, or to the Act of April 25, 1850 (Purd. Dig. 751), which gives to the lessor, his heirs or assigns, a remedy by action of covenant, against the lessee, his heirs, etc., or assigns. Irrespective, therefore, of this Act of Assembly, the case of Hannen *v.* Ewalt must be regarded as overruling Maule *v.* Weaver and Irish *v.* Johnston, and re-establishing the law as settled in Weidner *v.* Foster, and Royer *v.* Ake (3 Penrose & Watts, 464), that a covenant to pay ground-rent is a covenant which runs with the land, and is binding on the assignee without his being specially named. The same doctrine was held to be the law in Pennsylvania, as far back as 1827, in the case of Berry *v.* McMullen (17 S. & R. 87). Covenant, the Court say, will lie on privity of contract, and also on privity of estate; that the assignee, when the covenant runs with the land, takes it *cum onere*, and the covenants affect the owner of the title.

When Kern, therefore, became owner of the land, out of which this ground-rent was reserved, under the law as then established by the decisions of the Supreme Court, and also by the Act of 1850, he became personally liable in an action of covenant for all arrears of ground-rent, which should accrue whilst he was owner, and by force of his title was in actual possession, or had the right of possession vested in him. It is laid down in Woodfall's Landlord and Tenant, 348, and the cases cited, clearly settle the rule to be, that actual possession by a tenant is not essential to his liability.

This brings us to the consideration of the most material question in the case, as it now stands before us on the demurrer to the plea of the Statute of June 12, 1878.

The defendant plants himself on the proposition, that inasmuch as that Act is an Act affecting the remedy merely, it is constitutional, and that if inoperative at all, it is only so as to that portion of the arrears of rent accruing before it went into effect. Taggart *v.* McGinn (2 Harris, 155), is cited in support of the ground on which defence is taken to this action, but in the per curiam opinion of the Court, no more, we take it, was intended to be decided, than that the Act of 1850 settled the question beyond all dispute, that whatever doubt may have existed as to plaintiff's right to sue in covenant, that doubt was settled by the Act of 1850: and, in a line, asserting the fact, that the efficacy of an Act, which gives a new or legalizes an existing proceeding, had seldom been doubted. It does not decide that the remedy did not exist before or at the time the Act went into effect, because it was unnecessary to do so. But does the Act of 1878 affect only the remedy or mere form of action? It seems to us that it seeks to do more, and attacks the right of the owner of the rent to recover at all as against the assignee of the grantee of the land, held subject to the payment of ground-rent, although, under the law, his contract was, that taking the land as owner he would pay the rent. The language of the Act is, he shall not be personally liable for the payment, etc., unless by express undertaking he shall have assumed a personal liability, or the condition of personal obligation to pay is set out in the deed. In a conveyance made before the 12th of June, 1878, of land subject to ground-rent, neither of these conditions was required to fix the obligation of the owner of the land to pay the rent; taking title he contracted to pay, and was beyond all question legally bound to do so; but the Act of 1878, it is contended, relieves him from his obligation, which he had voluntarily assumed under a covenant which runs with the land, so that recovery may not be had against him in an action of covenant merely, but that no action of any kind may be maintained against

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him; the Act in question holding, that he shall not be personally liable, and thereby proposing to take from the owner of the ground-rent his right to make good his claim in any form of proceeding against the assignee of the grantee of the land. How can it be said that this affects the remedy only, as all remedy or right of action against the debtor is thus sought to be obliterated or swept away under the retroactive construction which is attempted to be placed upon it? Rights vested would thus be destroyed, and not regulated merely as to the manner of their enforcement. It will be difficult, we think, to find authority for the proposition, that retroactive Acts of Assembly, which impair or destroy vested rights, are to be maintained. In the case of Underwood *v.* Lilly (10 S. & R. 101), DUNCAN, J. says, such laws are to be supported when they impair no contract or disturb no vested right, but only vary remedies, cure defects in proceedings otherwise fair, and which do not vary existing obligations contrary to their situation when entered into. In Juorneay *v.* Gibson, STRONG, J. remarks, speaking of Acts of Assembly validating defective acknowledgments of deeds, that such Acts are sustainable only because they are supposed not to operate on the deed or contract changing it, but upon the mode of proof. We cannot agree that the defensive position is well taken against the right of the plaintiff to maintain his action of covenant against the terre tenant as to the entire claim, or as to any portion of it, because such a defence would operate on and destroy the contract, and is not confined to an order of maintaining or proving the demand. The attack is upon rights vested under the contract of the defendant to fulfil the covenants to pay rent which he assumed to perform, as the condition on which he was allowed to become owner of the real estate out of which rent was reserved. The remarks of PAXSON, J., in Merriman *v.* Moore (7 WEEKLY NOTES, 425), are pertinent to the question in hand, and against the claim that a retroactive effect is to be given to the law of the 12th of June, 1878.

The demurrer is sustained.

Opinion by ALLISON, P. J.

[See Burton *v.* Association, *ante*, 439.]

C. P. No. 2. Sept. 16, 1879.

In re Samuel Davies.

Attorney-at-law—Misconduct towards client—Failure to pay over U. S. bond collected for client—Appropriation of bond to his own use as security for a loan to him—Cause for disbarment—That the client subsequently settled the matter on payment of the amount of the bond is no answer to a rule to strike off name from list of attorneys—Practice—Rule taken by Law Association of Philadelphia.

Rule, entered on behalf of the Law Association of Philadelphia, to show cause why Samuel Davies should not be stricken from the list of attorneys.

The facts as they appeared from the depositions were stated in the opinion of the Court as follows:—

In the month of March, 1878, Samuel Davies, a member of the bar, obtained a United States bond for one hundred dollars from the Guarantee Trust Company for Cornelia J. Curtiss, who had employed him professionally for that purpose. Instead of delivering it to her immediately, Davies pledged the bond as security for money loaned to him, and when Mrs. Curtiss and her son-in-in-law, John N. Spencer, called for the bond, they were put off with evasive answers. He did not state what he had done with the bond, but said on each occasion that it should be forthcoming at the next. A correspondence ensued with Spencer, in the course of which Davies made various promises that were not kept, and he then gave Mrs. Curtiss a written assurance on the first of April, that if he did not return the bond "on or before Saturday" he would pay her what it was worth. This note was followed, on the sixth of April, by another, in which he promised to call on Monday or Tuesday evening "without fail" and bring the bond. This promise having been broken like the rest, Mrs. Curtiss, on the eighteenth of April, before Magistrate List, made an affidavit in which she charged Davies with the embezzlement of the bond, and a warrant was issued for his arrest, which took place on the eleventh of May, when he was held to bail to appear at the ensuing term of the Court of Quarter Sessions. Mrs. Curtiss had in the mean time made a similar charge under oath before the Board of Censors of the Law Association, and Mr. E. Spencer Miller, at their instance, obtained a rule on Davies to show cause why his name should not be stricken from the list of attorneys. Before this rule was taken, but after the application to the Board of Censors and his arrest, Davies called on Mrs. Curtiss and induced her to agree to settle the case and discontinue proceedings against him in consideration of the payment of $100, and she subsequently at his request made oath to a statement that she was entirely satisfied with the settlement, that the rule was obtained without her knowledge, and that she would willingly have lent the bond to him if he had asked for it.

R. L. Ashhurst (*S. Dickson*, with him), for the rule.

W. H. Ruddiman, contra.

November 1, 1879. THE COURT (after stating the facts as above). Two grounds were

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principally relied on for the defence, one that the public had no further concern in a matter which had been settled between the attorney and client; the other that Mrs. Curtiss had authorized the respondent to pledge the bond. If the latter point were established by the evidence it would be a sufficient answer to the rule. But it is unfortunately at variance with all the testimony in the cause except that given by Davies in his own behalf. Mrs. Curtiss indeed says that when Davies asked her consent to a settlement she told him that she would have lent him the bond if he had requested it, but this was said reproachfully, and implied that he had not obtained her leave. Still we might have given the respondent the benefit of the doubt were it not inconceivable that he should have listened to the reproaches that were heaped on him for the detention of the instrument without mentioning a point so vital to his defence, and that he should have made no allusion to it in his correspondence with John N. Spencer and Mrs. Curtiss or at the hearing before Magistrate List. Nothing could have been easier or more conclusive than to have said that Mrs. Curtiss had lent him the bond; that he had used it in the only way it could be made available, and that she must wait until he could find means to satisfy his creditor and redeem the pledge. Such an answer might not have been altogether satisfactory as between attorney and client, but it would have been a refutation of the criminal charge which was hanging over him.

The remaining inquiry, Did the settlement with Mrs. Curtiss purge the offense? admits of but one reply. When the property of a client is misappropriated and she is compelled to set the civil and criminal law in motion as a means of redress, a wound is inflicted on the reputation of the bar that can only be healed by the removal of the guilty party from an office which he has shown himself unworthy to fill. The practice of the law requires that confidence should be reposed by the client, and sacredly accepted as a trust by the attorney; and the observance of this obligation is so essential to the dignity and usefulness of the profession that a Judge should not hesitate to enforce the duty or visit a breach of it with the appropriate penalty. The rule was taken, not by Mrs. Curtiss, but on behalf of a body whose task it is to vindicate the honor and maintain the purity of the bar. And we are not at liberty to withhold the judgment which they demand. We arrived at this conclusion with much regret some weeks since, and a careful reconsideration of the evidence has satisfied us that no other sentence can be pronounced consistently with the requirements of the law and the protection of the community at large.

The rule is made absolute, and the Prothonotary is directed to transmit a copy of it and of the judgment of this Court to the other Courts of Common Pleas, to the Orphans' Court, and to the Court of Quarter Sessions.

Rule absolute.

Opinion by HARE, P. J.

C. P. No. 2. Nov. 9, 1879.

Mann v. Mann.

Divorce—Attachment for alimony and counsel fee where the wife is respondent—Practice.

Rule for attachment.

Divorce, wherein the husband was libellant. The libel charged adultery. The respondent having taken a rule for alimony and counsel fees took this rule to enforce obedience thereto.

A. S. L. Shields, for the rule.

Edward R. Worrell, contra.

This rule is restricted to cases where the wife is libellant. In cases like the present the result of non-compliance with the order of the Court is to stay proceedings and with that the respondent should be satisfied.

[HARE, P. J. This would be very inadequate where the wife was charged with adultery. Indeed it is difficult to see why if a wife is entitled to this rule against a husband, respondent, her case is not all the stronger where she is unwillingly brought into Court.]

THE COURT. Rule absolute.

Orphans' Court.

June 17, 1879.

Peterson's Estate.

Decedent's estate—Power of sale—Whether mandatory or discretionary—Appraisers of realty under terms of will—Power of Orphans' Court to compel appointment—Jurisdiction—Not conferred by consent.

Sur petition for appointment of appraisers to determine share of real estate, and answer.

Under the decision of the Supreme Court, Carrie May Peterson, testator's granddaughter, and daughter of the petitioner, took a vested interest in the estate of her grandfather, John Peterson. (See Peterson's Estate, 7 WEEKLY NOTES, 300.) She died in November, 1877.

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John Howard Peterson, testator's son, and father of the aforesaid Carrie May Peterson, died intestate in 1875. The petition of his widow Caroline, who had subsequently intermarried with one Speakman, recited the following clause of John Peterson's will:—

"And in order to enable my said trustees to pay off and settle any of the shares and portions of my estate, which may, from time to time, become due and payable on the decease of any of my said children, it shall and may be lawful for them, my said trustees, to take any of the unappropriated funds of my said estate, or to sell any of my real estate for such purposes, and in order to arrive at the value of any such share at the time of the decease of any such child or children, it shall be lawful for the said trustees, or the survivors or survivor of them, with the child or children, if of full age, and the next friend or guardian of such as may be under age, mutually to choose a judicious and disinterested citizen, and these citizens, if an even number, to choose another; or, in case they cannot agree upon such persons, then to apply to the Judges of the Orphans' Court to appoint such discreet and judicious persons, who, upon being duly qualified, shall ascertain the value of such share or portion, . . . and upon such share being so ascertained, and a due record thereof made, or being confirmed by said Court, any of my said children shall be at liberty to take the same at such valuation, . . . and if none of them will accept thereof, the same shall be sold by my said trustees at public sale to the highest and best bidder, . . . and with such funds to pay and satisfy the person entitled to such share his or her portion thereof. And the like proceedings shall be had as often as it may be required to ascertain and pay off such share or shares."

The petition, after alleging a demand upon, and refusal by the executors to select appraisers, prayed for an appointment of them by the Court in accordance with the terms of the will, to determine the share of Carrie May Peterson in the testator's real estate, to which the petitioner was entitled, as tenant for life, under the intestate laws of this State.

Thomas H. Speakman, for the petition.

Frank P. Prichard and *N. H. Sharpless*, contra.

October 4, 1879. THE COURT (after quoting the above clause of testator's will) held as follows: If this clause stood by itself, it might be held to give a power of sale to the trustees only after a previous appraisement of the property, and a refusal by the heirs to take. Whether the words "it shall be lawful for the said trustees," imply a discretion reposed in the trustees, or a command addressed to them, might be the subject of argument, if those words only were to be considered; but, taken in connection with the concluding words, "and the like proceedings *shall be had* as often as it may be required to ascertain and pay off such shares," they become imperative in their character. The testator's intention, however, must be gathered from the will regarded as a whole. We find then that the next succeeding section lodges with the trustees unlimited discretion in the matter of sales of the decedent's estate, including the manner in which they may be made. The language is: "The better to enable my said trustees and executors to execute this my will, according to the meaning and intention thereof, I do authorize and empower them, from time to time, whenever, in their opinion, or in the opinion of the survivors or survivor of them, or of a majority of them, they shall deem it advisable or advantageous to my estate, or for the more easily making *partition and division thereof among the parties interested*, to sell the whole *or any part of such estate*, they may sell the same accordingly, either at public or private sale, upon such terms and conditions as they may think best." What then becomes of the preceding section? The answer is, that it was intended by the testator as his suggestion of a plan of valuation and sale for the guidance of his trustees, subject, however, to the unlimited discretion, which, by the same instrument, he immediately proceeded to give them. There is no necessary repugnance between the two clauses, and, even if it exists, the rule is that the later clause must stand.

If the foregoing construction is correct, it follows that this Court has no power to compel an exercise by the executors of the discretion which was reposed in them by the testator. It is not competent, in other words, for the Court to substitute its will for that of the testator. The Court is equally powerless to grant the other relief prayed for. The petition alleges a demand upon the executors, and a refusal by them, to appoint appraisers, and, following the terms of the will, it prays an appointment of suitable persons by the Court. The objection to this is obvious. The Orphans' Court is a Court of limited jurisdiction, owing its existence and powers entirely to statute. No Act of Assembly gives it the right to make the appointment in question, and consent, although given in express terms by the will of the testator, and concurred in by the parties claiming thereunder, will not confer a jurisdiction which is otherwise wanting.

In dismissing the petition, no possible injury is wrought to the rights of the petitioner. It appears by the record that the share of Carrie May Peterson in the personal estate of John Peterson has been judicially ascertained under an account in that estate which was filed by the executors and duly confirmed. Under the intestate laws this share is payable by the administrator of the daughter's estate to the mother. And, by pursuing her remedy through proceedings for a partition, the interest of the latter, which amounts to a life estate in the daughter's share of the realty, will be secured to her. (Reagan's Estate, 7 W. 438.)

The petition is dismissed.

Opinion by ASHMAN, J.

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U. S. Circuit Court—Admiralty.

Wm. M. M.

Lubker v. Schooner A. H. Quinby, her tackle, etc.

Salvage—Effect of tender and payment into Court in admiralty—Appeal from District to Circuit Court—Right to depends on the whole sum involved—On appeal, the whole case, including question of costs, comes up de novo—Awarding of costs in admiralty rests in sound discretion of Court.

Costs in admiralty are given or refused according to the sound discretion of the Court, which is to be exercised in accordance with settled practice, for the furtherance of justice, and with reference to the facts of the case.

Though the question of costs is perhaps not *per se* the proper subject of an appeal, yet it is reviewable when a case is properly in the Appellate Court.

On appeal in a case of salvage the whole case—as well the adjudication of the amount of salvage as incidentally the costs—is before the Appellate Court for review; and that tribunal is not bound by the decree of the Court below, but can decree more, or less, or nothing.

In cases of salvage, when a libellant has refused a tender, and subsequently recovers only the same amount as was tendered him, he is always chargeable with his own costs which have accrued since the tender was made; and generally with the owner's costs also, unless there are some special circumstances to modify the rule.

A tender in a respondent's answer of a certain sum as compensation for salvage services, and payment into Court in pursuance thereof, is in no sense an admission of the libellant's right to such sum; and if the tender be refused, and a decree subsequently made against the respondent for the same sum as was tendered, he still has the right of appeal, and the amount decreed against him is to be considered in deciding whether there is a sufficient sum involved to give the right of appeal.

Appeal by the owner and claimant from a decree of the United States District Court for the District of Delaware.

Libel for salvage. The facts of this case were as follows: On May 1, 1877, early in the morning, the libellant discovered the schooner respondent about a mile outside of the Delaware Breakwater, and about four miles from the Delaware shore, damaged by a collision with a bark; she had lost both her masts and stanchions, and rail on port side; her windlass was broken, much of her rigging overboard and fouled with the bark, and there were forty-five fathoms of her anchor-chain out, attached to her port anchor. The schooner was laden with lumber so that her deck was only about a foot from the water. The sea at the time was rough and the wind high, but it was not a gale. The libellant put off from Lewes in a surf-boat, accompanied by four men, and went to the schooner's relief. Arrived at the schooner, he and the captain executed a paper, by which it was agreed that, if the libellant brought the schooner safely to the shore, he should be paid "what the Board of Underwriters say is just and true," or, "if not particularly agreed on, the compensation shall be such as is just in the premises." The libellant then went to work, and in about three hours had the schooner safe behind the Breakwater; they afterwards brought her to Wilmington. The respondent declining to appear before the Board of Underwriters, and no other umpire being agreed upon, on May 16, 1877, libellant filed his libel against the schooner, her tackle, etc. On May 26, 1877, respondents tendered him the sum of $400 for compensation and $63 for costs incurred to date, which was refused. On June 1, 1877, respondents filed their answer, renewing the above offer, and paid the sum into the Registry of the District Court.

Upon the hearing, the Court (E. G. BRADFORD, J.) decreed the libellant the sum of $400 as ample compensation for services rendered, and, on the question of costs, decreed against the respondent, saying: "On the question of costs, on some reflection, I have decided that the respondent pay all the costs of this suit. It is true the libellant has not recovered more than the amount tendered, but he has recovered a claim originally refused, and if he pursued it in good faith under an honest impression that he was entitled to more, which appears to have been the case, I am not prepared to put him into his own costs because he did not get a larger sum awarded in a decree."

From this decree the claimant appealed to the Circuit Court.

The libellant moved to dismiss the appeal on the grounds that (1) costs in admiralty *per se* are not the subject of appeal. (2) It is not competent for claimant to appeal from a decree which, aside from costs, only embraces the sum of money tendered and paid into Court by respondent.

The Court (MCKENNAN, J.) denied the motion, saying: "Ordinarily the amount of the decree, in an admiralty suit, is determinate of the 'matter in dispute,' and of the consequent right of appeal by the party against whom it is rendered. In this case the decree was in favor of the libellant for the sum of $400; but the respondent's right of appeal is contested on the ground that she offered to pay that amount to the libellant as a compensation for the salvage service described in the libel, together with the accrued costs, and paid the said sum and costs into the registry of the Court. This was not, however, an unqualified admission of a sum due to the libellant, but a conditional offer to pay it 'in full settlement and compromise' of his claim,

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and 'upon a discontinuance of the suit.' By the libellant's refusal of this offer his whole claim was open to contention. He was not relieved from the burden of establishing the allegations of his libel by appropriate, independent proofs. Nor was the respondent precluded from showing the actual value of his services. All the proofs, on both sides, the Court must consider, and its decree must necessarily be taken as a judicial measure of the pecuniary merit of the libellant's services, determined by the import and weight of all the evidence in the case. Inasmuch as the case could only be adjudged according to its actual merits, unaffected by the rejected offer, the libellant's claim, whether more or less, was the 'matter in dispute,' and the amount at which this was fixed by the decree of Court determines the right of appeal.

"The motion to dismiss the appeal is denied."

[The argument on the motion to dismiss the appeal has been combined with the argument on the appeal.]

E. G. Bradford, Jr., for the libellant.

The amount of salvage awarded, resting largely in the discretion of the Court, will not on appeal be altered upon slight grounds, or for inconsiderable differences of opinion.

The Sybil, 4 Wheat. 98.
The Dos Hermanos, 10 Wheat. 306, 310.
Hobart *v.* Drogan, 10 Pet. 108, 119.
Tyson *et al. v.* Prior, 1 Gallison, 133, 135, 136.
The Schooner Emulous, 1 Sumner, 207, 214.
The Schooner Boston and Cargo, 1 Sumner, 328, 339.
Cushman *v.* Ryan, 1 Story, 91, 97.
The Narragansett, 1 Blatch. 211, 217.

Costs in admiralty rest in the discretion of the Court, and are not *per se* appealable.

Barnett *v.* Luther, 434, 436.
Shaw *v.* Thompson, Olcott, 144, 156.
The Ship Moslem, Olcott, 374, 378.
The Martha, Blatch. & Howl. 151, 169.
Canter *v.* The American and Ocean Ins. Co., 3 Pet. 307, 319.
United States *v.* Brig Malek Adhel, 2 How. 210, 237.

It being improper to reverse the decree, as to the amount awarded as salvage, it should be affirmed as to costs.

The tender and payment of the money into Court, while it might *influence*, could not *defeat*, the exercise of discretion as to costs; nor would the Court have the power, by allowing such payment into Court, to debar itself from the exercise of that discretion.

The doctrine of tender at law, has no application to claims for uncertain damages.

2 Saunders on Pl. and Ev. *834.

The doctrine of tender, in admiralty, as applied to salvage cases, is altogether different, and rests upon the ground of discouraging the prosecution of unconscionable demands of salvors, after an offer of manifestly ample compensation has been made by the claimant.

But where a salvor has acted in good faith, as in the present case, it should clearly appear that his demand is greater than could have been made by a man of ordinary intelligence, in the exercise of an honest opinion as to the merit of his services, before the Court should disallow his costs, upon the ground of his refusal to accept a sum less than that claimed by him.

This is particularly the case where, as in the present instance, the claimant has been guilty of unfair and oppressive conduct toward the salvor.

If, however, a claimant in a salvage case can, as to costs, claim the benefit of a tender according to its rigid effect at law, the libellant in the same case should derive whatever benefit would have accrued to him from that tender and the payment of money into Court, if made in a Court of law.

In that event, the $400, paid into Court, was not a matter in dispute, and the Circuit Court has no jurisdiction, for its jurisdiction only attaches when the amount in dispute exceeds $50, exclusive of costs.

Desty's Fed. Proced. 56.

The sum of the matter in dispute as to a respondent, depends upon the *disputed* amount of libellant's demand, so far as that disputed amount is embraced in the decree of the District Court.

Shirley *v.* Titus, 1 Sumner, 447.
Olney *v.* S. S. Falcon, 17 Howard, 19.
2 Abbott's U. S. Practice, 234, 235.

The amount in dispute here, so far as the claimant is concerned, did not exceed $50, exclusive of costs, because the $400 was admitted by the answer to be a just compensation, and the payment of it into Court was a conclusive admission of record to that effect, and was equivalent to a payment *pro tanto*.

Hubbard *v.* Knous *et al.*, 7 Cush. 556.
Spalding *v.* Vandercook, 2 Wend. 431.
Johnston *v.* Columbian Ins. Co., 7 Johns. 315.
Murray *v.* Bethune, 1 Wend. 191.
Malcolm *et al. v.* Fullarton, 2 Durn & East, *645.
Vaughan *v.* Barnes, 2 Bos. & Pull. 392.
1 Tidd's Practice, *622, 624, 626.

The only matter, then, in dispute, was the libellant's demand over and above that sum, and as to this the decree was in claimant's favor.

Rumford, for respondent.

On an appeal the whole case, including the question of costs, comes before the appellate court *de novo*.

The fact that a tender was made to prevent further litigation, *which was rejected*, and the offer renewed in the answer, and the amount tendered paid into the registry of the Court, in no way limits or controls the sound discretion of the Court in awarding salvage compensation; such payment is merely a part of the formal requisites of a tender in admiralty. If, from the facts of the case, the Court, in the exercise of its sound discretion, should determine that the libellant was not entitled to so large a sum as had been tendered, a less sum would be decreed.

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The Jonge Bastiaan, 5 C. Rob. 287.
The General Palmer, 2 Hagg. 180.
The Frederick, 1 Hagg. 211.
Abbott on Shipping, 573, margin.
2 Conkling's Admiralty, 443.
2 Pars. Mar. Law, 732.

The rule appears to be that if a party does not accept what is tendered to prevent litigation, but proceeds with the suit, and recovers no more than the sum tendered, such party shall be liable for his own costs, and if it appear that the proceedings have been vexatiously pursued, he shall also be liable for the costs of the other party.

Abbott on Shipping, 573, marg., sec. 7.
2 Conkling's Admiralty, 441–443.
2 Pars. Maritime Law, 732–733.
The Paris, 1 Spink's Adm., 289, 291.
The Clifton, 3 Hagg. 118.
The Eleanora Charlotta, 1 Id. 156.
John and Thomas Baxter, Id. 157, note 1.
The Frederick, Id. 211.
The Black Boy, 3 Id. 386, note 3.
The Emu, 1 Wm. Rob. 16.
The Edward Howard, 1 Newb. Adm. 522.
The Batavier, 1 Spink's Adm. 169.
Shaw *v.* Thompson, Olcott's Repts. 156.
H. B. Foster, 1 Abbott's Repts. 222.

A tender to prevent litigation is no admssion of the justice of the demand, but merely an offer to escape the inconvenience of litigation.

The Frederick, 1 Hagg. 218.

THE COURT (STRONG, J.). This is an appeal by the owner and claimant of the schooner A. H. Quinby from a decree of the District Court, awarding to the libellant the sum of four hundred dollars as salvage. After a careful review of the evidence, I am of opinion that while the sum awarded is "ample compensation" for the salvage services rendered, and for the expenditures made by the salvors, it is not excessive. It is true the services rendered were of the lowest grade; the risk incurred, and the skill and appliances required, not great; and the time devoted to the services very short; but there was considerable expenditure in bringing the schooner to Wilmington, and the salvage allowed bears no undue proportion to the value of the property saved. I shall, therefore, affirm the decree of the District Court, so far as it awarded four hundred dollars to the libellant. But I cannot concur with that Court in condemning the respondent to pay all the costs of the suit. Costs in admiralty are undoubtedly given or refused at the discretion of the Court; but that discretion is to be exercised in accordance with settled practice, for the furtherance of justice, and with reference to the facts of the case. Here the libel was filed on the 16th of May, 1877, about two weeks after the salvage services were rendered. Ten days thereafter, May 26, the claimant, the owner of this schooner, tendered to the libellant the sum of four hundred dollars, as compensation for the services rendered, and also sixty-three dollars, the full amount of costs incurred to that day. The tender was refused. On the 1st of June, 1877, the respondent filed her answer, in which she renewed the offer of four hundred and sixty-three dollars, and concurrently she paid that sum into the registry of the Court. The sufficiency of the tender is not controverted, and it is therefore to be considered what its effect is. I think, as the libellant recovers no more than four hundred dollars, no more than he might have had on the 26th day of May, 1877, he is justly chargeable with the costs that have accrued since that date, because they have been needlessly made by him. Such, I understand, to be the general rule in salvage cases in courts of admiralty. It is certainly the English rule, and, so far as the decided cases show, it is the rule in this country. It is sufficient to refer to a few decisions, most of which were called to my attention during the argument. Thus in the case of The Vrow Margaretha (4 Rob. Ad. 103), Sir WILLIAM SCOTT said: "If a tender be pronounced sufficient, the Court will make the party who refuses such an offer liable not only to his own costs, but also to those of the other party, if it shall appear that proceedings have been vexatiously pursued." (See also The John and Thomas, 1 Hagg. 157, note; Do. 156.) In The Emu (1 W. Rob. 15), when the tender was held sufficient, no costs were given (against the salvors), but the Court said that in future cases, where a tender was pronounced for, costs would always be given. In The Batavier (1 Spinks, 169), a tender was held sufficient, and costs were adjudged against the salvors. (The Albion, 2 Hagg. 180; The Clifton, 3 Hagg. 124.)

It is true, the rule is not an unbending one; it may yield to circumstances in the particular case. It is, almost without exception, ruled that when the tender is held sufficient, the salvor is not entitled to subsequent costs. But whether he must pay the costs of an owner incurred after the refusal of a sufficient tender is not so well settled. In the case of The Queen (1 Spinks, referred to 1 Spinks, 175), Dr. LUSHINGTON said: "The rule I have endeavored to follow is, not to bind myself in all salvage cases to give costs *against* salvors, unless I think the tender was so large that the salvors, in the exercise of a sound discretion, could not do otherwise than accept it. Here the tender is sufficient, but it is not so much as to lead me to blame the salvors for not accepting it. I therefore pronounce for the tender, but without costs." But in a subsequent case (The Paris, 1 Spinks, 289), he said: "I consider it my duty to pronounce for the tender, and, I am sorry to say, to condemn the parties in the costs. That is a measure which I am reluctant to pursue, though, according to the practice in other Courts, when the tender is considered sufficient, they uniformly follow that course."

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Such, then, is the general rule. I do not question that there may exist in some cases sufficient reason for departing from the rule. There may exist a reasonable doubt respecting the sufficiency of the tender, or the conduct of the owners may have been such as to justify imposition of the costs, or a part of the costs, upon them. Public policy requires that favor should be shown to the salvors when they have acted in good faith, without any disposition to oppress unfortunate owners. But I find no such reasons existing in the present case. The ingenious argument made on behalf of the libellant urges that the owner exhibited bad faith in not appearing before the Philadelphia Board of Underwriters, to submit to that Board the question what sum was due to the libellant. To this I cannot assent. It is in evidence that when the libellant came on board the schooner, and before he began his salvage services, he obtained from the master of the schooner a contract that he should receive for his salvage services such sum of money as the Board of Underwriters of and in the city of Philadelphia should, within a reasonable time, award to him as being justly due for his salvage services—*or if the amount of said compensation should not be otherwise determined*, that he should receive such compensation as should be just in the premises. It is proved that the owner did not appear before the Board when notified by the libellant to appear; and this is charged as bad faith and a breach of the contract made by the master of the schooner. But the contract, admitting it to have been fairly obtained and binding, did not obligate the owner to submit the determination of the amount due to the arbitrament of the Board of Underwriters. It was in the alternative. She was at liberty to submit the assessment to the Board *or* to tender or submit to such compensation as was just. She chose the latter, as she had the right to do. She made a sufficient tender within what appears to me to have been a reasonable time. There was, then, no breach of faith or of the contract on her part. On the contrary, I think the conduct of the libellant was harsh and oppressive. He never exhibited the contract to the owner or her agent until after the schooner was seized, and after the tender was made. He insisted upon a determination by the Board of Underwriters, practically refusing to the owner her alternative right. He filed his libel before a reasonable time had elapsed, as I think, for a settlement of the amount due, and when the tender was made on the 26th day of May, 1877, after no unreasonable delay, he refused to accept it, saying, "he would lose $100 more before he would take that." The impression made upon my mind by all this is, that the conduct of the libellant was oppressive and arbitrary, dictated more by the consciousness that he had an advantage than by a desire to secure a just and reasonable settlement. Certainly there is nothing in all these facts which can justify a departure from the general rule respecting the imposition of costs. I feel constrained, therefore, to order that the libellant shall pay all the costs that have accrued since May 26, 1877, when the tender was made. While salvors are to be treated with favor, they are not to be encouraged in oppressing unfortunate owners.

It was urged in argument that the decision of the District Court upon the subject of costs is not reviewable on appeal. I think otherwise. It is true it has been said the matter of costs is not, *per se*, the proper subject of an appeal, and that it can be taken notice of only incidentally, as connected with the principal decree, when the correctness of the latter is directly before the Court. (The Malek Adhel, 2 How. 210, 237.) But here there is a general appeal of the whole case, including the ascertainment and determination of the amount due the libellant, and it has been contended that the sum awarded by the District Court was excessive. The entire case is before me, as well the adjudication of the amount of salvage, as incidentally the costs. I am not bound by the amount of an unaccepted tender. I can decree either more or less, or nothing. What is in controversy now is, the amount of salvage. Costs are only an incident, though it unfortunately happens in this case, that the incident is greater than the principal, in consequence, as I think, of the unjustifiable course of the libellant.

I notice another position taken by the proctor of the salvor. It is, that inasmuch as the respondent tendered $400, the amount in controversy in this appeal does not exceed fifty dollars, and therefore that the Circuit Court has no jurisdiction. This position cannot be maintained. The appeal brings the whole case before me. The appellant contends against the entire claim of the libellant. It is true, she tendered four hundred dollars, but the tender, not having been accepted, and the libellant having chosen to keep the case open, she is not bound by the amount of her tender. I am at liberty to award a less sum, if, in my judgment, a less sum would be sufficient compensation. If a tender be made in admiralty, the Court will afterwards, for good cause, reduce the amount, and decree a less sum to the libellant. (The Gen. Palmer, 2 Hagg. Adm. 176.)

I do not deem it necessary to say more. From what I have said my conclusions will be manifest. I shall decree against the respondent the sum of four hundred dollars, together with sixty-three dollars costs, the amount awarded by the District Court; and I shall direct that the costs of this appeal, and all costs made since May 26, 1877, be paid by the libellant.

Let a decree be prepared accordingly.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, DEC. 4, 1879.* [No. 32.

Supreme Court.

May, '79, 103. May 13, 1879.

Cornman's Appeal.

Attachment under the Act of March 17, 1869—Judgment—Execution—Exemption, when to be claimed—Practice—Analogy to foreign attachment.

Where a suit has been begun by attachment under the Act of March 17, 1869, judgment been obtained, and a venditioni exponas issued, the defendant is in time in claiming the benefit of the exemption law of April 4, 1849, if he present his claim after the issuing of the venditioni exponas, and before the advertisement of the sheriff's sale of the property attached.

Appeal from the Common Pleas of Cumberland County.

Debt, by R. Bruce Petrikin and J. S. Miller, against Joseph S. Cornman, to recover the amount of a note indorsed by plaintiffs for accommodation of defendant, which, defendant failing, plaintiffs had been obliged to pay.

The action was begun on August 2, 1875, under the provisions of the Act of March 17, 1869 (Purd. Dig. 53, pl. 71; P. L. 8), by the attachment of defendant's household furniture, etc. On August 9, 1875, defendant filed a motion to dissolve the attachment, supported by affidavit. At the hearing it was, however, agreed that the attachment should continue. A narr. in debt was filed, and defendant pleaded, and on October 15, 1877, judgment was entered for the plaintiffs by agreement, with proviso that "the judgment and record shall not be used as evidence by the plaintiffs in any pending litigation, for the purpose of sustaining any allegation of fraud on the part of defendant, either in the contracting of the debt or in connection with any other matter or thing whatever."

On October 30, 1877, a venditioni exponas issued, without a previous issue of a fieri facias. On petition of defendant, and rule granted, this writ was stayed temporarily until January 14, 1878, when the Court filed a brief opinion, deciding "that the writ of venditioni exponas is the proper writ of execution in a case like this, and, therefore, rule refused." On January 18, 1878, an alias venditioni exponas issued.

At defendant's request, and before advertisement of sale, the sheriff appraised and set aside the whole of the property attached for the benefit of the defendant, the value thereof amounting to $257.65. Thereupon the plaintiffs moved to set aside the appraisement. On January 27, 1879, the appraisement was set aside, the Court being of opinion that the claim for exemption should have been made before judgment was recovered, and before the cause was put at issue.

From this order the plaintiff took this appeal.

W. F. Sadler and *John Cornman* (with them *W. Trickett*), for appellant.

The Act of March 17, 1869 (P. L. 81), expressly provides "that nothing therein contained shall interfere with the rights of exemption of property under the existing laws of the Commonwealth." The Act of April 4, 1849 (P. L. 533)—the exemption law of this State—contemplated the request for exemption being made by defendant to the sheriff, after the issuing of the writ of execution.

Attachment under the Act of 1869 is merely a preliminary process for detention; it is not a process of execution, as in the case of attachment execution; but, after service, the action proceeds in the same manner as if commenced by summons.

Magee *v.* Beirno, 3 Wright, 62.
Albany City Ins. Co. *v.* Whitney, 20 Sm. 252.
Gould *v.* Walker, 2 WEEKLY NOTES, 81.
Waugh *v.* Burket, 3 Grant, 319.

Strouse's Exr. *v.* Becker (2 Wright, 193; Same *v.* Same, 8 Wright, 207) is not in point, because it refers to attachment as a final process only. Defendant was not, therefore, bound to apply for the exemption as soon as the attachment issued.

Waugh *v.* Burket, *supra.*
Hilbronner *v.* Sternberger, 4 WEEKLY NOTES, 186.

There is no authority for issuing a vend. ex. without previously issuing a fi. fa.

S. Hepburn, Jr. (with him *S. Hepburn*), for appellees.

The defendant must make prompt claim for exemption if he wants the benefit of the law allowing it. The defendant in this case presented his claim too late. The appraisement was, therefore, properly set aside.

Strouse *v.* Becker, 8 Wright, 208.
Diehl *v.* Holben, 3 Wright, 213.
Commonwealth *v.* Boyd, 6 Sm. 402.

June 16, 1879. THE COURT. The only question in this case is, whether the appellant was too late in claiming the benefit of the exemption law. Suit was commenced against him by attachment under the Act of March 17, 1869, and after the Court had refused to dissolve the attachment, judgment was entered by consent in favor of plaintiffs, coupled with an agreement that the record should "not be used as evidence

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by the plaintiffs in any pending litigation, for the purpose of sustaining any allegation of fraud on the part of the defendant, either in the contracting of the debt or in connection with any other matter or thing whatever." A vend. ex. which was subsequently issued for the sale of the goods attached, was stayed by order of Court at the instance of the defendant, and an *alias* issued to the next term about two months prior to the return day; and, so far as appears by the record, before sale was advertised, the sheriff was duly notified by the defendant of his claim under the exemption law. The goods, amounting to $257.65, were appraised and set apart to him, and the writ returned accordingly. The plaintiffs thereupon moved the Court to set aside the appraisement, on the ground that the demand was not made in time. The motion was allowed, and the learned Judge, in his opinion, ordering the appraisement to be set aside, says the claim should have been made before the cause was put at issue; that it came too late after judgment. This action of the Court has been assigned for error.

The Exemption Act provides that the officer charged with the execution of any warrant for levying and selling the property, real or personal, of any debtor, shall, if requested by him, cause to be appraised the property which he may elect to retain; "and property thus chosen and appraised, to the value of $300, shall be exempt from levy and sale on the said execution." It will be observed that the request must be addressed to the officer charged with the execution for levying upon and selling the property. It is against final or execution process that the claim is to be made, and not against original or mesne process, by which property may sometimes be seized or attached and held to answer the plaintiff's demand. The exemption is declared to be "from levy and sale on execution issued on any judgment," etc. Hence the claim need not be made until after judgment has been obtained and execution issued. While attachment in execution is strictly a final or execution process so far as the debtor is concerned, other forms of attachment are not. In foreign attachment the first step is the seizure of the non-resident defendant's property, which, if personal and not perishable, may be held until the claim of the plaintiff is adjudicated; and if he is successful, final process may then issue to sell the same in satisfaction of the judgment. In its inception and before judgment, foreign attachment is a species of mesne process. It is equivalent to a summons for the commencement of a personal action.

The proceeding under the Act of 1869 is ot the same general nature. When the necessary ground has been laid, the defendant's property is attached, and may be held to await adjudication of plaintiff's claim. If he obtains judgment, execution may issue against the property attached. Then, and not before, does the right of the defendant to have the property appraised and set apart to him arise. While he might perhaps, in anticipation of the execution, make the claim before it is issued, it is only by virtue of his having in his hands the execution to levy and sell, that the officer is required to have the property appraised and set apart under the Act. There can be no doubt that the defendant below was not required to give notice of his claim before the execution was issued. Did he give it within a reasonable time thereafter? We think he did. In furtherance of the humane and beneficent object of the Act, the exemption which it authorizes should always be allowed when it can be done without prejudice to the rights of creditors. In Diehl *v.* Holben (3 Wright, 213), it is held, that in the case of a fi. fa. levied on personal property, the demand must be made before the day of sale, and generally before it is advertised, unless delay is justified by absence from home, ignorance of the levy, or other circumstances. When a defendant has waived inquisition on real estate, his right to the benefit of the Act still remains, as in ordinary proceedings, to effect a sale, and his demand may be made at any time before the property is advertised. (Commonwealth *v.* Boyd, 6 P. F. S. 402.) So also in the case of an attachment execution, which is a form of final process, the claim must be made in a reasonable time after service of the attachment on the garnishee. (Strouse's Executors *v.* Becker, 8 Wright, 206.) These and other cases that might be cited, show that while some consideration is due to the creditors as well as the debtor, the claim of exemption is not too late unless it has been unnecessarily delayed until costs have been increased which otherwise might have been readily avoided. In the present case, owing to some doubt as to the validity of the first execution, it was stayed by order of Court before any action was taken under it.

After the *alias* was issued, and before any expense was incurred by advertising the sale or otherwise, the claim was made and duly recognized by the sheriff. This, according to all our cases, was in ample time. It follows, therefore, there was error in setting aside the appraisement returned by the sheriff.

The order of Court setting aside the appraisement is reversed, and the appraisement is confirmed.

Opinion by STERRETT, J.

[*Cf.* Ashworth *v.* Addy, *ante*, 342.]

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May, '79, 189. May 20, 1879.

Earley's Appeal.

Judgments—Powers and discretion of Courts in opening judgments—Act of April 4, 1877 (P. L. 53).

The exercise of jurisdiction upon rules to open judgments entered on warrants of attorney, has always been held to be within the sound discretion of the Courts. The Act of April 4th, 1877 (P. L. 53), providing for an appeal to the Supreme Court in such cases, has not changed the law in this respect.

In such cases the Court may judge of the weight of the evidence and the credibility of witnesses, and need not in every case where there is a conflict of testimony, send the case to a jury.

Appeal of John Earley from the decree of the Court of Common Pleas of Dauphin County, refusing to open a judgment entered upon a judgment note for $472.18, given by Earley to one John Zaring.

Defendant obtained a rule to show cause why the judgment should not be opened, on the ground that the judgment-note in suit had been given by him in renewal of three other notes, all supposed at the time of such renewal to be signed by him, but one of which, he alleged, subsequently proved to be a forgery. Depositions were taken, and, upon hearing, the Court (PEARSON, P. J.) was of opinion, from the evidence, that all the notes for which the judgment-note had been given in renewal were good and valid, and therefore discharged the rule.

The defendant took this appeal, under the provisions of the Act of April 4, 1877 (P. L. 53), assigning for error that the Court undertook to determine the facts in dispute; that their conclusion upon these facts was wrong, and that the Court erred in not opening the judgment.

Fleming and *McCarrell*, for appellant.

There was evidence that one of the notes was a forgery. Such evidence tended to show failure of consideration, and not to contradict or vary the instrument, and was admissible.

Anspach *v.* Bast, 2 Sm. 358.

The task of weighing the testimony and passing upon the credit of the witnesses should have been submitted to a jury.

Massey *v.* Buck, 1 Phila. 215.

Kellogg *v.* Krauser, 14 S. & R. 143.

W. C. Detweiler and *A. G. Herr*, contra.

The only evidence of forgery is contained in defendant's affidavit. The Court will not set aside a judgment on such evidence, if contradicted by the plaintiff under oath.

Koch *v.* Rice, 2 Luz. L. Reg. 24.

The questions of fact were properly decided by the Court; it was not necessary to send an issue to a jury.

June 2, 1879. THE COURT. The exercise of jurisdiction upon rules to open judgments entered on warrants of attorney, has always been held to be within the sound discretion of the Courts. The Act of April 4, 1877 (Pamphlet L. 53) which provides for an appeal to this Court, has not changed the law in that respect. It provides only that the decision "shall be reviewed by appeal in like manner and proceedings as equity cases are now appealed." It is a mistake to suppose that the Court cannot judge of the weight of the evidence and the credibility of witnesses, but must, in every case where there is a conflict of testimony, send the case to a jury. In equity cases these questions may be determined by the Chancellor, and, on appeal, his decision is reviewed. We are to determine in all such appeals whether the discretion of the Court below has been rightly exercised. We think the decision on the rule in this case is fully sustained by the opinion of the learned President.

Order affirmed. Appeal dismissed at the cost of the appellant, and record remitted.

PER CURIAM. PAXSON, STERRETT, and WOODWARD, JJ., absent.

[See next case.]

May, '79, 72. May 20, 1879.

Hockernell v. Flickinger.

Judgment—Discretion of Courts in opening judgments—Appeal under Act of April 4, 1877 (P. L. 53)—Principal and surety—Evidence.

In cases of applications to open judgments entered upon warrants of attorney, the Courts have a right to exercise their sound discretion. The Act of April 4, 1877 (P. L. 53), was not intended to alter this right, but merely to afford a means for reviewing this discretion.

Where there is no absolute evidence as to a state of facts constituting the condition upon which a bond is executed, the rights of the legal holder ought not to be affected by the parol evidence of loose conversations.

Where a surety in a judgment bond desires that the same may be entered up in order to constitute a lien on the real estate of the principal, he should give notice in writing to the obligee under the provisions of the Act of May 14, 1874 (P. L. 157).

Appeal from the Common Pleas of Lebanon County.

This was an application by David Hockernell to open a judgment entered November 27, 1875, upon a judgment bond given by John Hockernell to John Flickinger in which petitioner was a surety.

The following facts appeared from the depositions taken under the rule to show cause why the judgment should not be opened: In the

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spring of 1875 John Hockernell was indebted in the sum of $1855 on two bonds to John Flickinger, upon one of which bonds David Hockernell was surety. On April 1, 1875, it was agreed between the parties that these two bonds should be replaced by a judgment bond for the full amount to be given by John Hockernell to John Flickinger. Said bond was accordingly executed, David Hockernell becoming the surety thereon.

There was some testimony on the part of the defendant to the effect that Flickinger agreed, before the execution of this bond, to enter it up at once, so that it might take effect as a lien upon the real estate of John Hockernell, then amply sufficient to pay the debt. On the part of the plaintiff it was, on the contrary, testified that, though asked subsequently to the execution of the bond by David to enter it up, he had never agreed to do so. In June, 1875, John Hockernell became insolvent. The judgment bond was entered up November 27, 1875, whereupon the present application was made to open the judgment on the ground that defendant was injured by plaintiff's negligence in not entering up the bond.

The defendant contended in the Court below, that, if the said David Hockernell, the petitioner to open said judgment, has made out a *prima facie* case, he is entitled to have said judgment opened, and to have the same tried by jury; and that the testimony taken by Flickinger was irrelevant, and could not be read in the cause.

The Court declined to affirm this proposition, but were of opinion upon the evidence that there was no such contract for the entering up of the bond as the defendant sought to set up as a defence to its payment. The rule was, therefore, discharged. The defendant appealed under the provisions of the Act of April 4, 1877 (P. L. 53), assigning for error the action of the Court below in refusing to open the judgment, and discharging the rule.

Grant Weidman and *C. P. Miller*, for appellant.

If the defendant below made out a *prima facie* case, he was entitled to have the judgment opened, and an issue sent to a jury. The Court below exceeded its authority in determining which set of witnesses were to be believed, and on which side the weight of the evidence was found.

Devereux *v.* Roper, 1 Troubat and Haly, part ii. p. 662, n. 4. (5th ed. vol. 1, p. 459, n. 1).

The right of trial by jury is a constitutional right, and the only recognized way of determining disputed facts.

Trimble's Appeal, 6 W. 133.
Brown *v.* Parkinson, 6 Sm. 341.
Kellogg *v.* Krauser, 14 S. & R. 137.

Whenever a party who commits the fraud, and has acquired a benefit from it, seeks to avail himself of the act, the Court will interfere to prevent it.

Cochran *v.* Eldridge, 13 Wr. 365.
Simms *v.* Slacum, 3 Cranch, 307.

Whenever, from the evidence, there appears to be a material fact in dispute, it is not the province of the Court to decide the controversy; but it then becomes the duty of the Court to make such order as will secure the hearing of the contention before a jury, if the right to be so heard is invoked by either party.

Overholt's Appeal, 2 Jones, 224.
Dickenson and Haven's Appeal, 7 B. 258.
Ekel *v.* Snevily, 3 W. & S. 272.
Massey *v.* Buck, 1 Phila. 215.

The agreement to enter the judgment upon record was a substantial and material part of the consideration.

Harlan *v.* Harlan, 8 H. 307.
Ayers's Appeal, 4 C. 179.

The Courts permit a party to show a verbal promise, not included in the terms of the written contract, made by one of the parties, at or before the making of the instrument, if such promise was used or was the inducement to obtain the writing.

Powelton Coal Co. v. McShain, 25 Sm. 245.
Barclay *v.* Wainwright, 5 WEEKLY NOTES, 163.
Lippincott *v.* Whitman, 3 Id. 313.
Shughart *v.* Moore, 28 Sm. 469.
Graver *v.* Scott, 30 Sm. 88.
Caley *v.* Phila. and Chester R. R., 30 Sm. 364.
Act of 4 April, 1877, P. L. 53.

J. P. S. Gobin, for appellee.

The proceeding to open this judgment was an application for the exercise of the equity power of the Court. There is no equity in the application. The appellant relied upon a purely technical defence.

When a rule to show cause, applied for upon proper grounds shown, is granted, the adverse party, with his depositions, will be fully heard.

Snyder *v.* Castor, 4 Yeates, 443.

In proceedings relating to opening or refusing to open a judgment, parol evidence is heard, and the questions of fact are to be determined by the Court below.

Bunce *et al.* *v.* Wightman, 5 C. 336.
Ordroneaux *v.* Prady, 6 S. & R. 512.
Kalbach *v.* Fisher, 1 Rawle, 323.
Knox *v.* Flack, 10 H. 337.
Jones *v.* Dilworth, 13 Sm. 447.

Any question *dehors* the record must depend upon the finding of the facts by the Court below.

Righter *v.* Rittenhouse, 3 Rawle, 273.
Gordonier *v.* Billings, 27 Sm. 502.
Meyer *v.* Germantown R. R. Co., 3 W. & S. 92.
Massey *v.* Buck, 1 Phila. 215.
Brightly's Equity, 490–529.

Judgments, under the practice in Pennsylvania, will only be opened on sufficient grounds and proof of merits.

Lawrence Executors *v.* Rutherford, 1 Pearson, 558.
Troubat and Haly, vol. i. p. 651.
Bailey *v.* Clayton, 8 H. 297.

The exercise of the power asked for by the

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appellant, of the Court below, was that entirely belonging to the discretion of the Court.

Connelly *v.* City of Phil., 5 Norris, 112.

This Court will not review the conclusions of the Court below as to the weight of evidence, but merely to ascertain the ground of their action, if at all.

Jackson *v.* Morter, 1 Norris, 295.
Connelly *v.* City of Phila., 5 Norris, 112.

In strict practice the evidence is not brought up, or if it is, only that the appellate Court may judge of its competency.

Hutchinson *v.* Ledlie, 12 C. 112.

June 2, 1879. THE COURT. It is unnecessary to repeat what has been said in Earley's Appeal, just decided [reported above], that on rules to open judgments entered on warrants of attorney, the Courts still have the right to exercise their discretion upon the depositions. The appeal was given by the Act of 1877 in order that the exercise of that discretion should be reviewed in this Court. Before that Act there was no appeal, and the decision of the lower Court was final. The allegation of the appellant here was that at the time the bond and warrant was executed the obligee promised to enter it up so as to be a lien on the real estate of John Hockernell. There was some evidence of this. We think, however, upon a careful examination of the whole testimony, it did not appear to have been made the condition upon which the bond was executed. Without this is shown the legal rights of the holder of the bond ought not to be affected by the parol evidence of loose conversations. Had the surety in this case desired that the bond should be entered up, a notice to do so would have been sufficient. The Legislature recognizing the danger of parol evidence in such cases has provided by the Act of May 14, 1874, that such notice shall be in writing.

Order affirmed. Appeal dismissed at the costs of the appellant, and record remitted.

PER CURIAM. PAXSON and WOODWARD, JJ., absent.

[See preceding case.]

March 6, 1879.

Grim's Appeal.

Will, construction of—Devises and demonstrative legacies—Abatement of—Intention of testator—When intent uncertain, general rules of inheritance adhered to.

A. devised land to one of his six children, "he to pay for it $5500," the latter sum to be equally divided among his other children; making no distribution of his personal estate, and no provision for the payment of his debts. On deficiency of the personal estate to pay the debts:

Held, that the devise and the legacies must abate *pro rata*.

There were six children, and the auditor found that the land was worth $6600:

Held, to be evidence of an intention to equalize the children.

Held, further, that the fact that the devisee was first taker under the will, was evidence of his being the favorite.

Per MERCUR, J. Where the meaning of a devise is uncertain, the law will adhere as closely as possible to the general rules of inheritance; and whoever claims against the laws of descent must show a satisfactory written title.

Appeal from the Orphans' Court of Lehigh County.

Appeal by M. Grim from a decree confirming the report of an auditor appointed to audit and re-settle the account of the administrators of A. Grim.

The petition of M. Grim set forth that A. Grim died March 22, 1874, leaving a widow and six children (of whom the petitioner is one), and a will, and codicil thereto, the material portions of which were as follows:—

"Item 2. To my son James, now residing on my farm, I give and bequeath the whole of my farms and lands, with the following restrictions: he is to pay for said farm six thousand dollars [altered by the codicil to $5500], one thousand to remain as above said as a dower, the interest to be paid annually to my widow, the rest to be equally divided among the rest of my children, and the one thousand dollars which are to remain as dower in my farm, shall also equally be divided among my children after the death of my widow, or when she shall in any other way forfeit the above made provisions."

That the testator had made no provision for the payment of his debts, nor any distribution of his personal estate. The petition further averred that James had accepted the devise, and taken possession of the real estate; and that, though more than a year had elapsed since testator's death, the $5500, one-fifth of which was bequeathed to the petitioner, remained unpaid; and prayed for such a decree as might be just, etc.

An answer was filed, and the account referred to an auditor, before whom it appeared that the testator's personal estate had been insufficient to pay his debts; and who, in his amended report, found that the value of the farm was $6600, and held that the devise and the legacies must abate *pro rata* for the payment of the debts. There were also certain individual accounts between M. Grim and J. Grim, which the auditor took into account in settling what sum should be paid over to the petitioner.

Exceptions were filed by M. Grim, but were dismissed, and the report confirmed; whereupon M. Grim took this appeal, assigning for error the decree that the devise and legacies abate *pro rata*, and the considering in this proceeding of the individual accounts between himself and the appellee.

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Butz and *Schwartz*, for appellant.

The Court below assumed an intention on the testator's part to equalize all his children; no such intention appears in the will, and, when it does not, devises and legacies do not abate *pro rata*.

Hallowell's Estate, 11 H. 223.
Loomis' Appeal, 10 Barr, 387.

The devisee takes the land *cum onere*.

Hoover *v.* Hoover, 5 Barr, 351.

Evan Holben, for appellee, presented no paper-book, but cited—

Knecht's Appeal, 21 Sm. 333.
Hallowell's Estate, 11 H. 223.

May 7, 1879. THE COURT. This contention is between a devisee and a legatee under the will of Abraham Grim, of whom they are sons and heirs. The testator devised to the appellee the whole of his real estate, charged with the payment of $5500, the interest on $1000 thereof to be paid to his widow while she continued such, and the residue to be equally divided among his other five children, of whom the appellant is one. It is found as a fact that the real estate was of the value of $6600. Such being the case it indicates that the testator intended an equal distribution of his estate among all his children. The intention is further evinced by the fact that the appellee is the first taker under the will, and is, therefore, presumed to be the favorite of the testator. (McFarland's Appeal, 1 Wright, 300; Wilson *v.* McKeehan, 3 P. F. Smith, 79.) Still further, where the meaning of a devise is uncertain, the law will adhere as closely as possible to the general rules of inheritance, and whoever claims against the laws of descent must show a satisfactory written title. (Lipman's Appeal, 6 Casey, 180; Amelia Smith's Appeal, 11 Harris, 9; France's Appeal, 25 P. F. Smith, 220.) There is no reason to infer that the testator intended to give the appellee less than he gave to each of his other children. He made no disposition of his personal estate, and it was found insufficient to pay his debts. The main question therefore is, whether the legacies shall abate *pro rata* to pay the residue of the debts of the testator? The Court below held they should, and decreed accordingly. This is assigned for error.

It may be conceded, under the English authorities, that demonstrative legacies or specific bequests of personalty, payable out of a particular fund, set apart for that purpose, will abate only as against each other, in case of a deficiency of assets for the payment of simple contract debts; and also that some of the earlier decisions of this Court appear to have assumed that to be the correct rule. In later cases, however, this Court has given a reason for modifying the rule which prevails in England, resting, in my opinion, on substantial ground. There lands are not, as here, regarded as general assets for the payment of debts. Hence it was reasonably inferred that an intention existed there, as against simple contract debts, to prefer specific devises over specific legacies. In this State, however, lands have always been assets for the payment of debts, whether by simple contract or otherwise. Hence now specific or demonstrative legacies shall not alone be liable to abate; but on a deficiency of personal assets to pay debts, devises are equally liable to abate. (Loomis' Appeal, 10 Barr, 387; Teas's Appeal, 11 Harris, 223; Armstrong's Appeal, 13 P. F. Smith, 312; Knecht's Appeal, 21 Id. 333; Snyder's Appeal, 25 Id. 191.) It therefore follows, under the established facts, that the legacy of the appellant was liable to abatement *pro rata*. It is unnecessary to consider the other assignments. We discover no error. Decree affirmed, and appeal dismissed at the costs of the appellant.

Opinion by MERCUR, J.

Jan. '79, 53. March 27, 1879.

Hughes's Appeal.

Practice—Payment into court—Decrees of Appellate Court—Distribution of fund—Restitution.

It is error in a court for the purpose of enforcing a decree of the Supreme Court to engraft thereon an order of restitution not contained in it.

In a contest over a fund in court, a decree was made awarding the fund to one H. More than thirty days after this decree of distribution, the Prothonotary, under the order of the Court, paid the fund to H. Nearly a year afterwards N., whose claim to the fund had been rejected by the Court, took an appeal to the Supreme Court, the appeal was sustained, the decree of the Court below reversed, and "the fund in court" awarded to N. The Court below upon the return of the record made an order of restitution directing H. to pay the money again into court:

Held, to be error.

Appeal from the Common Pleas of Montgomery Co.

The facts were as follows: On Sept. 27, 1871, the Mutual Fire Insurance Company of Montgomery Co., who had been summoned as garnishees of Daniel S. Nippes, paid into court the sum of $1385 for distribution. Before the auditor appointed to make distribution the claim of Margaret Nippes, wife of the defendant, to the fund in question was rejected, and the fund was distributed to attaching creditors as follows: John J. Hughes, $247.50, S. E. Hartranft, $247.30, and A. J. Anderson, $681.68. The auditor's report was confirmed, and distribution

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in accordance therewith decreed Aug. 19, 1872. More than thirty days thereafter, on Sept. 27, 1872, no appeal having been taken, the Court directed payment of the fund in conformity with the decree. On Sept. 3, 1873, an appeal was entered by D. S. Nippes and Margaret, his wife, and on May 23, 1874, the proceedings were returned from the Supreme Court with a certified copy of the opinion of the said Court, and a remittitur stating "decree reversed at the cost of the appellees, and record remitted, that the fund in Court may be paid or distributed according to the principles of this opinion" (25 Sm. 472). The case was again referred to an auditor to make distribution, to whose report exceptions were filed by Nippes and wife, which were dismissed and the report confirmed. December 6, 1875, a second appeal was taken to the Supreme Court by whom the following decree was entered, "decree reversed at the costs of the appellees. And now it is ordered that the fund in court, less the costs in the Court below, be paid to the appellant, Margaret Nippes" (35 Leg. Int. 245). April 6, 1878, the remittitur was filed in the Court below. April 22, 1878, a rule was granted to show cause why the Court should not make an order that Hughes, Hartranft, and Anderson refund the amounts paid to them. Aug. 10, 1878, the rule was made absolute, and it was ordered that such re-payment be made within thirty days. From this decree each of the said distributees appealed, assigning for error the entry of the decree.

James Boyd (with whom were *H. K. Weand* and *Chas. T. Miller*), for appellants.

The Supreme Court on April 1, 1878, directed that the money *then* "in court" should be paid to Margaret Nippes; the Court below attempted to execute this decree by requiring that the money which had not been in Court for five years should be paid. Since no appeal was taken the payment was voluntary, and restitution cannot now be awarded: it is only awarded when payment has been compelled by execution on an erroneous judgment not when paid without execution.

Allegheny Bank's Appeal, 12 Wr. 334.

An order of restitution (when one is made) is part of the judgment itself. It would have been included in the decree if it were intended.

Duncan *v.* Kirkpatrick, 13 S. &. R. 294.

This must be treated as a voluntary payment, and as such, being without fraud, the money cannot be recovered.

Baldy *v.* Brady, 3 H. 111.
Natcher *v.* Natcher, 11 Wr. 496.
Espy *v.* Allison, 9 W. 462.
Real Estate Sav. Inst. *v.* Linder, 24 Sm. 371.

The Court below had no authority outside the decree of the SupremeCourt.

J. D. Bennett and *G. R. Fox*, contra.

The appeal was taken in ample time if within seven years.

Act of April 13, 1791, Purd. Dig. 602, pl. 2.

There was never any motion to quash the certiorari, dismiss the appeal, or raise the question now made.

[SHARSWOOD, C. J. Our attention was not called to the fact that the money was not in court.]

[PAXSON, J. Was a writ of restitution asked for?]

It was incidentally mentioned, and SHARSWOOD, J., said it would only lie in case of money erroneously paid under an execution; that was not the case here.

May 7, 1879. THE COURT. The contention in regard to this fund is now here the third time. It was a contest between the appellee in her own right and the appellants as attaching creditors of her husband's rights. The fund had been paid into court by an insurance company. The Court below decreed the money to the attaching creditors. In Nippes's Appeal (25 P. F. Smith, 472), the decree was reversed "and record remitted that the fund in court may be paid or distributed according to the principles of this opinion." The Court below thought the effect of the decree was to reopen the whole case, and therefore again referred it to an auditor by whom additional evidence was taken. He again reported the former distribution and it was confirmed by the Court. Mrs. Nippes appealed therefrom to this Court (Leg. Int. of 14th of June, 1878), when the following decree was entered, "Decree reversed at the costs of the appellees, and now it is ordered that the fund in court, less the costs in the Court below, be paid to the appellant, Margaret Nippes." Since this decree the Court below, acting according to its understanding of the directions therein given, has ordered the appellants to pay into court certain moneys which it had ordered to be paid and which were actually paid to the appellants nearly a year before Mrs. Nippes's first appeal was taken. That order to pay money to the appellants was made thirty-nine days after the final confirmation of an auditor's report decreeing it to them. The last order of the Court ordering the money to be paid back presents the error assigned.

The correctness of this order depends on the effect to be given to the last decree of this Court. Its language in ordering payment to Mrs. Nippes is limited to "the fund in court." It does not extend to, or include any money or fund not "in court." The decree did not contain an order of restitution. Whether the equities of the case would have required that it should have been done cannot now be considered. It was not done. That decree we cannot now review nor change. We can only consider its commands and give effect to them. As restitution

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was not of course, there is no legal presumption that it was not designedly withheld. The money which the appellants had received was not collected by them on execution, and therefore stands on a different footing. (Allegheny Bank's Appeal, 12 Wr. 334; Cassell *v.* Duncan, 2 S. & R. 57; Kirk *v.* Eaton, 10 S. & R. 103.)

When an order of restitution is made, it is not merely collateral to the judgment of reversal, but is a part of the judgment itself. (Duncan *v.* Kirkpatrick, 13 S. & R. 294.) If then restitution be ordered it is a constituent part of the judgment of reversal. If not found therein it cannot be a part of the judgment. The decree of this Court covered the whole case. The power of the Court below was limited to enforcing the decree thus made. That being the whole judgment of this Court the Common Pleas could not enlarge it nor change its legal effect. The 11th section of the Act of 16th June, 1836 (Purd. Dig. 1351, pl. 29), authorizes the Supreme Court whenever it shall have rendered a judgment or made a final decree or decision in any cause, action, or matter brought into the same by writ of error, certiorari or appeal, to remit the record with its judgment or decree to the appropriate Court, which judgment, decree, or decision said Court shall duly carry into execution or effect, or the Supreme Court may order execution thereof to be done by processs issuing out of the same and thereupon remit the record. The learned Judge therefore erred in engrafting on a decree of this Court an order of restitution.

Order reversed.

Opinion by MERCUR, J.

Jan. '78, 159. March 17, 1879.

Rhoads v. Reed.

Mortgages—Sci. fa. setting out no averment as to time of payment of the debt—Practice—Act of April 14, 1851.

A condition in a bond for the payment of a specific sum without mention of the time of payment is in law a covenant for immediate payment.

A scire facias sur mortgage may issue where the præcipe refers to the record of the mortgage, although there be no averment in the sci. fa. as to the time of payment of the debt.

Error to the Common Pleas of Schuylkill Co.

Scire facias sur mortgage by Henry Reed against Isaac Rhoads. The sci. fa. was issued upon a præcipe filed May 7, 1877, which referred to the record of the mortgage. It set forth that Henry Reed in a bond executed Aug. 15, 1868, was indebted to William Rhoads in the sum of $3000, but did not mention the time of payment of either the principal or interest. On July 2, 1877, judgment was entered against the defendant for want of an affidavit of defence, and damages were assessed at $3405.50. On Nov. 12, 1877, a writ of levari facias was issued to Dec. Term, 1877. On Nov. 19th the defendant filed an affidavit averring that the writ of sci. fa. set forth no time when either principal or interest became due and payable, and obtained a rule, returnable within a week, to show cause why the judgment should not be stricken off. The Court made no order to stay proceedings on the levari facias, and the property was sold Dec. 1, 1877, the above rule being still pending and undisposed of. On Dec. 17th of the same year a rule was granted to show cause why the acknowledgment of the deed should not be disallowed, and the sheriff's sale set aside upon the ground that a rule had been granted on Nov. 19th to show cause why the judgment should not be set aside, which was pending and undetermined when the sheriff's sale took place. On Jan. 5, 1878, the Court discharged both rules, and upon the same day the sheriff acknowledged his deed to the plaintiff. The defendant took this writ of error, assigning for error the discharge of his rules and the entry of judgment for the plaintiff.

Benjamin W. Cumming, for the plaintiff in error.

The scire facias showed on its face *no immediate cause of action.* It omitted to set out when the debt fell due. No inference from the date can be drawn as to the time of payment. An averment that a party is indebted is not a ground to infer that the debt was then payable. The time of payment is the essential part of a contract, and the instrument must be stated in terms according to the legal effect. The scire facias, which takes the place of a declaration, must show on its face an immediate cause of action to warrant a judgment by default.

Swift *et ux. v.* Allegheny Building and Loan Association, 1 Norris, 142.

It is submitted that justice requires that when a plaintiff resorts to a judgment by default, he should not violate an essential rule of pleading by omitting to state when the obligation falls due, and that, if he does omit this necessary statement, he is as much in default as the defendant, and is, therefore, not entitled to judgment.

G. R. and *S. H. Kaercher*, for the defendant in error.

The Act of April 14, 1851 (P. L. 625), authorizing the entry of judgment for want of an affidavit of defence, in actions, *inter alia*, of scire facias sur mortgage, did not require a copy of the mortgage to be filed. Judgment for want of an affidavit of defence in a sci. fa. sur mortgage has been entered where no copy of the bond or mortgage had been filed, and the præcipe sim-

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ply referred to the mortgage, in which there was an ambiguity or obscurity as to what was due at the time of the issue of the writ.

Kennedy *v.* Ross, 1 Casey, 256.

No greater particularity of averment is required than in an action on a promissory note.

McConeghy *v.* Kirk, 18 Sm. 200.

Swift *et ux. v.* The Allegheny B. & L. Association cited on the other side, is inapplicable, for it was the case of a mortgage to a building association, in which it is impossible to ascertain the amount due.

March 31, 1879. THE COURT. The præcipe for the scire facias on the mortgage referred to the record, which gave the defendant all necessary information, as the Act of 14 April, 1851 (Pamph. L. 625) did not require a copy of the mortgage to be filed. Besides the scire facias set out the mortgage reciting a bond conditioned for the payment of three thousand dollars, which in law means forthwith, and the scire facias issued ten years from the date of the mortgage. If the mortgage was not due and ripe for the scire facias, it was for the defendant to aver it in an affidavit of defence.

PER CURIAM. Judgment affirmed.

Common Pleas—Law.

C. P. No. 2. Nov. 22, 1879.

Burkhart v. Haviland.

Affidavit of defence law—Practice—Amendment of copy—Leave given to withdraw one item without prejudice to right to proceed in another action for the same, and judgment on the remaining items—Pending attachment not a bar to judgment.

Rule to show cause why leave should not be given to plaintiff to withdraw from this suit his claim "upon the note dated December 10, 1879," etc., without prejudice to his right to proceed for the same in another action; and also for judgment for want of a sufficient affidavit of defence upon the remaining item of his copy filed, allowing the credit claimed.

The action was assumpsit on two promissory notes, brought to June term, 1879. The affidavit of defence set up that as to one of them the suit was prematurely brought, it appearing that it was dated December 10, 1879 (that date having not yet arrived), at three months; whereupon the Court discharged a rule for judgment (reported *ante*, p. 486), and the plaintiff took this present rule. As to the other note the affidavit set up: (1) That the notes were given for coal sold by the payee to the defendant, with the understanding that they were not to be paid until the defendant had resold the coal; that $65 had been paid on account, and that the present holder came into possession of the notes after maturity. (2) That the notes have been attached in the hands of the defendant.

A. B. Guilbert, for the rule.

The plaintiff may have leave to withdraw disputed items without prejudice, and take judgment for the balance.

Brightly's Tr. & H. Pr., p. 235, § 423.
Richards *v.* Bisler, 3 WEEKLY NOTES, 485.
Johnson *v.* Bazin, 4 Id. 171.

The averment that the notes were not to be paid until certain coal was sold is insufficient, unless supplemented by an averment that the coal remains unsold.

A pending attachment will not prevent judgment.

Hicks *v.* Brinkworth, 1 WEEKLY NOTES, 90.
Selfridge *v.* Dickinson, Ibid. 158.
Bank *v.* Cummings, Ibid. 313.
Hughes *v.* Cummings, Ibid. 345.

THE COURT. Rule absolute.

C. P. No. 2. Nov. 22.

Kiker v. Walker.

Exemption—Practice as to allowing or refusing—Court does not interfere unless in very exceptional cases.

Rule on sheriff to show cause why he should not allow defendant's claim for exemption.

On October 18, 1879, judgment was entered against Eliza M. Walker on the verdict of a jury. On October 22d a *fi. fa.* issued, returnable the first Monday of November. On November 19, the claim for exemption was made in due form, and was refused by the sheriff; whereupon this rule was taken.

Randall, for the rule.

THE COURT. The Court does not interfere with the sheriff in allowing or refusing exemption, unless for some special reason making an exceptional case. He acts upon his official responsibility, which is regarded as sufficient protection to the rights of parties. There is nothing in this case to take it out of the ordinary practice.

Rule discharged.

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C. P. No. 2. Nov. 1, 1879.

Herring v. Reade.

Lease by married woman—When covenants of lessee enforceable—Writ of habere facias embracing personalty—Amendment—Practice.

Rule to strike off judgment and set aside execution.

The facts were as follows: Anna L. Herring leased to the defendant certain premises at the northwest corner of Eleventh and Callowhill Streets, the said premises being partly furnished and the furniture going with the lease. The lessee entered and is still in possession. The lease was in the usual form, containing mutual covenants, a warrant of attorney to confess judgment in ejectment, etc.; and was signed by Anna L. Herring and the lessee.

After breach, an action of ejectment was brought by Samuel L. Herring and wife in right of said wife, and a judgment confessed by virtue of the warrant and a writ of *habere facias* issued.

The writ directed the sheriff to deliver possession of the house "and the following furniture:" (describing it).

The affidavit upon which this rule was granted set forth (1) that, the lease being executed by a married woman without her husband joining, the covenants were not mutual, and therefore the lessee was not bound; and (2) that a writ of *habere facias* for the delivery of personalty was fatally irregular.

James Gay Gordon, for the rule.

A lease by a married woman is void unless executed in accordance with the provisions of the Act of February 24, 1770.

Harbert *v* Miller, 4 WEEKLY NOTES, 325.

A writ of *habere facias possessionem* for the delivery of personalty is unknown to our law, and the Courts must set it aside.

Hannis, contra.

A contract between a married woman and one *sui juris* may be binding upon the latter though not on the former.

Walker *v.* Coover, 15 Sm. 430.
Vance *v.* Nogle, 20 Id. 176.
Pichard *v.* Kahn, 2 WEEKLY NOTES, 95.

An agreement to rent if signed by one party and accepted by the other is sufficient.

Bergner *v.* Palethorp, 2 WEEKLY NOTES, 297.

The object of inserting a list of the furniture in the lease was that the sheriff might know what was to remain in the house and what to put out.

THE COURT. A hundred years ago the Court would have been obliged to make this rule absolute; it is not, however, beyond our power to permit the plaintiff to amend his writ by striking out the list of personalty from the body of the writ; he may then furnish the sheriff with a list as he sees fit. Upon these conditions—

Rule discharged.

Oral opinion by HARE, P. J.

C. P. No. 2. Oct. 25, 1879.

In re estate of Catharine Gaul.

Proceedings in lunacy—When irregular—A petition for a commission de lunatico inquirendo is an independent proceeding, and cannot be instituted as part of pending litigation to which the alleged lunatic is a party—A finding that the person "was an imbecile and has been so since her birth" is not warranted by the statute.

Sur petition to quash proceedings in lunacy.

A long litigation had been in progress respecting various branches of the Gaul estate. Pending this, and as a part of it, a bill had been filed in this Court to June Term 1877, No. 707, for account, etc., between a number of parties, among whom was Catharine Gaul.

On July 12, 1879, a commission in lunacy had been petitioned for to inquire into the mental condition of the said Catharine Gaul, and entitled as of June, 1877, No. 707. A commission was issued and report was filed September 17, 1879.

The inquisition found, *inter alia*, "That at the time of taking this inquisition Catharine Gaul was an imbecile and has been so since her birth, that she does not enjoy lucid intervals and is entirely unable to transact business and manage her estate."

It appeared that no order of notice of the commission to the relatives of the alleged lunatic had been made by the Court.

R. L. Ashhurst (with him *Chapman Biddle* and *R. Evans*), for the petition.

(1) The Court is without jurisdiction. The proceeding in lunacy is a separate matter and should have gone into the Court of Common Pleas No. 4, into which, under the rules, business was running at the time of the petition for the commission.

(2) The want of order of notice by the Court is fatal to the proceedings.

Act 13 June 1836, § 6, Purd. Dig. 981, pl. 7.
Hinchmann's Case, 4 Clark, 184.
Hinchmann *v.* Ritchie, Bright. Rep. 159.

(3) The finding that Catharine Gaul was "an imbecile" is bad, not being in the words of the statute and commission. The finding covers her whole life and might interfere with vested rights.

F. Wolfe, contra.

THE COURT. This proceeding is irregular from the start. It is no part of the suit in equity, and should have been commenced and entitled as a separate action. The order of notice is discretionary with the Court. Still if the circumstances of this case had been brought to the Court's attention, order of notice to all concerned would have been made. The finding running back to the birth of the alleged lunatic might vitiate past transactions, and is bad for

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using the word *imbecile* which is not the language of the statute, and may be the subject of uncertainty as to its extent.

On all these grounds the rule is made absolute.

Oral opinion by MITCHELL, J.

Orphans' Court.

June 16, 1879.

Hopple's Estate.

Testamentary capacity, what constitutes — Legitimate influence — When exercisable.

Sur appeal from Register and demand for an issue.

This was an appeal by the two surviving brothers of Joseph Hopple, the decedent, from the decision of the Register of Wills, granting letters testamentary to the widow. The petition alleged want of testamentary capacity, and undue influence on the part of the wife. An examiner was appointed before whom the following facts appeared.

The decedent died in 1874, leaving an estate valued at $200,000. He left a will, which after providing for the child of an adopted daughter, gave the residue to his wife, appointing her sole executrix. On behalf of the petitioners testimony was adduced to show that the testator was a "weak-minded man," "timid, and easily imposed upon." His property was inherited. He was always unsuccessful in business. He did not appear to be aware of the value or extent of his property. All this in turn was contradicted by witnesses, who declared that decedent was perfectly equal to the management of his affairs. It appeared, however, that testator's wife, a woman of strong will, had obtained a complete mastery over her husband, and continually represented to him that his brothers, the contestants, were endeavoring to rob him. The allegation was, that thus she influenced his mind against them. The testator, certain witnesses testified, deferred all to her wishes, fearing that she might become insane, it being shown that she once suffered from a short, temporary attack of that nature.

J. Temple Hopple, for the contestants.

George Junkin, for the widow.

September 22, 1879. THE COURT, after stating the facts, held as follows:—

Whether, upon the facts as detailed, a verdict finding either mental incapacity or undue influence, would be upheld, may well be doubted. The testator's want of memory, his vacillation of purpose, his credulity, his vagueness of thought, may all have existed along with adequate testamentary capacity. "Mere feebleness of intellect, short of what might by many be supposed to amount to idiocy, is insufficient to render a will void." (Per GIBSON, J., in Dornick *v.* Reichenback, 10 S. & R. 92.) "Eccentricities of conduct, absurd opinions, or belief in things appearing to us extravagant, although they may be and are evidences of mental incapacity, do not constitute it necessarily and in themselves." (Per KING, J., in Leech *v.* Leech, 1 Phila. Rep. 247.) It may further be true that the testator was not capable of estimating the magnitude of his estate taken as a whole, and that his final disposition of it was not such as his surviving brothers would have dictated. But it was not necessary for the purposes of a valid bequest that he should have been able to specify every part of his property. It was sufficient if he was competent to form the resolution and purpose expressed in his will. (Stevenson *v.* Stevenson, 9 Cas. 469.) So, too, it may be literally true that the testator deferred to the opinion of his wife in the management of his estate and in the daily conduct of his life, and her influence may have been wrought by force of superior intellect, or by the fear that to oppose her wishes would bring on the recurrence of a painful malady. Upon this point, LOWRIE, J., in Dean *v.* Negley (5 Wr. 317), uses this language: "Lawful influence, such as that arising from legitimate family and social relations, must be allowed to produce its natural results, even in influencing last wills. However great the influence thus generated may be, it has no taint of unlawfulness in it, and there can be no presumption of its actual unlawful exercise merely from the fact that it is known to have existed, and that it has manifestly operated on the testator's mind as a reason for his testamentary dispositions." And TILGHMAN, C. J., in Miller *v.* Miller (3 S. & R. 269), says: "A man has a right by fair argument or persuasion to induce another to make a will, and even to make it in his own favor."

Some of the facts, however, brought out by the contestants' witnesses, were directly at variance with the theories of mental unsoundness and undue influence. It was shown that the will was executed in 1864, ten years before the death of testator, and that it remained in his custody up to the latter period. The widow, who was called as for cross-examination by contestants, testified that she was ignorant of the existence of a will until two years after it had been made. It was very clear from the whole testimony that differences of opinion had arisen between the brothers respecting the division of

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the father's estate, and these differences may have provoked the hostility which, it was alleged, was manifested by the wife of decedent to her husband's brothers. It also appeared that the testator was one of the administrators of his father's estate, and for a time had charge of the collection of the rents, which amounted to $15,000 per annum. He made various sales of his own property, one to his brother Richard, for which the latter paid him more than $18,000. To another relative he loaned various sums upon bond and mortgage and a promissory note; and he also exacted from his brothers the payment of sums with interest against their urgent protest that no such amounts were due. In fifteen years his estate, under his personal care, had increased in value $75,000. His letters, which were pronounced by contestants childish and unintelligible, were produced in evidence upon the call of one or both parties to the proceeding. A careful comparison of the correspondence between the brothers, which was thus disclosed, compels the observation that whatever indications of sanity may be gathered from the ability of the respective writers to express themselves coherently and with some regard to the proprieties of language, must be placed to the credit of decedent. Throughout the testimony the somewhat remarkable point seems to have been pressed by contestants with great pertinacity, that the testator devoted to his wife time and attention which should have been given to business, and that she usurped his society to the exclusion of his former associates.

In the attempt to reach the merits of this case, it has been deemed unnecessary to discuss the testimony produced by the proponent. A large number of witnesses appeared on behalf of the will, whose want of relationship to the parties seemed to preclude any suspicion of interest. Their evidence was a flat denial of every material fact alleged by the contestants. It is sufficient to say that the evidence submitted by the latter falls far short of raising a presumption of such mental unsoundness on the part of the testator as would unfit him to make a valid bequest of his property; it is equally ineffective in showing that any influence was brought to bear upon him in the final disposition of his estate which destroyed his free agency. This was the test applied in Browne *v.* Molliston (3 Wh. 137), Leech *v.* Leech (1 Phila. 244), Tawney *v.* Long (26 P. F. S. 106), and kindred cases, and it is conclusive of the present inquiry.

Indeed, if the contestants' case exhibited one defect which was more conspicuous than another, it was in the absence of all evidence, except the circumstance that the will was in her favor, to show that the wife of testator had any, even the slightest, agency in its framing. On the contrary, it was distinctly shown that the will was prepared by the counsel of the testator from instructions furnished by the latter, and was given into his custody and retained by him. We cannot believe, that in preferring the claims of his wife and adopted grandchild, to those of collateral kinsmen, the testator displayed either imbecility or want of natural affection. And in the absence of all recorded authority in its favor, we cannot assent to the proposition that a testator who defers to the opinion of his wife, in the belief that her judgment is superior to his own, precludes her from becoming an object of his bounty by raising the presumption that the will by which he sought to express his gratitude, was procured by undue influence.

The petition is dismissed at the costs of the appellants, and the demand for an issue is refused.

Opinion by ASHMAN, J.

United States Supreme Court.

No. 711. Oct. 22, 1879.

The United States v. Steffens.
Same v. Wittemann.

No. 719.

The United States v. Johnson et al.

Constitutional law—Trade-marks—Acts of Congress relating thereto are unconstitutional—Whether Congress may enact limited laws regulating the use of trade-marks in commerce with foreign nations and among the several States—Power of the Government to make treaties relating to trade-marks, not decided—Acts of Congress of July 8, 1870, and August 14, 1876—Revised Stats., sections 4937 to 4947; 19 U. S. Stats. 141—Constitution of U. S., Art. I., section 8, clauses 4 and 9—Common-law and statute jurisdiction in the several States, relating to trade-marks, remain as heretofore.

Defendants being indicted for violation of the statutes of the United States relating to the registration and protection of trade-marks, the Circuit Judges of the Courts where the indictments were pending were divided in opinion as to the constitutionality of those laws, and certified that division to the Supreme Court:

Held by the Court that:

1. Property in trade-marks has long been recognized

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and protected by the common law and by the statutes of the States, and does not owe its existence to the Act of Congress providing for their registration in the Patent Office.

2. A trade-mark is neither an invention or discovery, nor the writing of an author within the meaning of the clause of the Constitution in regard to securing to authors and inventors the exclusive use of their writings and discoveries.

3. As a regulation of commerce, if trade-marks can be in any case the subject of congressional action, that action is limited by the Constitution to their use in "commerce with foreign nations, among the several States, and with the Indian tribes."

4. The legislation of Congress in regard to trade-marks contains nothing in its terms, or in its essential character, which looks to a regulation thus limited, but in its language it embraces, and was intended to embrace, all commerce, including that between citizens of the same State.

5. As the statute is so framed that it is impossible to separate that which has reference to commerce within its control and that which is not, and as Congress certainly did not intend to pass the limited registration law which such a construction would imply, the whole legislation must fall, as being void for want of constitutional authority.

The first two of the above named cases were heard together, on certificates of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of New York. They were indictments charging the defendants with violation of the Act of Congress approved August 14, 1876, entitled "An Act to punish the counterfeiting of trade-mark goods, and the sale or dealing in of trade-mark goods." The trade-marks involved are owned by the firm of Mumm & Co., of Rheims, France, manufacturers of champagne. The accused were label-makers, and had sold thousands of copies of spurious Mumm & Co. labels to bottlers of American champagnes. The single question in each case was whether the Act of August 14, 1876, under which these indictments are found, can be upheld, wholly or in part, as a law necessary and proper for carrying into execution any of the powers vested in Congress by the Constitution of the United States.

Devens (Attorney-General), for plaintiff.

[No counsel appeared contra.]

The case of United States *v.* Johnson *et al.* came up on a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of Ohio. This case, like the two immediately preceding, presented the question whether the Act of Congress providing for the punishment of the counterfeiting of trade-marks is constitutional. It also involved indirectly the constitutionality of Sections 4937 to 4947 of the Revised Statutes, providing for the registration of trade-marks and furnishing remedies for their infringement.

Devens (Attorney-General), for plaintiff.

George Hoadly, for defendants.

Mr. Justice MILLER delivered the opinion of the Court, Nov. 18, 1879.

The three cases whose titles stand at the head of this opinion are criminal prosecutions for violations of what is known as the trade-mark legislation of Congress. The first two are indictments in the Southern District of New York, and the last is an information in the Southern District of Ohio. In all of them the Judges of the Circuit Courts in which they are pending have certified to a difference of opinion on what is substantially the same question: Are the Acts of Congress on the subject of trade-marks founded on any rightful authority in the Constitution of the United States?

The entire legislation of Congress in regard to trade-marks is of very recent origin. It is first seen in sections 77 to 84, inclusive, of the Act of July 8, 1870, entitled "An Act to revise, consolidate, and amend the statutes relating to patents and copyrights." The part of this Act relating to trade-marks is embodied in chapter 2, title 60, sections 4937 to 4947 of the Revised Statutes. It is sufficient at present to say that they provide for the registration in the Patent Office of any device in the nature of a trade-mark to which any person has by usage established an exclusive right, or which the person so registering intends to appropriate by that act to his exclusive use; and they make the wrongful use of a trade-mark, so registered, by any other person, without the owner's permission, a cause of action in a civil suit for damages. Six years later we have the Act of August 14, 1876 (19 U. S. Statutes, 141), punishing by fine and imprisonment the fraudulent use, sale, and counterfeiting of trade-marks registered in pursuance of the statutes of the United States, on which the information and indictments are founded in the causes before us.

The right to adopt and use a symbol or device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of the use of that symbol by all other persons, has been long recognized by the common-law and chancery courts of England and of this country, and by the statutes of some of the States. It is a property right, for which damages may be recovered in an action at law, and the violation of which will be enjoined by a court of equity, with compensation for past infringement. This property and the exclusive right to its use were not created by the Act of Congress, and do not now depend upon that Act for their enforcement. The whole system of trade-mark property and the civil remedies for its protection existed long anterior to the Act of Congress, and remain in full force since its passage. These

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propositions are so well understood as to need no citation of authorities or elaborate argument to prove them.

The property in trade-marks and the right to their exclusive use, resting on the laws of the States in the same manner that other property does, and depending, like the great body of the rights of person and of property, for their security and protection on those laws, the power of Congress to legislate on the subject, to establish the conditions on which these rights shall depend, the period of their duration, and the legal remedies for their protection, if such power exist at all, must be found in some clause of the Constitution of the United States, the instrument which is the source of all the powers that Congress can lawfully exercise.

In the argument of these cases this seems to be conceded, and the advocates for the validity of the Acts of Congress on this subject point to two clauses of that instrument, in one or in both of which, as they assert, sufficient warrant may be found for this legislation.

The first of these is the eighth clause of section 8 of the first article of the Constitution. That section, manifestly intended to be an enumeration of the powers expressly granted to Congress, and closing with the declaration of a rule for the ascertainment of such powers as are necessary by way of implication to carry into efficient operation those expressly given, authorizes Congress, by the clause referred to, "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

As the first and only attempt by Congress to regulate the right of trade-marks is to be found in the Act to which we have referred, entitled "An Act to revise, consolidate, and amend the statutes relating to patents and copyrights," terms which have long since become technical as referring, the one to inventions and the other to writings of authors, it is a reasonable inference that this part of the statute also was, in the opinion of Congress, an exercise of the power found in that clause of the Constitution. It may also be safely assumed that, until a critical examination of the subject in the courts became necessary, it was mainly, if not wholly, to this clause that the advocates of the law looked for its support.

Any attempt, however, to identify the essential characteristics of a trade-mark with inventions and discoveries in the arts and sciences, or with the writings of authors, will show that the effort is surrounded with insurmountable difficulties.

The ordinary trade-mark has no necessary relation to invention or discovery. The trade-mark recognized by the common law is generally the growth of a considerable period of use rather than sudden invention. It is often the result of accident rather than design; and when under the Act of Congress it is sought to establish it by registration, neither originality, invention, discovery, science, nor art is in any way essential to the right conferred by that Act. If we should endeavor to classify it under the head of writings of authors, the objections are equally strong. In this, as in regard to inventions, there is required originality. And while the word writings may be liberally construed, as it has been, to include original designs for engravings, prints, etc., it is only such as are original and are founded in the creative powers of the mind. The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like. The trade-mark may be, and generally is, the adoption of something already in existence as the distinctive symbol of the party using it. At common law the exclusive right to it grows out of the use of it, and not its mere adoption. By the Act of Congress this exclusive right attaches upon registration. But in neither case does it depend upon novelty, upon invention, upon discovery, or upon any work of the brain. It requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation. We look in vain in the statute for any other qualifications or condition. If the symbol, however plain, simple, old, or well known, has been first appropriated by the claimant as his distinctive trade-mark, he may by registration secure the right to its exclusive use. While such legislation may be a judicious aid to the common law on the subject of trade-marks, and may be within the competency of legislatures whose general powers embrace that class of subjects, we are unable to see any such power in the constitutional provision concerning authors and inventors and their writings and discoveries.

The other clause of the Constitution supposed to supply the requisite authority in Congress is the third of the same section, which, read in connection with the granting clause, is as follows:—

> The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

The argument is that the use of a trade-mark —that which alone gives it any value—is to identify a particular class or quality of goods as the manufacture, produce, or property of the person who puts them in the general market for sale; that the sale of the article so distinguished is commerce; that the trade-mark is, therefore, a useful and valuable aid or instrument of com-

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merce, and its regulation by virtue of the above provision of the Constitution belongs to Congress, and that the Act in question is a lawful exercise of this power.

It is not every species of property which is the subject of commerce, or which is used or even essential in commerce, which is brought by this clause of the Constitution within the control of Congress. The barrels and casks, the bottles and boxes, in which alone certain articles of commerce are kept for safety, and by which their contents are transferred from the seller to the buyer, do not thereby become subjects of congressional legislation more than other property. (Nathan *v.* Louisiana, 8 How. 73.) In the case of Paul *v.* Virginia (8 Wallace, 168), this Court held that a policy of insurance made by a corporation of one State on property situated in another was not an article of commerce, and did not come within the purview of the clause of the Constitution we are considering. "They are not," says the Court, "commodities to be shipped or forwarded from one State to another and then put up for sale." On the other hand, in the case of Almy *v.* The State of California (24 How. 169), it was held that a stamp-duty imposed by the Legislature of California on bills of lading for gold and silver transported from any place in that State to another out of the State was forbidden by the Constitution of the United States, because such instruments were a necessity to the transaction of commerce, and the duty was a tax upon exports.

The question, therefore, whether the trade-mark bears such a relation to commerce in general terms as to bring it within congressional control, when used or applied to the classes of commerce which fall within that control, is one which, in the present case, we propose to leave undecided. We adopt this course because, when this Court is called on in the course of the administration of the law to consider whether an Act of Congress or any other department of the Government is within the constitutional authority of that department, a due respect for a co-ordinate branch of the Government requires that we shall decide that it has transcended its powers only when that is so plain that we cannot avoid the duty.

In such cases, it is manifestly the dictate of wisdom and judicial propriety to decide no more than is necessary to the case in hand. That such has been the uniform course of this Court in regard to statutes passed by Congress will readily appear to any one who will consider the vast amount of argument presented to us assailing such statutes as unconstitutional, and will count, as he may do on his fingers, the instances in which this Court has declared an Act of Congress void for want of constitutional power.

Governed by this view of our duty, we proceed to remark that a glance at the commerce clause of the Constitution discloses at once (what has been often the subject of comment in this Court and out of it) that the power of regulation there conferred on Congress is limited to commerce with foreign nations, commerce among the States, and commerce with the Indian tribes. And, while bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the States means commerce between the individual citizens of different States, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, is beyond the control of Congress.

When, therefore, Congress undertakes to enact a law which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the statute, or from its essential nature, that it is a regulation of commerce with foreign nations, among the several States, or with the Indian tribes. If it is not so limited it is in excess of the power of Congress. If its main purpose is to establish a regulation applicable to all trade, to commerce at all points, especially if it is apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress.

We find no recognition of this principle in the chapter on trade-marks in the Revised Statutes. We would naturally look for this in the description of the class of persons who are entitled to register a trade-mark or in reference to the goods to which the trade-mark should be applied. If, for instance, it described persons engaged in commerce between the different States, and related to its use in such commerce, it would be evident that Congress believed it was acting under the clause of the Constitution which authorizes it to regulate commerce among the States. So, if when the trade-mark has been registered, Congress had protected its use on goods sold by a citizen of one State to another, or by a citizen of a foreign State to a citizen of the United States, it would be seen that Congress was at least intending to exercise the power of regulation conferred by that clause of the Constitution. But no such idea is found or suggested in the statute. Its language is: "Any person or firm domiciled in the United States, and any corporation created by the United States, or of any State or Territory thereof," or any person residing in a foreign country which, by treaty or convention, affords similar privileges to our citizens, may, by registration, obtain protection for his trade-mark. Here is no requirement that such person shall be

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engaged in the kind of commerce which Congress is authorized to regulate. It is a general declaration that anybody in the United States, and anybody in any other country which permits us to do the like, may, by registering a trade-mark, have it fully protected. So, while the person registering is required to furnish "a statement of the class of merchandise, and the particular description of the goods comprised in such class, by which the trade-mark has been or is intended to be appropriated," there is no hint that it is goods to be transported from one State to another, or between the United States and foreign countries. Section 4932 is intended to impose some restriction upon the Commissioner of Patents in the matter of registration, but no limitation is suggested in regard to persons or property engaged in the different classes of commerce mentioned in the Constitution. When we come to the remedies provided by the Act for infringement of the rights of the owner of the registered trade-mark, there is no restriction of the right of action or suit, to a case of trade-mark used in foreign or inter-State commerce.

It is, therefore, manifest that no such distinction is found in the Act, but that its broad purpose was to establish a universal system of trade-mark registration for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, without regard to the character of the trade to which it was to be applied or the locality of the owner, with the solitary exception that those who resided in foreign countries which extended no such privileges to us were excluded from them here.

It has been suggested, that, if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. To this there are two objections: First, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in that kind of commerce; secondly, while it may be true that when one part of a statute is valid and constitutional and another part unconstitutional and void, the Court may enforce the valid part where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in the case of the United States *v.* Reese (2 Otto, 221). In that case Congress had passed a statute punishing election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at an election. This Court was of opinion that, as regarded the section of the statute then under consideration, Congress could only punish such denial when it was on account of race, color, or previous condition of servitude. It was urged, however, that the more general description of the offence included the more limited one, and that the section was valid where such was in fact the cause of the denial. But the Court said through the Chief Justice:—

"We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting words that are not there now. Each of the sections must stand as a whole or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when as expressed, it is general only. . . . To limit this statute as now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold in some instances under the Act of Congress and in others under State law. (Cooley on Cons. Limitations, 178, 179; Commonwealth *v.* Hitchings, 5 Gray, 485.)

In what we have here said we wish to be understood as leaving the whole question of the treaty-making power of the General Government over trade-marks and the duty of Congress to pass any laws necessary to carry such treaties into effect untouched.

While we have in our references in this opinion to the trade-mark legislation of Congress had mainly in view the Act of 1870 and the civil remedy which that Act provided, it was because the criminal offences described in the Act of 1876 are by their express terms solely referable to frauds, counterfeits, and unlawful use of trade-marks which have been registered under the provisions of the former Act. If that Act is unconstitutional, so that the registration under it confers no lawful right, then the criminal enactment intended to protect that right falls with it.

The questions in each of these cases being an inquiry whether these statutes can be upheld in whole or in part as valid and constitutional must be answered in the negative, and it will be so certified to the proper Circuit Courts.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, DEC. 11, 1879.* [No. 33.

Supreme Court.

May, '78, 26. June 7, 1878.

Chase v. Irvin's Executors.

Executors—Power to purchase real estate to prevent sacrifice at sheriff's sale—Evidence under Act of 1869—Ejectment on equitable title—When brought without tendering unpaid purchase-money—Record of prior ejectment—When admissible in evidence.

Where a judgment belongs to a decedent's estate, the executors may, in order to promote the interests of the estate and save the security, purchase real estate at a sheriff's sale.

In such cases the title vests in them extra the will, and they hold it not as executors but as trustees for the estate. Hence in an ejectment by them to recover the land, the Act of 1869, excluding testimony of the opposite party where executors are parties to the record, does not apply. But under the provisions of the said Act, where the assignor of the title claimed by the trustees is dead, the other party cannot be heard to prove admissions of such deceased assignor.

A tender of unpaid purchase-money is not a prerequisite to an ejectment by an equitable vendee, where the vendor claiming under an adverse title intrudes on the lawful possession of his vendee.

The admissibility of the record of a prior ejectment, as persuasive evidence on the question in issue, depends upon whether the same title was passed upon in that action.

Error to the Common Pleas of Clearfield County.

Ejectment, by E. A. Irvin and James B. Graham, executors of William Irvin, against John M. Chase, for one hundred acres of land in Knox Township, Clearfield County.

The plaintiffs claimed under the following title. The land in question was part of a larger lot surveyed in pursuance of a warrant dated June 8, 1784, to William King, duly returned into the proper office in the year 1785. By divers mesne conveyances the one hundred acres in dispute became, in the year 1835, vested in Isaac Dunlap, who, by indenture dated December 26, 1842, conveyed the same to Stacy W. Thompson and Isaac H. Thompson. In 1846 the lot was sold as the property of the Thompsons at a sheriff's sale under a judgment obtained against the Thompsons by William Irvin. Said Irvin became the purchaser, and a sheriff's deed was duly executed to him May 14, 1846.

On September 19, 1859, Stacy W. Thompson, having at that time no title to the land, entered into an agreement with William A. Dunlap to sell him the said lot of ground for $800. Of this amount one-half was paid, and the residue yet remains due. The articles of agreement were not recorded. On June 11, 1864, William Irvin, the owner of the said lot, conveyed the same to the said Stacy W. Thompson. The title thus obtained by Thompson immediately passed by operation of law and vested in William A. Dunlap to the extent of his right under the articles of agreement.

In 1865 the said William Irvin obtained a judgment against said William A. Dunlap, which became a lien upon Dunlap's interest in the land. Irvin died in December, 1869. The lien of the judgment was, however, kept alive till 1874, when the property was sold thereunder at sheriff's sale, and, in order to prevent a sacrifice and save the judgment, was bid in by D. L. Krebs, attorney for plaintiffs, to whom the sheriff's deed was made. This title was transferred by Krebs to the plaintiffs.

The defendant, except as to 20 or 25 acres, claimed the whole tract by virtue of a survey made in 1793, in pursuance of a warrant to George Scuff. This survey was claimed by defendant not to conflict, except as to the said 20 or 25 acres, with the King survey, which, it was alleged, was properly located elsewhere. Plaintiffs, on the other hand, alleged that the two surveys, except as to the said 20 or 25 acres, were wholly in conflict. Defendant also claimed that part of the "King" survey, alleged by plaintiffs to be within the "Scuff" survey, by virtue of a deed from Stacy W. Thompson and Isaac Thompson to John M. Chase, dated June 19, 1868. This deed was recorded, and defendant claimed that he was a bona fide purchaser, without notice of Dunlap's title under the articles of agreement.

Plaintiffs, however, showed that in 1859 Dunlap had entered into actual occupation of a part of the land, and that defendant had actual notice of his claim of title thereto.

Defendant requested the Court to charge that the plaintiffs, as executors of William Irvin, had transcended their powers and duties as executors in buying in this property, and that, therefore, they were not authorized to bring this suit in their capacity as executors. This point the Court refused, saying, "Where, as in this case, the testator had obtained a judgment which became a lien on the land of the defendant, and the land was about to be sold under an execution, it was the duty of the executors to step in and purchase the land, to prevent it being sacrificed by a sale at an undervalue, and hold it for the benefit of the estate. Having done that in the present instance, they did not transcend their powers and

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duties as executors. They would hold the land in trust for the estate, and could resort to an action of ejectment to recover possession of the land for the benefit of the estate." (3d assignment of error.)

The defendant, John M. Chase, was offered as a witness for the defence to prove certain admissions by Isaac Dunlap and Daniel Bowman, under both of whom plaintiffs claimed, as to the relative positions of the "Scuff" and "King" surveys. Also to show certain possession of and improvements on the said Scuff tract by him the said Chase. Objected to, for the reason that William Irvin being dead, and his executors being the party on the record, the defendant was incompetent to testify to matters occurring in the lifetime of William Irvin; and, for the same reason, that defendant was not competent to testify to things occurring in the lifetime of Isaac Dunlap, deceased. The Court sustained the objection, and ruled the witness incompetent. (7th assignment of error.)

The defendant requested the Court to charge: "The plaintiffs claim title through William A. Dunlap, who purchased the land in controversy from Stacy W. Thompson, by articles of agreement, dated September 19, 1859, for the sum of $800. No deed having been made to them or their vendor, they have at most but an equitable title, and cannot recover without proving that they have paid all the purchase-money, or made a tender thereof before the bringing of this suit, and unless the jury are satisfied from the evidence that this was done, their verdict must be for the defendant." This point was refused. (4th assignment of error.)

Defendant offered in evidence the record of a suit in ejectment brought in 1859 by John M. Chase *v.* Stacy W. Thompson *et al.*, for the land now in dispute, also a writ of estrepement in the same case, and a record of the Supreme Court affirming the judgment entered thereon for the plaintiff. This was offered upon the question of notice of Mr. Chase's claim to William Dunlap, prior to his purchase from Thompson, and as persuasive evidence upon the question at issue. Objected to as irrelevant and improper. Objection sustained. (6th assignment of error.)

The Court left to the jury the question as to the conflicting lines of the original surveys, instructing them that if in conflict they must find for the claimants under the prior survey, and also the question as to Chase's notice of Dunlap's equitable title.

The jury found for the defendant, the land to be released on payment by plaintiffs over the sum of four hundred dollars with interest from November 24, 1876; two hundred dollars to be paid on June 1, 1877, and two hundred on June 1, 1878. Judgment was entered on the verdict, and the defendant took this writ, assigning for error, *inter alia*, the answers and rulings of the Court to the several points and offers of testimony above set forth.

Murray and *Gordon*, for plaintiffs in error.

Executors can do nothing unless specially authorized by will or by statute.

Chew's Executors *v.* Chew, 4 Casey, 17.
Ross *v.* Barclay, 6 Harris, 183.
Waters *v.* Margerum, 10 Sm. 44.
Estate Charles Hepburn, 8 Phila. 207.

The cases of Billington's Appeal (3 Rawle, 55) and of Oeslager *v.* Fisher (2 Barr, 469) were decided on account of their peculiar circumstances.

The action should have been brought, if at all, by the heirs, not the executors.

Beale's Executors *v.* Commonwealth, 17 S. & R. 392.
Thompson *v.* Adams, 5 Sm. 483.

Neither William Irvin nor Isaac Dunlap were assignors of a contract or chose in action within the meaning of the Act of 1869.

Karns *v.* Tanner, 16 Sm. 304.
Hanna *v.* Wray, 27 Sm. 29.
Mann *v.* Wieand, 4 WEEKLY NOTES, 10.
Standbridge *v.* Catanach, Id. 177.
Gyger's Appeal, 24 Sm. 48.
McFerren *v.* Mt. Alto Iron Co., 26 Sm. 188.

The fact that executors are parties to the record should not have excluded defendant's testimony; the Act of 1869 was not intended to apply to cases like the present. At any rate plaintiffs are not acting in this suit as executors.

Plaintiffs were bound, holding only an equitable title, to tender the unpaid purchase-money before suit brought.

Snyder *v.* Wolfley, 8 S. & R. 332.
Thomas *v.* Wright, 9 S. & R. 87.
Chahoon *v.* Hollenback, 16 S. & R. 433.
Smith *v.* Webster, 2 Watts, 486.
Gore *v.* Kinney, 10 Watts, 140.
Cadwalader *v.* Berkheiser, 8 Casey, 43.

The record of the former ejectment should have been admitted as evidence of notice to Dunlap.

Murphy *v.* Nathans, 10 Wright, 514.
Bolin *v.* Connelly, 23 Sm. 336.
Billington *v.* Welsh, 5 Binn. 132.
Keeler *v.* Vantuyle, 6 Barr, 253.

And also as persuasive evidence as to the point at issue.

Koons *v.* Hartman, 7 Watts, 25.
Wilson *v.* Bigger, 7 W. & S. 117.
Levers *v.* Van Buskirk, 4 Barr, 315.
Beck's Ex. *v.* Graybill, 4 Casey, 66.
Soper *v.* Guernsey, 21 Sm. 222.

Wallace & Krebs and *McEnally & McCurdy*, for defendants in error.

The executors acted within the scope of their duty.

Bonsall's Appeal, 1 Rawle, 266.
Billington's Appeal, 3 Rawle, 48.
Oeslager *v.* Fisher, 2 Barr, 467.
Neff's Appeal, 7 Sm. 91.

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The plaintiffs being executors, defendant was not a competent witness.

Taylor *v.* Kelly, 30 Sm. 95.

Where a vendor acts in bad faith by giving possession of property, already sold under articles, to a third party, the equitable owner may bring ejectment without tendering unpaid purchase-money.

Harris *v.* Bell, 10 S. & R. 39.
D'Arras *v.* Keyser, 2 Casey, 249.
Gregg *v.* Patterson, 9 W. & S. 208.
Dixon *v.* Oliver, 5 Watts, 509.
Keller *v.* Auble, 8 Sm. 410.

The record of the former ejectment suit offered in evidence was wholly improper and irrelevant.

June 17, 1878. THE COURT. In order to save a judgment belonging to the estate of William Irvin, the executors above named took an assignment from Mr. Krebs, their attorney, of a sheriff's deed for the land in suit, which had been sold as the property of William A. Dunlap on an execution issued upon a judgment belonging to J. B. Graham and son. This was altogether proper, and the title being in this manner vested in Irvin and Graham, they were the proper persons to institute and maintain this suit.

But as the title to the land vested in them *extra* the will of the testator, they hold not as executors but as trustees; the trust arising from the duty and good faith due from them to the estate intrusted to their care. The action, then, not being one by executors it does not for this reason fall within the proviso of the Act of 1869, and had there been nothing else in the way, the defendant might have been admitted as a witness in his own behalf. But the offer, covered by the defendant's seventh assignment, proposed proof, by Chase, of the declarations of Isaac Dunlap, the deceased assignor of the title claimed by the plaintiffs, as to the lines of the land in controversy. In other words, Chase himself being witness, proposed to make title in himself through the declarations of a grantor of the plaintiffs, that grantor being dead. But this was within the proviso of the statute as interpreted by the case of Karns *v.* Tanner (16 P. F. Smith, 297), and was therefore properly rejected.

The defendant's sixth point was well ruled. Whilst it is undoubtedly true, that one claiming the equitable title to land, as against his vendor, who is rightfully in possession and to whom the purchase money has not been fully paid, cannot recover in ejectment without a tender of such purchase money first having been made, yet such is not the rule where the vendor, claiming under an adverse title, intrudes upon the lawful possession of his vendee. (Harris *v.* Bell, 10 S. & R. 39.) In such case, full justice is done by a conditional verdict such as the Court directed in the present case.

The next, and only other assignment which we think necessary to notice, is the sixth. This covers the rejection of the record of the Court of Common Pleas of Clearfield County, showing an action of ejectment brought to January term, 1859, by John M. Chase against Stacy W. Thompson *et al.*, in which there was a verdict for the plaintiff on the 22d of June, 1866. This was offered as notice to William A. Dunlap of Chase's claim prior to his purchase from Thompson, and as persuasive evidence on the question in issue.

The first part of this proposition amounts to nothing, for, at the time of Dunlap's purchase, the claim of Chase was adverse to the title under which Dunlap held and unconnected with it, so that the question of notice was not in the case, since if Chase were entitled to the property under his Scuff title he would recover without regard to whether his adversaries had or had not notice. As to the latter part of the offer, that must depend upon whether or not the plaintiff's title was passed upon in that action. To ascertain this we must revert to that title. It seems that the property in controversy was covered by a warrant from the Commonwealth to William King dated June 8, 1784, which was duly surveyed and returned to the land office in 1785. Afterwards in 1835 one hundred acres of the land covered by the above-named warrant vested in Isaac Dunlap, who, on the 25th of December, 1842, conveyed the same to Stacy W. and Isaac Thompson. In 1846 Willam Irvin bought this property at a sheriff's sale upon a judgment which he held against the Thompsons.

Whilst Irvin thus held the land Stacy W. Thompson agreed, by articles, dated September 19, 1859, to sell the same to William A. Dunlap, whose equity, as we have already shown, the plaintiffs now own; and in 1864 William Irvin reconveyed, by deed, to Thompson, Dunlap's vendor. On the other hand, at the time of the trial of the ejectment, in 1866, the defendant, Chase, claimed title under a warrant to one George Scuff, surveyed in 1793, and he afterwards, June 19, 1868, obtained, from the Thompsons a deed for their interest in the premises now in dispute.

It is thus apparent, that at the time of the commencement of the ejectment, mentioned in the defendant's offer, Stacy W. Thompson had no title to the land then claimed by Chase. Now in order that a former ejectment may have force as evidence in a subsequent suit, it is necessary that it should have been not only between the same parties and for the same land but, also, that it should have involved the same title. (Treaster *v.* Fleisher, 7 W. & S. 137) Here, however, the title now in controversy was not involved in the prior ejectment, inasmuch

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as Thompson had no title whatever at the impetration of that writ. It is true that having obtained a deed from Irvin before the time of the trial, he might have used it as he might have used any outstanding title, but, as at that time, by reason of his previous sale to Dunlap, he had but the legal title, the verdict could only operate, if at all, upon that title.

The judgment is affirmed.

Opinion by GORDON, J.

Jan. '79, 110. Feb. 5, 1879.

Crawford v. Ford.

Will—Devise—Construction of—Remainders—Vested and contingent.

It is now settled law in Pennsylvania that in a will the words "when" or "upon" in a gift to a person at a certain period, if preceded by a limitation of the estate, do not import a contingency, but the estate vests from the death of the testator.

The testator devised all the residue of his estate to trustees to "hold, manage, let, and demise" the real estate, and "to hold, invest," etc., "the personal estate;" . . . . and after applying one-fourth part of the net income to keeping down incumbrances and discharging debts, "then to pay over the whole of the remainder . . . . to my dear wife, Elizabeth, for her own use and for the maintenance and education of my children, ... until the eldest of them shall attain the age of twenty-one years, and upon and after that event" such child was to receive a specified portion of income, and so on of each child as he or she came of age. "And upon the arrival of the youngest of my surviving children at full age, ... to divide the whole of my said residuary estate, if my wife should not be living, ... in equal shares among all my children who shall then be living, and the issue of such of them as may survive me and then be dead." John, the testator's oldest son, died during the minority of Thomas, the youngest son, leaving a will:

Held, that the estate of John was a vested remainder, and that the executors and trustees under his will were entitled to the income accruing after his death and before division.

Womrath *v.* McCormick, 1 Sm. 504; Manderson *v.* Lukens, 11 Har. 31, followed.

Error to the Common Pleas No. 2 of Philadelphia County.

Amicable action in debt. Case stated, wherein Henry C. Ford and Frank K. Hipple, executors and trustees under the will of John H. Edwards, deceased, were plaintiffs, and George L. Crawford, substituted trustee under the will of George W. Edwards, deceased, were defendants, setting forth substantially as follows:—

(1) George W. Edwards, father of John H. Edwards, died August 27, 1861, leaving a will, etc., by which he provided, *inter alia*, as follows:—

Thirdly. I give, devise, and bequeath all the rest, residue, and remainder of my estate, real and personal, whatsoever and wheresoever, to my executors hereinafter named and the survivors or survivor of them, and the heirs, executors, administrators, and assigns of such survivor, upon the following trusts nevertheless, that is to say, upon trust to hold, manage, let, and demise the real estate, and to hold, invest, reinvest, and keep invested my personal estate, and to collect and receive the rents, income, and profits thereof; and out of the same in the first place to pay and discharge all taxes, charges, ground-rents, and all interest upon incumbrances on my said estate, together with all charges and expenses incident to the management and reasonable repair of the same and to this trust.

And upon further trust, after paying said charges, to apply one-fourth of the net income of my whole estate, as it shall accrue, and as soon as it shall amount, from time to time, to a reasonable sum, to the payment and discharge of my debts and the incumbrances upon my real estate, and, after deducting such fourth part, then upon further trust as to the remainder of the net income of my said estate, to pay over the whole of the same in half-yearly payments, to my dear wife, Elizabeth R., for her own use, and for the support, maintenance, and education of my children at her discretion, until the eldest of them shall attain the full age of twenty-one years; and upon and after that event, to pay to such child, in half-yearly payments, a full and equal share (regard being had to the number of my children then surviving) of two-thirds of the said three-fourths of the net income of my estate, until the division of my whole estate, as hereafter provided; and in like manner upon and after the arrival of each of my other surviving children respectively at full age, upon trust, to pay over to each of the said children, so coming of age, a like equal share of the said two-thirds of three-fourths of the remainder of the said net income, in semi-annual payments, as aforesaid, until the said division of my whole estate; and upon further trust, to pay the remainder of three-fourths of my said net income, not so becoming payable to my children respectively, to my said wife, Elizabeth R., for her use, and the maintenance of my children, who may still be minors, as aforesaid; and upon the arrival of the youngest of my surviving children at full age, then, in case my said wife, Elizabeth R., should be then living, upon trust, to set apart and hold one-third of my residuary estate, real and personal, for the use of my said wife, Elizabeth R., for and during the term of her natural life, and to divide the remaining two-thirds of my said residuary estate, as well as the one-third to be held and set apart for my said wife, upon her death (that is, the whole of my said residuary estate, if my said wife should not be living when my youngest child shall come of age), in equal shares and proportions among all my children who may then be living and the issue of such of them as may survive me and may then be dead; such issue taking, nevertheless, such share only as their parent would have taken respectively if he or she had survived until the time of the general distribution of my estate.

The testator left to survive him a widow, Elizabeth R. Edwards (since deceased), and eight children, viz., John H., Ignatius L., Mary G., Elizabeth S., Geo. W., Richard S., Joseph F., and Thomas A. Edwards.

(2) John H. Edwards died on or about February 12, 1877, having first made his last will and testament, dated August 1, 1876, after his death duly proved and registered at Philadelphia, etc., leaving surviving him a widow, Lydia B., and five children, to wit: Lydia B., Mary, Ellen L., Edmund B., and Elizabeth R.

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Edwards, all minors: of which will he did appoint the plaintiffs the executors, to whom letters testamentary were duly granted by the Register of Wills on February 16, 1877; and in said will, said John H. Edwards did direct said plaintiffs to receive from the trustees of his said father's estate the income due him from that estate, and from the moneys thus received to pay his widow the sum of $300 per month for the support of his family until his estate should be paying income; and did also direct said plaintiffs to pay to his said widow one-third of the net income of his estate during her natural life and while his estate was being settled, and to divide the balance among his children as therein set forth.

(3) The executors and trustees named in the will of said George W. Edwards, deceased, having all died, the Orphans' Court of this county, by decree of February 24, 1877, did appoint George L. Crawford, Esq., substituted trustee under said will; and letters of administration, *d. b. n. c. t. a.* on said estate were duly granted to said George L. Crawford, Esq., by the Register of Wills of this county.

(4) Thomas A. Edwards, the youngest child of said George W. Edwards, deceased, arrived at the age of twenty-one years on July 18, 1878.

(5) George L. Crawford, substituted trustee as aforesaid, has received the income and rentals of the estate of said George W. Edwards, and has divided the same into the proper proportions and paid to all the parties interested in said estate all their respective proportions of said income, excepting the plaintiff's, and on the sixteenth day of December, 1878, had in his hands the sum of seven hundred and fifty dollars balance of income which had accrued since the coming of age of the said youngest son and at that date belonging to the share of the said John H. Edwards, collected since his death, which he declines and refuses to pay over to the plaintiffs, alleging that the interest of John H. Edwards, deceased, in his father's estate was contingent and not vested in him, and that by reason of his death prior to the time when his father's estate was directed to be divided, he had no power of testamentary disposition therein, and that the share which he would have taken, if living at the period of division, then vested in his children as purchasers under the will of their grandfather, George W. Edwards, deceased.

If the Court should be of opinion that John H. Edwards took a vested interest under the will of his father in his share of the residuary estate of the said testator, which would pass by the will of the said John H. Edwards, judgment to be entered for the plaintiffs for the sum of $750; if otherwise, for the defendant.

The Court below entered judgment, *pro forma*, for the plaintiffs. Whereupon defendant took this writ, assigning for error the action of the Court.

Edward Olmsted, for plaintiffs in error.

Where real or personal estate is devised or bequeathed to such of the children, or to such child or individual as shall attain a given age, or the children, etc., who shall sustain a certain character, or do a particular act, or be living at a particular time, without any distinct gift to the whole class, immediately preceding such restrictive description; so that the uncertain event forms part of the original description of the devisee or legatee; in such case, the interest so devised and bequeathed is necessarily contingent on account of the person. For, until the age is attained, character sustained, or the act performed, or the person is ascertained, there is no person *in rerum natura* answering the description of the person who is to take as devisee or legatee.

Smith on Executory Interests, § 281.
McBride *v.* Smyth, 4 Sm. 245.
Bentley *v.* Kaufman, 5 WEEKLY NOTES, 88.

Where a testator directs trustees to pay income of real and personal estate to his wife for life, and on her death to apply the income to the support of his children then living and the issue of such as are then deceased, until the youngest child attained his majority, it has been held that the class is not to be ascertained until the death of the widow, and that a child who dies in her lifetime takes nothing.

Deighton's Settled Estates, L. R. 2 Ch. 783.

In List *v.* Rodney (2 Nor. 483) the testator's words were: "the devise to my daughter S. and to her children is intended and shall give to her children living at her death, and to the lawful issue of any one deceased, the real estate," etc. This was held to give the children a contingent remainder. The language of the will in the present case is almost identical, and unless List *v.* Rodney is to be overruled, it is submitted that the judgment of the Court below must be reversed. Womrath *v.* McCormick (1 Sm. 504), in the aspect in which it is adverse to our present contention, was overruled by List *v.* Rodney.

Henry Wharton, for defendants in error.

The use of adverbs of time, such as "then," "at," "upon," "from and after," when introducing or used in connection with a gift to a person at a given age, or at a given period, if preceded by a limitation of the estate, do not of themselves import a contingency, but merely the order of succession, and the estate vests at the death of the testator.

Boraston's Case, 3 Co. 21 a; Tudor's Lead. Cases, Real Property, 685.
Goodtitle *v.* Whitby, 1 Burr. 228.
Doe *v.* Lea, 3 Term Rep. 41.
Doe *v.* Ewart, 7 Ad. & Ell. 636.
Phipps *v.* Ackers, 9 Cl. & Fin. 591.

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This also includes cases where the prior estate has been given to some third person, either for the benefit of the devisee himself, or for that of some other persons; and cases where the estate is given over in case the devisee does not attain the given age or survive the fixed period.

Phipps *v.* Ackers, 9 Cl. & F. 591.
Edwards *v.* Hammond, 3 Lev. 132; 1 Bos. & P. N. R. 324, note.
Bromfield *v.* Crowder, 1 Bos. & P. N. R. 313.
Doe & Nowell, 5 Dow, 203, note.

The rule also applies where the prior estate is given on trusts which do not exhaust the whole intermediate income, *e. g.*, where it is to be employed in the discretion of the trustees towards the maintenance of the devisee.

James *v.* Lord Wynford, 1 Sm. & Giff. 40.

The greater prominence given in late years to the doctrine of Boraston's Case, has made obsolete much of the learning of contingent remainders. As respects wills, and conveyances operating solely by virtue of the statute of uses, it is settled now that where it is possible to do so without violence to language, all estates are *vested, subject to be divested* on the occurrence of the particular contingency by which their enjoyment is precluded, in possession or otherwise. They are made in effect estates on condition subsequent. This difference, it is true, has always existed, but owing to common law traditions it has only of late years come into prominence. The advantage of this mode of treating such questions is that the attention is concentrated on the divesting words, instead of being occupied with finding sufficient words of original gift. As to a class of children, for instance, it is now assumed as a matter of course, that they are intended to take at once, subject to such modal conditions of enjoyment as their age or the circumstances of the estate may for a limited time make proper or necessary. This fits the idea of ordinary people without violating technical accuracy.

List *v.* Rodney, relied on by the other side, differs from Womrath *v.* McCormick (*supra*), because in the former there was no defined existing class of children of the life-tenant at the death of the testator—some might die, some might be born afterwards, as did in fact happen. The words to be construed were words of direct gift, while in Womrath *v.* McCormick they were words of division.

In McBride *v.* Smyth (*supra*) there was a direct gift to such of the testator's children as might then be living; the contingency of survivorship was part of the description of the persons who were to take.

March 10, 1879. THE COURT. It is impossible to distinguish this case from Womrath *v.* McCormick (1 P. F. Smith, 504), and that case so nearly resembles Manderson *v.* Lukens (11 Harris, 31) that, as Mr. Justice THOMPSON remarked, it was almost impossible to distinguish it. These determinations settle the law in this State to be that the use of the words "when" or "upon" in a gift to a person at a certain period, if preceded by a limitation of the estate, does not import a contingency, but the estate vests from the death of the testator. "*When* and *upon*," says Mr. Justice THOMPSON, in Womrath *v.* McCormick, referring to the time of performing an act, "are substantially synonymous." There was in this case no uncertainty other than that which attaches to every remainder, that the remainder-man shall outlive the tenant for life; but that never makes the remainder contingent. The same principle is recognized in Provenchere's Appeal (17 P. F. Smith, 469), where it is said: "When the enjoyment of an entire fund is given in fractional parts at successive periods which must eventually arrive, the distinction betwixt time annexed to payment and time annexed to the gift becomes unimportant."

Judgment affirmed.

PER CURIAM.

Jan. '78, 162. Jan. 14, 1879.

Rutherford, Exec'r, v. Commonwealth.

Guardian and ward—Sale of property of ward—Bond conditioned for faithful execution of power conferred upon guardian—Liability of surety thereunder.

A guardian, by virtue of an order granted by the Orphans' Court to sell his ward's property and to account for the proceeds, sold a part at one time, and the balance at another, without a further order of Court. After the sale of the first part, security was given, conditioned "for the faithful execution of power conferred upon the guardian." Security was also entered after the second sale:

Held, that the surety on the first bond was liable for the proceeds of both sales, there being nothing in his bond confining his liability to the first sale.

Error to the Common Pleas No. 3 of Philadelphia County.

Debt, on a bond given by F. Geisler, guardian of Morgan minors, and John Given, to the Commonwealth.

At the trial, before FINLETTER, J., the following facts appeared: On Feb. 16, 1867, F. Geisler, guardian of Francis J., Annie, and Robert Morgan, presented his petition to the Orphans' Court, setting forth that they were each entitled to an undivided one-sixth part of a certain lot of ground, and asking for an order to sell the minors' interest at public sale. The order was

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granted. There were two houses on said lot, advertised in the handbills as Nos. 1 and 2. In April, 1867, Geisler made return to the order of sale that James Judge had purchased the property described as No. 1, and that no one bidding a satisfactory price for the property No. 2, it was not sold. The Court confirmed the sale to Judge, and ordered security in $3500; John Given, defendant's testator, becoming the surety. The condition of the bond filed was as follows:—

"That if Ferd. Geisler, guardian, should faithfully execute the power committed to him by the Orphans' Court in the sale of certain real estate of Francis J., Annie, and Robert Morgan, minors, ordered by the Court on the 16th February, 1867, and truly account for and pay over the proceeds thereof according to law, and as the Court should direct, then the obligation to be void, etc."

Geisler did not ask for an alias order of sale, but, on May 4th, 1867, he made a further return that in pursuance of the order of sale of 16th Feb. 1867, he sold the balance of the premises described in said order to James Judge for $3575, and praying the sale should be confirmed, which was done, and security ordered in $3000, Samuel A. Miller becoming the surety.

Francis Morgan coming of age, Geisler, after citation, filed his account, charging himself with the distributive share of the minors, and the Court thereupon ordered him to pay over to Francis Morgan his portion of the property. Geisler then absconded, and Given having died meanwhile, Morgan brought this action against his executor.

Defendant's special plea set forth that the portion ordered by the Court to be paid to Morgan was not any part of the proceeds of the sale made under the order of the Court of Feb. 16, 1867, for the proper distribution of which defendant had become surety.

The defendant presented the following point: "That upon the evidence offered in this case by the plaintiff, the verdict should be for the defendant." *Refused.*

The Court charged the jury *inter alia*, that, "In a case of this kind, when the money has been traced to the possession of the guardian, it is the duty of his security to show that it has been properly accounted for. If the order of the Orphans' Court had reference to this fund, it is your duty to render a verdict for the plaintiff."

Verdict and judgment for the plaintiff.

Defendant took this writ, assigning for error the refusal of the point and the portion of the charge of the Court above quoted.

Walter J. Budd, for the plaintiff in error.

New security having been ordered by the Court, and taken after the second sale, plaintiff in error is only liable for Morgan's proportion of the proceeds arising from the first sale.

H. Haverstick, for the defendant in error.

The order of the Court was for the sale of the whole property, and Given's bond being for the faithful execution of the power conferred by the Court, he is liable for the amounts realized from both sales, nothing appearing in the bond to restrict his liability to the first sale.

February 3, 1879. THE COURT. The condition of the bond in suit was, that Geisler, the guardian, "should faithfully execute the power committed to him by the Orphans' Court for the city and county of Philadelphia, in the sale of certain real estate of Francis, Annie, and Robert Morgan, minors, ordered by the Court on the 16th February, A.D. 1867, and should truly account and pay over the proceeds of the same." It is evident that this condition extends to both sales under the same order, and the liability of the surety is not confined to the proceeds of the lot first sold. The fact that another bond and surety was ordered and given on the sale of the second property did not release the first surety from his express engagement. If he meant only to be responsible for the proceeds of the first property, he should have been careful to have had it so specially expressed in the bond.

Judgment affirmed.

PER CURIAM.

July, '78, 42. Jan. 20, 1879.

Kase v. Greenough.

Affidavit of defence law—Instrument within the Act—Bond conditioned to pay costs—Equity—Petition to intervene—Security for costs.

A Court of Equity may require security for costs from one applying to be made a party to a suit, and may determine the amount of the Master's fee in proceedings relating to such application.

Plaintiff in an action of debt filed a copy of the bond given by defendant as security for costs in an equitable proceeding, together with copies of the decree and the order fixing the amount of the costs. The affidavit of defence disclosed no meritorious defence:

Held, that judgment was rightly entered for the plaintiff.

Error to the Common Pleas No. 3 of Philadelphia County.

Debt, by William J. Greenough, individually and as trustee, against Simon P. Kase and Peter C. Tomson. The plaintiff filed a copy of a bond given by the defendants to him in the sum of $1000, upon condition "that if the said Simon P. Kase shall fail in his application to be made a defendant in the suit of William J. Greenough against the Danville, Hazleton & Wilkesbarre Railroad Company, Columbia County, Common

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Pleas, December Term, 1877, No. 3, in equity; then he will pay the costs attending the proceedings before Samuel Dickson, Esq., the Master in said suit, including the Master's fee." With the copy of the bond was filed a copy of the decree of the Court dismissing the petition of Simon P. Kase to be made a defendant, and a copy of an order of Court fixing the amount of the Master's fee, "including amount paid or to be paid by the Master for the services of a short-hand writer in taking and printing the testimony," at $1000.

The defendant filed an affidavit of defence in part as follows: "Deponent is advised and so suggests that the paper filed does not entitle the plaintiff to judgment for want of an affidavit of defence, the same being conditioned for the payment of costs and not for any determined and specific sum of money. . . . . Deponent is advised and so suggests that the said Court had no power to order deponent to execute such a bond as the paper sued on, as a condition of deponent's being allowed to take testimony in support of his said application. And deponent is advised that said order of said Court was illegal, and that said bond is void. Deponent further saith that said bond is conditioned for the payment of the Master's fee, in the event of deponent's failure in his said application; but deponent avers that the said Master has never presented any bill for his said fee, nor made any claim upon deponent for the same. Deponent further saith that no averments have been filed with said bond showing the amount due thereon, and that the amount of deponent's liability thereunder is not certain or determined." . . . .

On motion, the Court entered judgment for plaintiff for want of a sufficient affidavit of defence. The defendants took this writ of error, assigning as error the entry of the judgment.

F. Carroll Brewster (with whom was *Francis E. Brewster*), for plaintiffs in error.

The affidavit was sufficient. The bond was conditioned for the performance of a collateral condition, viz., the payment of costs by the obligors in the event of the failure by one of them in an application made by him to become a defendant in a certain suit, and it is therefore not within the affidavit of defence Act.

Boas *v.* Nagle, 3 S. & R. 250.
Comm. *v.* Steelman, 2 Miles, 405.
Comm. *v.* Hoffman, 24 Sm. 105.
Smith *v.* Harley, 1 WEEKLY NOTES, 111.
Sands *v.* Fritz, 3 N. 15.

The copy of the bond is unaccompanied by any averment showing its forfeiture. It is conditioned for the payment of *costs;* but the obligors never agreed to pay for the services of a short-hand writer; the only legal costs are attendance and mileage of witnesses; the bond is not capable of an equitable construction to include equitable costs. This charge the Court was unauthorized to exact.

Tenor *v.* Hutton, 1 Phil. 50.

Samuel Gustine Thompson (with whom was *Geo. L. Crawford*), contra.

The copy filed is a *record*, not a *bond* only; The Act includes it.

Moore *v.* Fields, 6 Wr. 471.

The averment of the amount due is contained in the decree and is sufficient.

Sutton *v.* Athletic Club, 4 WEEKLY NOTES, 90.
Lehman *v.* Jaquett, 5 Id. 183.
Bayard *v* Gillasspy, 1 Miles, 259.

The power of the Court to exact the bond was unquestionable.

Pemberton on Decrees, 404-5.

The costs would have been a judgment, and the bond was therefore unnecessary at any rate, or only voluntary. Kase would have been liable without it.

February 10, 1879. THE COURT. A Court of Equity has a large discretion as to costs. It can always place a party under terms who applies to the Chancellor for that which is only grantable of grace. When therefore the plaintiff in error, Kase, applied to be made a party to the proceedings in equity, he submitted himself to whatever the Court might see fit to direct in regard to his application. It was highly reasonable that he should pay the expense of it if he did not succeed. He accordingly, with Tomson, the other plaintiff in error, gave bond conditioned to pay the costs attending the proceedings before the Master to whom his application had been referred, and it was entirely competent for the Court to determine the amount of the Master's fee.

Judgment affirmed.

PER CURIAM. WOODWARD, J., absent.

Jan. '78, 171. Jan. 15, 1879.

Sloan v. Chamberlain.

Damages, remote and proximate—Province of Court and jury.

In an action upon a promissory note, the defendant offered to prove, as a set-off, that the plaintiff had agreed, upon a given consideration, to satisfy a judgment which he held against the defendant, that he had failed to do so, and that, as a consequence, the defendant had been unable to raise money upon his property, whereby he had suffered loss:

Held, that the alleged damages were entirely too remote and speculative, and could not properly be set-off.

Held further, that the question of the remoteness or proximity of the damages to the cause which was alleged to have produced them was for the Court.

Error to the Common Pleas No. 4, of Philadelphia County.

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Assumpsit on a promissory note, by Chamberlain & Co. against Samuel Sloan. Pleas, non-assumpsit, payment with leave, etc., set-off.

Upon the trial, after the plaintiff had offered in evidence the note, and rested, the defendant offered to prove that at the time the note was given the plaintiff held judgments against the defendant, which, in consideration of several notes (one of which was the one in suit), he agreed to satisfy of record, that he did not do so; that defendant was engaged in business in the State of Missouri, and had incurred debts in erecting machinery, etc., and had expended all his available funds, and had no means of raising money except the property bound by plaintiff's judgment. That he made numerous applications for a loan on this property, which were refused on the ground of the lien of plaintiff's judgment. That by reason of the failure to obtain this loan and thus prevent a sale by the sheriff of his effects in Missouri, defendant was compelled to sell it (the said business), thereby sustaining a loss of about ten thousand dollars. That defendant would not have sustained loss and been compelled to sell had he been able to borrow money on said house, and that he would have been able to borrow money except for plaintiff's judgment.

The Court excluded this testimony, and directed the jury to find for the plaintiff. Verdict and judgment accordingly. Defendant took this writ, assigning for error the action of the Court in rejecting his offer of evidence.

E. O. Michener, for plaintiff in error.

The damages offered under the plea of set-off were the direct proximate result of the plaintiff's breach of contract, and should have been admitted.

Scott *v.* Hunter, 10 Wright, 192.
Dubois *v.* Glaub, 2 Sm. 238.
Pittsburgh *v.* Grier, 10 Har. 54.

The question was one which should have been submitted to the jury.

Fairbanks *v.* Kerr, 20 Sm. 86.
R. R. Co. v. Hope, 30 Id. 373.

George Tucker Bispham (*Wayne McVeagh* with him), for defendant in error.

The mere statement of the offer of evidence shows that the immediate cause of loss to the plaintiff in error was his own business embarrassments. It was not the fault of the defendant in error that he needed to borrow money. In this view of the case the evidence was clearly inadmissible.

Hadley *v.* Baxendale, 9 Exch. 341.
Sedgwick on Damages, 77.

Feb. 3, 1879. THE COURT. The damages offered to be proved were entirely too remote and speculative. Whether they were so or not was for the Court and not the jury. Had the evidence been admitted, the jury must have been instructed to disregard it. A party might just as well be allowed to prove that in consequence of the non-payment of an ordinary debt he had been unable to carry on his business, had lost his credit, and been forced into bankruptcy. This is very much the case of the plaintiff in error. He complains that in consequence of the defendant's breach of contract in not satisfying an incumbrance on his property, he had been unable to borrow money upon it, and was unable, in consequence, to prevent a sheriff's sale of his property in Missouri, whereby he sustained a loss of ten thousand dollars. The bare statement of the case is a sufficient argument against its admissibility. Judgment affirmed.

PER CURIAM.

Common Pleas—Law.

C. P. No. 4. March 12, 1879.

Strawbridge v. City of Philadelphia.

Municipal corporations—City of Philadelphia—The introduction of gas and the carrying of it through the streets is within the scope of an express authority conferred upon the city by law—Act of April 2, 1790—Ordinance of March 21, 1835—In the absence of negligence, the city is not responsible for damage arising from the bursting of a gas main owned by it.

Sur exceptions to award of referee.

This was an action on the case to recover damages done to the plaintiffs' premises, at the N. W. corner of Eighth and Market Streets, and to the stock contained therein, and for loss of rent and services of employés, by reason of an explosion of gas in their basement, which gas escaped from a main owned and operated by the city of Philadelphia, for the purpose of lighting the city.

When called for trial the parties agreed to a rule of Court that the cause should be referred to a referee (Rufus E. Shapley), upon whose award judgment should be entered, unless exceptions were filed. Before the referee the evidence showed that on the evening of August 10, 1874, the said main was broken by causes unknown, that, in consequence, the gas escaped and found its way into the plaintiffs' basement, where, upon the entrance of an employé of the plaintiffs with a lighted candle, it exploded. It was shown that the gas main was of good quality, and it was admitted that the defendant was guilty of no negligence.

The referee, in an elaborate report, decided that the city was not liable to the plaintiffs for the damages which they suffered by reason of the

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explosion. To this award the plaintiffs filed exceptions.

David W. Sellers, for the exceptant.

The manufacture of gas by the city is a private commercial adventure. It is authorized by ordinance, but there is no legislative Act exempting the city from liability for damages done thereby. Injury resulting from the conduct of a private business must be compensated, irrespective of the question of negligence.

Pottstown Gas Co. *v.* Murphy, 3 Wr. 257.
Shuter *v.* City, 3 Phila. 228.
Smith *v.* Phillips, 8 Phila. 10.
Imperial Gas Light Co. *v.* Broadbent, 7 H. of L. 600.
St. Helen's Smelting Co. *v.* Tipping, 11 Id. 642.

Any one who brings upon his premises any dangerous thing, likely to escape and do mischief, must pay for all damages which result, if it does escape, irrespective of negligence.

Rylands *v.* Fletcher, L. R. 3 H. of L. 330.

Charles E. Morgan, Assistant City Solicitor, contra.

The Act of April 2, 1790, gives the city the right to legislate fully in regard to lighting the city; and the ordinance of March 21, 1835, directs that gas-pipes be laid in the streets. Where a person or corporation is authorized by law to do a particular thing, or to carry on a particular class of business, so long as they keep within the scope of the power granted, they are completely protected from proceedings at law or in equity, in behalf of the public, therefor.

Wood on Nuisances, § 746.
Blyth *v.* Water Works Co., 25 L. J. (Ex.) 212.
Vaughan *v.* Railway Co., 5 H. & N. 679.

But, assuming that no such authority had in fact been conferred upon the city, this is not a case of nuisance. A business which is lawful, and is carried on reasonably, and which does not necessarily affect health, comfort, or the ordinary uses and enjoyment of property in the neighborhood, cannot be a nuisance.

Rhodes *v.* Dunbar, 7 Sm. 290.

It is, therefore, readily distinguishable from Gas Co. *v.* Murphy, Shuter *v.* City, and the other cases cited by the other side. The doctrine of Rylands *v.* Fletcher is law in this country only in cases of nuisance.

Lossee *v.* Buchanan, 51 N. Y. 476, and cases cited.
Madras Railway Co. *v.* The Zemindar of Carvatenagarum, 1 L. R. Ind. Ap. 364 (1874).

Even if the doctrine of Rylands *v.* Fletcher were accepted as law in analogous cases in Pennsylvania, it would not apply to the present case, as there are such manifest and essential differences between the facts of that and the present case.

C. A. V.

July 5, 1879. THE COURT. After the most careful examination of the facts and of the principles of law involved in this case, which is one of much importance, not only in its individual aspects, but also in its public relations, we are of opinion that the conclusion reached by the referee is in harmony with the well-settled law of this State, and that the plaintiffs have no cause of action whatever against the defendant. The whole subject is discussed with so much learning and ability by the referee in his report that it is necessary to say very little beyond this, that we adopt his views of the case, which are maintained by abundant authority. The case of Rylands *v.* Fletcher (Law R., 3 H. L. 330; s. c. Law R., 1 Ex. 265), which is principally, indeed I may say almost exclusively, relied upon by the plaintiffs' counsel, is by no means conclusive of the present case, although it bears a strong resemblance to it in some of its general features. Leaving entirely out of the case the question of contributory negligence on the part of the plaintiffs arising out of their violation of the City Ordinance of November 12, 1855, which prohibited the building of vaults beyond the curb line, and even conceding for the sake of the argument that illuminating gas collected in large quantities possesses some elements of danger, yet it must be obvious that there is a great difference between bringing upon one's premises a dangerous substance or element for private profit, and the introduction of that substance or element for public convenience by authority of law. In the former case a man may well be held responsible for results which naturally arise out of the dangerous character of the thing itself, for he may be said to assume the risk of all consequences, just as a man assumes the risk of all accidents which may happen from keeping upon his premises animals which are *feræ naturæ*, without regard to any question of negligence in their keeping. On the other hand, it may be said without fear of contradiction that no man can be held responsible for doing that which he is expressly authorized by law to do, unless he is guilty of some negligence or misconduct in connection with it. In such cases what is authorized to be done must be done in a careful manner. This is the whole obligation, and unless there be negligence no action for damages can be maintained for acts which are within the scope of an express authority conferred by law.

That the introduction of gas and the carrying of it by mains through the streets for the purpose of lighting the city is a statutory power conferred upon the city of Philadelphia admits of no doubt. The Act of April 2, 1790, gave the city full power to ordain and establish whatever laws might be convenient or necessary for the purpose of lighting the city, and the ordinance of March 21, 1835, directing the laying of pipes through the city for the distribution of gas was a lawful exercise of the power thus conferred by the Legislature upon the city. It has been so determined in many cases in which the extent of

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municipal authority under such grants has been discussed. Indeed it has never been doubted. The distinguished citizens who on the 28th of November, 1833, presented to the City Councils their celebrated remonstrance against the plan of lighting the city with gas, enumerated in that earnest and solemn document (which is now before me) every objection which occurred to them. They represented that gas was an article as ignitible as gunpowder and as fatal in its effects: that it would, by explosions and conflagrations, cause an immense destruction of property and an appalling loss of life; that "it would contaminate all the waters of the Delaware and Schuylkill, and would destroy the immense shoals of shad, herring, and other fish with which they abound;" but it was not suggested by the remonstrants that the proposed action of Councils was contrary to law, or beyond the powers conferred by the Legislature upon the city, although among the signers were such eminent lawyers as Horace Binney, John Sergeant, Benjamin Chew, William J. Duane, Joseph P. Norris, and William L. Hirst, and such citizens as Dr. Physick, Hartman Kuhn, James C. Fisher, John C. Crekson, Matthew Newkirk, Paul Beck, Roberts Vaux, and hundreds of others of distinguished intelligence and prominence. Fortunately the grave fears which were then entertained have been demonstrated to be unfounded by an experience of more than forty years, and no instance I apprehend can be recalled in all that period of injury resulting from gas in the street mains which was not clearly traceable to negligence or improper intermeddling. That the injury suffered by the plaintiffs in the present case was due to one or the other of these causes we entertain no doubt whatever, but as the facts found by the referee conclusively show that the fault did not lie at the door of the city he could do no otherwise than find for the defendant. In that finding we entirely concur, and the exceptions are therefore to be dismissed, and the award confirmed.

Opinion by THAYER, P. J.

Orphans' Court.

May 23, 1879.

Hughes's Estate.

Trust for sole and separate use—Such trust, if not efficacious at the time appointed for it to go into effect, cannot become so by reason of subsequent marriage—A trust, however, in favor of minors, and upon the youngest reaching the age of twenty-one years, then to be conveyed in such way and manner that each share shall be for the sole and separate use of the beneficiary free from the debts "of her then present or any future husband," will be sustained—In such case the status of the daughters at the time fixed for the division of the estate fixes the nature of their interest.

Sur exceptions to adjudication.

At the audit of the account of the executors of Thomas Hughes, the following facts appeared. The decedent died January 15, 1871, leaving a will dated December 20, 1870. After specific bequests to two brothers and a sister for life, the remaindermen being the residuary legatees, the decedent devised the residue of his estate to his executors in trust:

"To pay over the net interest and income thereof annually or oftener, if they may see fit unto my four daughters, Annie, Kate, Fanny, and Teresa Hughes, share and share alike, for their sole and separate maintenance, education, and support, until my youngest child shall arrive at the full age of twenty-one years. And as soon as my said youngest daughter shall have attained her said majority, then I direct my executors and trustees aforesaid to pay over out of the principal of my estate to the Convent of the Holy Child JESUS at Sharon the sum of $10,000. After the payment of the said sum of $10,000 has been made as aforesaid, then I direct my said executors to divide all the rest, residue, and remainder of my estate then in their possession, equally between my said four daughters, namely, Annie, Kate, Fanny, and Teresa Hughes, if then living, and to the issue of any of them who may be then deceased, such issue taking such share only between them as his, her, or their parent would have had and taken if living, in such way and manner, however, that the same shall be for their sole and separate use and support, and shall not in any way be liable to the control, debts, or engagements, of their then present or any future husband or husbands they or either of them may have."

Teresa, the youngest daughter became of age August 26, 1878; Kate, another daughter, entered a convent, where she still remains. The two remaining daughters were married respectively November 30, 1876, and October 16, 1878.

The auditing Judge (PENROSE, J.) held that the bequest to the convent was void as being made within thirty days of testator's death, although it was urged that the bequest was in reality for the support of a daughter of the decedent who had some time previously taken her vows as a sister, the convent having given up all claim to the bequest as for their benefit as a corporation. It was also claimed that the shares of the two married daughters should be paid to them absolutely, the separate use having failed as they were not married until nearly six years after testator's death. The auditing Judge held that their shares must be held in trust for them, saying, *inter alia:* "In ordinary cases if the legatee is unmarried or not contemplating marriage at the time of the death of the testator then a trust for her separate use is inoperative. But in the present case the testator seems to have fixed a different time for determining the question,

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viz., when the youngest daughter shall come of age; until then the trust was executory."

To this adjudication Mrs. Muller and Mrs. Snyder filed exceptions.

Theodore F. Jenkins, for the exceptants.

July 5, 1879. THE COURT. That a trust for separate use cannot exist except for a woman married or contemplating marriage is too well established to need the citation of authority. It is, indeed, implied in the very nature and definition of such a trust, which is purely a creation of equity for the protection of women in a state of coverture, and therefore no more applicable to a single woman than it is to a person of the opposite sex.

It is true, that in England, if created for a woman then unmarried, such a trust is not absolutely void, but simply suspended, and becomes operative in case of her subsequent marriage, if, in the meanwhile, she has not exercised her power of alienation, as she may do. But in Pennsylvania the views of Lord Cottenham, in Massay *v.* Parker (2 Mylne & Keen, 174) though overruled subsequently in Tullett *v.* Armstrong (1 Beav. 1, 4 Mylne & Craig, 377), were adopted in Hamersly *v.* Smith (4 Whart. 126), and it is here settled by an unbroken line of cases, that a trust for separate use, if not efficacious at the time appointed for it to go into effect, cannot become so by reason of any subsequent marriage; and, as said in McBride *v.* Smyth (4 Smith, 250), "nothing else than a legislative enactment can change the law as thus established."

The case before us, however, is not affected by this principle. It is true that when the will was made, and when the testator died his daughters were all unmarried. They were then young children—the youngest but thirteen years of age. He was aware, for knowledge in this respect must be presumed, that a trust for separate use could not, under these circumstances, be created. He does not attempt to do it. Evidently acting under professional advice, he defers the time at which his daughters' estates are to take effect, and gives his entire property to trustees, upon whom he confers certain active duties. These duties are, *first*, to receive and apply the income for a given period; *second*, to make conveyances when that period has expired. The character of the conveyances so to be made is simply indicated by the testator, the actual conveyance being left to the trustees; and whether the daughters shall receive legal or equitable estates depends upon their *status* when the conveyance is to be made.

The time at which this is to be done is when the youngest daughter reaches the age of twenty-one years, when the trustees, after giving to a religious corporation the sum of ten thousand dollars, are directed "to make division of the estate in *such way and manner* as that the share of each daughter shall be for her sole and separate use and support, and shall not in any way be liable to the control, debts or engagements of her *then* present or any future husband." Of course, if the daughters all remain unmarried, the direction as to separate use will not take effect, nor can it avail so far as any future husband is concerned; but the provision is executory and to be construed liberally. It is as if he had said, "should any of my daughters be then married or contemplating marriage, I direct that their shares shall be settled by my said trustees for their separate use; the shares of the others to be conveyed to them absolutely." "Executory trusts," says Mr. Smith (Executory Interests, § 489), "are trusts raised by a stipulation or direction in a will, etc., to make a conveyance, settlement, etc. etc., to uses or upon trusts which do not appear to be formally and finally declared by the instrument containing such stipulation." "In the case of trusts executed," he adds, § 491, "the limitations may be deemed to receive their intended shape from the words of the will, etc., itself. But in the case of trusts executory, the party may be fairly understood to leave the limitations to be perfected by the conveyance, settlement, etc. etc., stipulated or directed by him, and to have intended that the conveyance, settlement, etc., should avoid or correct any relative inconsistencies or technical obstacles, arising from impropriety of expression, to the general scope of the conveyance, settlement, etc. etc., so directed by him:" (See also Fearne on Cont. Rem. *118; Ib. 113–14; Atherly on Marriage Settlements, *121; 4 Kent. *219.)

It will be seen that the case differs very essentially from McBride *v.* Smyth (4 Smith, 245), which has been cited as an authority against the position here taken. The trust there was not executory in the sense defined above. The estate given to the trustees terminated *ipso facto* when the youngest child became of age, and no power or duty with regard to the settlement or division then to be made was conferred upon them. The testator undertook to make the division himself, and, of course, the invalidity of the trust for separate use was determined by the state of facts at the time of his death. But here the estate remains in the trustees; and, until they have exercised the power given, does not pass to the daughters at all. Until then, though in one sense vested, it is, as already stated, uncertain whether their interests will take effect as legal or as equitable estates; if married, the trustees will make settlements to their separate use; if unmarried, they will take absolutely.

It cannot be doubted that a testator may give an estate *in futuro*, either in remainder or by

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way of executory devise, to his daughter, if she be then unmarried, but if married, to trustees for her separate use. There is nothing illegal or against the policy of the law or any rule of property in such an alternative limitation. And this, in effect, is precisely what has been done in the case now before us.

The hostility to trusts which for a period characterized the decisions of our Supreme Court, has passed away. They are no longer regarded with disfavor. On the contrary, within proper limits, they are encouraged, especially where intended for the protection of the beneficiary. (See Earp's Appeal, 25 Smith, 119; Ingersoll's Appeal, 5 Norris, 245.)

The question presented in this case is one of importance, and until a higher Court shall say that the division of the testator's estate, to be made by the trustees at the time his youngest daughter becomes of age, shall *not* be in such manner as that the shares of his married daughters shall be for their sole and separate use, we must decline to permit it to be made in any other way. Exceptions dismissed and adjudication confirmed.

Opinion by PENROSE, J.

Dissenting opinion by ASHMAN, J.

(After quoting the clause from the will, *supra*.) The auditing Judge decided that the status of the daughters at the time fixed for the division of the estate determined the nature of their interest; and that as to the daughters last named, one of whom was married, and the other in contemplation of marriage when the youngest child attained full age, the trust for their separate use took effect at that time.

The point involved in this ruling is a new one, and, if valid, creates an exception to a rule which has been laid down without qualification by the Supreme Court of this State. The doctrine of the English cases seems to be, that a trust for a woman's separate use may be effectually created, although she be unmarried at the time and no particular marriage is in contemplation; and that the trust, although suspended by the cessation of coverture, will reattach on a subsequent marriage. (Hill on Trustees, 419.) "But," says STRONG, J., "whatever may be the rule in the English Courts, it is here too well established to be disturbed by anything else than a legislative enactment, that a separate use for a woman cannot be created unless she is covert, or unless in immediate contemplation of her marriage." (McBride *v.* Smyth, 4 P. F. Sm. 245.) That case decided that the marriage must be in existence or in contemplation at the time the trust is created. "That the marriage must be in immediate view at the time of the creation of the trust is proved by all the cases, which decide that on the termination of the coverture, the trust falls, and is not revived by a second marriage, for if any marriage would answer to the provision for the trust, a second would as well as the first." (Per AGNEW, J., in Wells *v.* McCall, 14 P. F. Sm. 207.) The cases of Hammersley *v.* Smith (4 Wh. 126), Ogden's Appeal (20 P. F. Sm. 501), Dunn & Biddle's Appeal (4 Nor. 94), and a host of intermediate decisions, affirm this doctrine. The sole distinction between the present case and that of McBride *v.* Smyth is, that in the latter the testator himself gave to his daughter, if living when his youngest child should attain majority, an estate for her separate use, whilst here he directs his trustees to divide his estate at that period among his surviving daughters, so that the same shall be held for their separate use. In this case, as in McBride *v.* Smyth, the daughters were unmarried and not in contemplation of marriage at the time of testator's death; but by the decision of the auditing Judge the testator is enabled to confer upon a trustee a power which all the cases assert he does not possess. In the effort to escape from restricting too far the power of alienation and the husband's marital rights, while preserving within reasonable limits the power of the parent to provide for the future support of his daughters, the law effected a compromise, as was well said in Wells *v.* McCall (14 P. F. Sm. 213), by which the donor could impose a trust upon his gift in view of a then existing or contemplated marriage. The date of the creation of the trust was the limit of this compromise. If this limit can be extended in the manner proposed by the auditing Judge a result will be reached which it was declared, in McBride *v.* Smyth, could be effected only by legislative enactment. It would, for instance, have been easily possible for both of the daughters claiming in this case to have married and lost their husbands, and to have remarried before the time fixed for the division of the estate. Contrary to every decision in Pennsylvania, they would then have been affected with a separate use. In Wells *v.* McCall (14 P. F. Sm. 214) it was admitted that there is always more or less of uncertainty in the title where the fact is to be ascertained, that a marriage was in actual contemplation, and the answer was that the creation of the trust itself put every one on inquiry, and that the marriage following in a reasonable time concluded the proof. But how immeasurably would this difficulty be increased where the fact is to be gathered, not from the date of the testator's death, which is here the date of the creation of the trust, but from an event (the attaining by a youngest child of full age), which can of necessity be known to very few, and the celebration of a marriage, which may be separated by many years from the death of the testator. The distinction drawn by the auditing Judge

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between executory and executed trusts is undoubtedly correct, and it is true that "in modelling the limitations of executory trusts in wills, as in marriage settlements, equity will interpose in such a manner as to substantiate the apparent intention." (Fearne on Cont. Rem. 118.) But equity will not interfere where the intention, if effected, would override a well-settled rule of law.

Campbell *v.* Ingersoll (6 WEEKLY NOTES, 125) presents, perhaps, a stronger analogy to the present case than McBride *v.* Smyth. The testatrix devised and bequeathed to trustees in fee all her residuary estate in trust for her two nieces, the income, if necessary, to be expended for their education, etc., during their minority, and upon their arrival at twenty-one years of age, the income to be paid to them quarterly, "so that the same may be for their equal and sole and separate use, and not subject to the debts or control of their husbands in case of their marriage." SHARSWOOD, J., in delivering the opinion of the Court, said: "The fact that the testatrix intended also, as one of the objects of the trust, to create sole and separate estates for her nieces, then being unmarried and not in contemplation of coverture, *though that object be considered inoperative and void*, does not invalidate the trust, if for other reasons it ought to be supported." In this case it was expressly found by the examiner that at the time of testatrix's death, the *cestui que trust* was unmarried and not in contemplation of marriage; and the trust, although upheld on other grounds, was repudiated as a valid trust for her separate use.

June 17, 1879.

Gray's Estate.

Decedent's estate—Question of fact—Demand for issue—Not a matter of right, but in discretion of the Court—Claim for money advanced on mortgage—Satisfaction of record, effect of—Payment of mortgage debt—Presumption as to—Evidence necessary to establish—Counsel fees.

Sur exceptions to auditor's report and demand for an issue.

By agreement of all the parties the account of Alexander P. Colesberry, executor under the will of Robert Gray, was referred to an auditor (Lewis Waln Smith) from whose report thereon, the following facts appeared:—

The decedent, with one Leeds, in July, 1862, purchased of William B. Taylor, their former employer, a brewery property for $64,000, Taylor taking a purchase-money mortgage for the whole sum. They carried on the business under the name of Leeds and Gray. In November, 1863, Leeds and Gray executed a new mortgage on the brewery property for $25,000, and also a bond and mortgage to Taylor for $64,000, which was substituted for the purchase-money mortgage held by him. A previously existing mortgage of $10,000 was satisfied out of the $25,000. In 1863 Leeds died, and Gray continued the business. In September, 1869, Gray paid Taylor $14,000 in cash. Gray's books showed, that up to June, 1873, he was paying Taylor interest on about $50,000, and although after that time payments may have been made, they were not receipted for in Gray's books, nor charged against Taylor, or any particular account.

Early in March, 1875, Gray applied to a conveyancer to negotiate a loan of $50,000 to be secured by mortgage on the brewery property. He mentioned the existence of the mortgage of $25,000, which it seems had by this time been reduced to $10,00, and which would be paid out of the money to be borrowed on this new mortgage. He also said that there was a large second mortgage on the property "which was pretty well settled up, and could be satisfied in a few minutes." The loan was effected, and on the 29th of March of the same year Taylor satisfied of record his mortgage for $64,000, the entry being regularly made in the margin of the mortgage book in the office of the recorder of deeds. The relations between Gray and Taylor were always confidential, the latter being in the habit of both making and endorsing notes for Gray's accommodation, and this to very large amounts.

Before the auditor, a claim was made in behalf of Taylor for $64,000, with interest from June, 1873, and in support of this demand it was alleged, that while the claimant had satisfied the mortgage and surrendered the bond, he never had been paid. That the act was one dictated purely by friendship for the decedent, and done merely as an accommodation, to enable him to borrow money for business purposes. In support of this, the following testimony was offered; that (1) in September, 1873, Gray in his own handwriting admitted his indebtedness to Taylor of $50,000 on this mortgage, and that from June, 1873, to February, 1876, covering the admission of liability, and many months subsequent to the entering of satisfaction, the books of Gray fail to show that he paid Taylor any part of that sum, and (3) the condition of Gray's business was such that he could not take any money out of it, all he could command being required to carry on the brewery.

This the auditor rejected, as "Gray's lips were sealed in death and the claimant's in law, and no witnesses were produced to contradict or explain away the proof of payment." The claim was therefore refused.

Exceptions were filed to this finding of the auditor.

An issue to the Common Pleas was also demanded to try the question of fact relating to payment of the mortgage debt.

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As to the allowance of a counsel fee out of the testator's general estate, instead of the trust, the facts are fully set out in the opinion of the Court.

G. W. Thorn and *George Junkin*, for William B. Taylor.

Wm. McMichael and *John C. Bullitt*, for the executor.

John J. Ridgway, for the Girard Life Insurance Company.

July 5, 1879. THE COURT. After a careful examination of the evidence, we fail to discover any error in the conclusions of the auditor, and are of the opinion he was fully justified in the disallowance of the claim of the exceptant, and refusal of the issue demanded. As has been well settled, the issue is not a matter of right, but rests in the sound discretion of the Court. It is to inform its conscience, not to relieve from duty or responsibility, and, to prevent useless delay and expense to parties, demands for issues to try disputed questions of fact arising in the settlement of decedents' estates should be refused, unless it clearly appear from the complication of material facts, or the contradictory character of the testimony, that the question in dispute can be more readily and satisfactorily determined by the verdict of a jury. And as the Court is not concluded by the verdict, the evidence presented in support of the demand for the issue must be such as would sustain a verdict in favor of the demandant.

The claim forming the subject of the exceptions is to recover the amount of a mortgage and its accompanying bond and warrant, neither of which evidences of indebtedness were in the possession of the claimant, he having satisfied of record the former, and surrendered the latter to the mortgagor nearly sixteen months prior to his death. At the audit it was produced by the executor of the mortgagor with his signature and those of the subscribing witnesses, cancelled.

The claimant was thus upon the threshold of his proceeding confronted by his own solemn act and declaration that he was satisfied, and his debt paid. But as was said by WOODWARD, Justice, in Fleming *v.* Parry (12 Harris, 47), between the original parties, where the rights of innocent third parties have not intervened, "there is no magic in an entry of satisfaction, either on a judgment or mortgage, which can prevail against the truth and equity of the transaction." Therefore, notwithstanding the presumption arising from the facts mentioned, it is not conclusive against the right of the claimant to recover, and the result of the authorities upon the subject is that he is still permitted to show the intention of the parties, at the time of the transaction, to keep alive the debt, or that the entry of satisfaction was procured by fraud, made by accident, or through a mistake of fact. In either event if satisfactorily established the Court in the exercise of its equitable jurisdiction, will relieve against the act improvidently committed, and carry out the true intention of the parties. (See West's Appeal, 36, Legal Intelligencer, 138, April 4, 1879; 7 WEEKLY NOTES, 427, and cases cited.)

The claimant thus had every opportunity of overcoming the presumption arising from his deliberate act and declaration, but the proof offered was wholly insufficient, and failed to present such material and disputed facts as justified their submission to a jury. The *onus* lay upon him in the first instance to remove the effect of his entry of satisfaction and surrender of the bond and warrant, and until sufficient evidence of the non-payment of the mortgage debt was produced, neither the executor nor the testator, if still surviving, would be called upon to offer any proof of the payment in full and liquidation of the debt. From the evidence, we gather that the claimant rested his case mainly, if not wholly, upon the testator's books of account, which entirely omitted any payments to claimant of the principal of the mortgage, either at the date of satisfaction or subsequent thereto. But this is entitled to little weight, as the books were shown to be unreliable and incorrect in many other respects, and the absence of such entries would be no evidence of the non-payment of the debt, for *non constat* the money was paid by testator from sources other than the receipts of his business. And as remarked by the auditor: "It would be idle to speculate on the hundreds of ways in which a payment could be made and yet not appear in the books. They will suggest themselves to every mind at once. It is no answer to the presumption of payment to show that the money did not pass through one particular channel." As an illustration of the unreliability and incorrectness of testator's books, it may be mentioned that the considerable sum of $37,609.28, received by him on April 10th, 1875, the balance of a mortgage loan upon his real estate, does not appear in his cash book, but was deposited directly in bank. It is also remarkable that although the testator lived for nearly sixteen months after the satisfaction of the mortgage, and he and the claimant continued upon the most friendly and intimate relations, not a single witness was produced as to any admissions or declarations of testator, acknowledging the existence of the debt, or of any demand upon him by claimant for the payment of either principal or interest thereon, or for any new evidence of indebtedness, but on the contrary, the claimant remains silent, and after the testator's lips are closed by death, presents a claim, which, if allowed, would absorb a large portion of the estate. If the claim be just, the claimant has no one to condemn but himself, as by his own laches he must be debarred from its recovery. There being, therefore, no evidence of any fraud or imposition practised by the testator, nor that

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the entry of satisfaction of the mortgage and the surrender of the bond and warrant of attorney were the result of an accident or mistake of the claimant, and further, there being no evidence that either of the parties after entry of satisfaction ever recognized or contemplated the mortgage debt as being still existing and unpaid, the claimant must be held to the legal and natural consequences of his own acts. He having failed to overcome the presumption of payment arising therefrom, his claim was properly disallowed.

The exceptions are therefore dismissed.

We must, however, direct a correction of the report in one particular. Testator devised and bequeathed his residuary estate to trustees for the payment of annuities, etc., who were very properly represented by counsel before the auditor. But an allowance out of the estate for the employment of professional services can only be made for the purpose of advising, assisting, and in this case defending, the executor, who is the representative of the estate. It was, therefore, improper to direct a further counsel fee to the counsel for the residuary legatee. He should be compensated out of the trust estate and not the general estate of testator.

Opinion by HANNA, P. J.

June 18, 1879.

Cremers's Estate.

Petition for bill of review—When not granted—Laches—Where a petition, answer, and replication have been filed, and no testimony taken, the responsive allegations of the answer are presumed to be true.

Sur petition for review.

In the adjudication of the above estate it appeared that the decedent, Marguerite Cremers, died in March, 1874, leaving a will, in which she named her niece, Marie d'Arros, residuary legatee, and appointed C. H. A. Esling, her executor. The testatrix therein desired the exclusion of her husband, Calixte Cremers, from any participation in her estate; it was also contended before the auditing Judge, in behalf of the said Marie d'Arros, that the habits of the decedent's husband were irregular, and that at the time of her death he was living in Europe, but the auditing Judge found that the said Calixte did not at any time desert his wife, or refuse to contribute to her support, and directed the balance in the accountant's hands to be paid to him, which adjudication was confirmed upon exceptions filed (see 6 WEEKLY NOTES, 240), and this decree was affirmed in the Supreme Court upon appeal. (See *ante*, 126.)

The accountant then filed a petition, which, reciting an agreement with the respondent, Calixte Cremers—by the terms of which the furniture and personal effects of the decedent were to be retained by the petitioner until the claim which the said Calixte Cremers proposed to make as decedent's husband should be determined—prayed for a review and reargument.

The answer of Calixte Cremers traversed the fact of the agreement.

Benj. H. Brewster, for the petitioner.

Daniel Dougherty, contra.

July 5, 1879. THE COURT (after stating the facts): Conceding such an agreement to have been made, it is manifest that it was not adhered to by the petitioner, who admitted at the argument that he had not retained the furniture, but that it had been delivered to the residuary legatee, and not stored at all; and his claim for storage was therefore withdrawn or abandoned. Under these circumstances, and after several years' usage by one whose claim was, as the Court has decided, invalid as against the respondent, it would be unjust to compel the latter to take the property in its present condition (see Whitaker *v.* Houghton, 5 Norris, 48). But the answer utterly denies that any agreement whatever was made and being responsive, must in this respect be taken as verity, until overcome by evidence adequate, according to the rules of equity, for this purpose. No such evidence has been furnished, and, if it had been, it could not have availed, in view of the surrender of the goods to the legatee.

Apart from the merits of the case, the petitioner has not brought himself within the principles governing bills of review. He has shown no error apparent on the face of the record, and alleges no matter arising since the decree. Relief is never granted upon any other ground, unless the application be made promptly; and any laches or negligence destroys the title to relief. (Story's Eq. Pl. § 414.)

Here the adjudication, which charged the petitioner with the household furniture at its appraised value (upon which commissions had been claimed and allowed), and which directed him to pay the amount in cash, was filed in April, 1878. It was confirmed by the Court in banc, after exceptions upon other grounds had been filed and dismissed, in November, 1878, and the decree was affirmed by the Supreme Court on the 3d of March, 1879. Yet no suggestion such as now set up in the petition was made until April 5, 1879, until after the order to pay had issued. And it was not until May 3, 1879, that the present petition was filed.

The case may be a hard one for the petitioner, but it would be a still harder one for the respondent if he should be compelled to bear a loss arising from an unauthorized use of his property, which it was in the power of the petitioner, as it was his duty, to have prevented.

Petition dismissed.

Opinion by PENROSE, J.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, DEC. 18, 1879.* [No. 34.

Supreme Court.

Oct. & Nov. '79, 73. Oct. 9, 1879.

Gill for use, etc. v. Hutchison.

Mortgage — Certificate of no defence — Effect thereof in hands of assignee — Estoppel of mortgagor.

A mortgagor who at the same time that he executes a mortgage delivers to the mortgagee a certificate of no defence, thereby estops himself from setting up, as against a purchaser of the mortgage, that there was fraud in obtaining the mortgage, or that the mortgagee has misappropriated the money received from the sale.

Error to the Common Pleas No. 2 of Allegheny County.

Scire facias sur mortgage, by S. B. W. Gill, for the use of Mrs. Eliza Lewis and W. W. Lewis, against John Hutchison.

The defendant pleaded, specially, that the mortgage sued on was given by him to the said S. B. W. Gill as collateral security for the payment of defendant's written obligation to said Gill for eight thousand dollars, and that the said written obligation is not in the possession, ownership, or control of the equitable plaintiffs.

Further, that the said written obligation, and also the mortgage sued on in this case, were given to the said Gill to secure him for a loan which he was to make to this defendant when required in the future, and this defendant has never yet required him to lend any money: and neither the said S. B. W. Gill nor any person for him, has ever loaned any money to this defendant, or to any person for him on account of the said written obligation, or on account of the mortgage sued on.

At the trial the following facts appeared: On February 5, 1877, John Hutchison, for the purpose of raising money, as mentioned below, made to S. B. W. Gill a promissory note for $8000 and, to secure this note, executed and delivered a mortgage on certain of his property in Allegheny City, a bond, and a certificate of no defence, the latter being as follows:—

I, John Hutchison, hereby certify and acknowledge that a mortgage made by me to S. B. W. Gill, dated February 5, A. D. 1877, for $8000, payable in two years, with interest payable semi-annually, together with the bond of myself accompanying the same, is justly, fully and entirely owing and payable according to the terms and conditions thereof. And I hereby also further certify to any person or persons who may desire to purchase the same, that I have no drawback, claim, set-off, or other defence of any kind whatever to the payment of any part of said mortgage, either principal, interest, or commissions when due and payable or collectable by the terms and conditions therein recited as aforesaid.

Witness my hand and seal this fifth day of February, A. D. 1877.

Attest D. E. DAVIS. JOHN HUTCHISON [L.S.].

Hutchison admitted his signature to this instrument, but testified that it was no part of his agreement with Gill, and that he had no knowledge of ever having signed it.

The defendant testified that no consideration passed at the time, it being understood between Hutchison and Gill that as the former required funds to enable him to carry out a certain contract, he should obtain them from Gill, the note and mortgage being held as security for such advances: but that Gill failed and refused to make any payments whatever. There was no direct evidence of actual fraud in obtaining the certificate of no set-off.

Gill being in possession of these papers had the mortgage recorded, and on February 27, 1877, sold it with the accompanying bond to Mrs. Eliza Lewis and W. W. Lewis, and had the assignment entered on the record. W. W. Lewis, who conducted the transaction, testified that he saw the certificate of no defence before the assignment and that it was given to him after the money had been paid. At about the same time Gill placed the promissory note in The National Bank of Commerce of Pittsburgh. Gill absconded in September, 1877, without having paid Hutchison any money whatever. After this, in May, 1878, The National Bank of Commerce brought suit against Hutchison on the note, and recovered judgment thereon.

The Court (WHITE, J.) instructed the jury that there was not sufficient evidence to warrant them in finding that the certificate of no defence was obtained from the defendant by fraud, and that if they found from the evidence that Gill had in his possession the mortgage and bond and no defence paper, and exhibited them to Lewis, who on the faith thereof paid Gill the money, the equitable plaintiffs were entitled to recover.

Verdict and judgment for the plaintiff. The defendant took this writ, assigning for error the charge of the Court as above given.

Robert Pollock (with him *Thos. M. Marshall*), for plaintiff in error.

Hutchison did not agree to sign the certificate of no defence. He did not know what he was doing when he did sign it. It results from this that Gill must have concealed from him the nature of the writing which he was signing and this constitutes such fraud as should render the instrument of no force or effect.

W. W. Lewis, one of the equitable plaintiffs, testified merely that he saw the certificate of no

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defence before he paid the money. This was not sufficient to render it an estoppel. He must go further and show that he relied and acted on it: that by reason of it he was induced to pay the money; that it, and it alone, produced this force and effect on his mind.

Wilcox *v.* Howell, 44 N. Y. 398.
Weaver *v.* Lynch, 1 Casey, 449.
Eldred *v.* Hazlett, 9 Casey, 307.

M. W. Acheson, contra.

The most that can be made of Hutchison's own testimony is that he signed the paper without understanding its contents and without inquiry in respect thereto.

The mortgagor having given a certificate of no defence, is estopped from setting up a defence against an assignee.

Ashton's Appeal, 23 Sm. 153.
Scott *v.* Sadler, 2 Sm. 211.
McMullen *v.* Wenner, 16 S. & R. 18.
Weaver *v.* Lynch, 1 Casey, 449.

The purchaser was not bound to look to the application of the money.

Gray's Admr. *v.* The Bank of Ky., 5 Casey, 365.
Penna. R. R. Co.'s Appeal, 5 Norris, 80.

October 20, 1879. THE COURT. When a mortgagor at the same time that he executes a mortgage, delivers to the mortgagee a writing certifying that he has no defence or defalcation, it is in effect, an agreement that the mortgagee shall negotiate the mortgage. It is an acknowledgment that he has received full consideration. It is indeed most usual to execute such writings when no consideration has been received, and the sole object of the mortgage is to raise money by the sale of it. It would be in the highest degree inequitable to allow the mortgagor to set up that there was fraud in obtaining the mortgage, or in a misappropriation by the mortgagee of the money raised by the sale. It is unnecessary to say what would be the effect of actual fraud in procuring the "no defence" paper. In this case there was no evidence of such fraud.

Judgment affirmed.

PER CURIAM.

[See next case.]

Oct. & Nov. '79, 110. Oct. 10, 1879.

Robertson v. Hay, to use, etc.

Mortgage—Certificate of no defence—Effect of—Evidence—Effect of material alteration of deed by stranger—Effect of immaterial alteration by party.

R. executed a bond and mortgage to H., and also a certificate of no defence, and placed them in G.'s hands, in order that he might raise money for R., if R. should at any time instruct him so to do. G., without orders from R., negotiated the mortgage:

Held, that even if G. failed to account to R. for the money received, the facts were insufficient to defeat a recovery by the assignee; since the papers which R. executed and placed in the hands of G. not only impliedly authorized a sale of the mortgage, but invited purchasers by expressly declaring that the mortgagor "had no defence of any kind whatever."

Where one of two innocent parties must suffer from the tortious act of a third, he who gave the wrong-doer the means of perpetrating the wrong must bear the consequences of the act.

A material alteration of a deed, if made by a stranger, will not affect the validity of the instrument.

An immaterial alteration, even if made by a party thereto or his agent, does not invalidate the instrument or make it inadmissible as evidence.

Error to Court of Common Pleas No. 1, of Allegheny County.

Scire facias sur mortgage, by A. B. Hay, to the use of James McCandless against Stewart Robertson. The facts were as follows:—

Robertson executed, on June 18, 1873, his bond and mortgage to A. B. Hay, the law partner of S. B. W. Gill, for $1500. This mortgage was duly acknowledged June 24, 1873, and recorded June 28, 1873. A "certificate of no defence" was also executed by Robertson, bearing date July 18, 1873, acknowledged July 19, 1873.* No consideration was paid Robertson at the time of the execution of these instruments. They were all handed over by him to Gill to be kept in his custody until Robertson might need money to be raised upon them. In such case he was to notify Gill, who was then to negotiate the mortgage, and raise the necessary funds.

On June 24, 1873, Gill, without orders from Robertson, sold the mortgage to McCandless, and procured the same to be assigned to the purchaser by his law partner, Hay. Whether any of this money obtained by this unauthorized assignment was accounted for by Gill to Robertson was a disputed point at the trial. McCandless had no dealings with any one except Gill, and received from Gill the instalments of interest upon the mortgage as they fell due. There was no direct evidence that Robertson knew anything of the transaction except that, in 1875, he obtained a policy of insurance upon the property mortgaged, in which was inserted the clause, "Loss, if any, first payable to James McCandless mortgagee."

At some time after the assignment of the mortgage, Gill, who retained possession thereof as agent and attorney for McCandless, inserted a

* As printed in the paper book of defendant in error this certificate was dated *June* 18, 1873; and Robertson testified that, although until this suit was brought he did not know what a certificate of no defence was, he believed he executed and gave it to Gill on June 18, at the same time with the mortgage.

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clause therein waiving the right of exemption under the Act of February 25, 1873 (P. L. 161), which Act had been repealed by the Act of April 10, 1873 (P. L. 712). He inserted also a clause in the certificate of no defence purporting to be an extension by the mortgagor of the mortgage for one year.

In 1877 Gill absconded, and arrears of interest fell due upon the mortgage, whereupon McCandless brought this suit. On the trial, the Court charged the jury, in affirmance of plaintiff's points: "If you find that Stewart Robertson created and acknowledged this mortgage, together with the accompanying bond and certificate of no defence, and placed them in the hands of S. B. W. Gill for the purpose of negotiation at some time or other, and he, Gill, on the 24th of June, 1873, exhibited to McCandless the mortgage, bond, and certificate of no defence, in the condition McCandless testifies they then were, and if upon the faith of these papers McCandless then purchased the mortgage for the sum of $13,000, and made payment to Gill by his check, and that he, McCandless, acted in good faith—and that you must find from the evidence—then the plaintiff is entitled to a verdict for the amount of his claim with interest." (First, second, and third assignments of error.)

The defendant asked the Court to charge: "That the alteration in the mortgage in evidence was a material alteration; and if the jury believe from the evidence that the said alteration was made after the execution and acknowledgment of said mortgage while it was in the custody of the plaintiff, his agent or attorney, and without the knowledge or consent of the defendant, then the plaintiff cannot recover." To this the Court replied, "There was no Act of Assembly in existence on June 18, 1873, to waive, consequently the interlineation was wholly immaterial. . . . For this reason I refuse the point, and you will regard the question that has been raised about the addition to or alteration of the mortgage as not existing, so far as its effect upon this case is concerned." (Fifth assignment of error.)

The plaintiff offered in evidence the above-mentioned certificate of no defence. Defendant objected, because it showed material alterations which were made while in the possession of the plaintiff, without the authority of the defendant, whereby the defendant claimed that the paper was void as an instrument of evidence, and incompetent and irrelevant. The Court overruled the objection and admitted the paper in evidence, instructing the jury, "There is no such material alteration at all as would warrant you in disregarding this certificate of no defence." (Eighth assignment of error.)

Verdict and judgment for the plaintiff for $17,382.75. The defendant took this writ, assigning for error, *inter alia*, the rulings and instructions to the jury cited above.

John Dalzell (*John Hampton* and *A. N. Sutton* with him), for the plaintiff in error.

The assignee of a mortgage stands in no better position than the mortgagee, because the security is not negotiable.

Duquesne Bank's Appeal, 24 Sm 426.
McMullen *v.* Wenner, 16 S. & R. 20.
Weaver *v.* McCorkle, 14 S. & R. 306.

A party about to purchase such a security is bound to inquire of the obligor if he have any defence or set-off to it.

Eldred *v.* Hazlett's Adm'r, 9 Casey, 315.
Frantz *v.* Brown, 1 P. & W. 257.
McCandless *v.* Engle, 1 Sm. 314.
Michener *v.* Cavender, 2 Wright, 334.

Nor was it in this case sufficient to put implicit reliance on the certificate of no defence.

Wilcox *v.* Howell, 44 N. Y. 402.

Any alteration or addition to a deed in a material or immaterial part by the obligee, without the consent of the obligor, avoids the whole.

Pigott's Case, 11 Co. 27.
Moore *v.* Bickham *et al.*, 4 Binney, 1.
Marshall *v.* Gougler, 10 S. & R. 164.
Smith *v.* Weld, 2 Barr, 54.
Neff *v.* Horner, 13 Sm. 331.
Morris *v.* Vanderen, 1 Dallas, 67.

M. W. Acheson (*Miller* and *McBride* with him), contra.

A mortgagor who gives a certificate of no defence is estopped from setting up a defence against an assignee.

Ashton's Appeal, 23 Sm. 153.
Scott *v.* Sadler, 2 Id. 211.
McMullen *v.* Wonner, 16 S. & R. 18.
Edgar *v.* Kline, 6 Barr, 327.
Weaver *v.* Lynch, 1 Casey, 449.

McCandless could not suffer from the unfaithfulness of Robertson's agent. Where one of two innocent parties is to suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must alone bear the consequences.

Bank of Kentucky *v.* Schuylkill Bank, 1 Pars. Eq., 248.
Mundroff *v.* Wickersham, 13 Sm. 37.
Penn. R. R. Co.'s Appeal, 5 Norris, 80.

An immaterial alteration of an instrument does not avoid or affect it.

Burkholder *v.* Lapp's Ex., 7 Casey, 322.
Gardinier *v.* Sisk, 3 Barr, 326.
Miller *v.* Gilleland, 7 Harris, 119.
Miller *v.* Reed, 3 Casey, 244.

The alteration of an instrument by a stranger, though material, does not avoid it.

Wharton on Evidence, sects. 627 and 628.
Withers *v.* Atkinson, 1 Watts, 249.
Fritz *v.* Commissioners, 5 Harris, 131.
Neff *v.* Horner, 13 Sm. 327.

October 27, 1879. THE COURT. This is a case of scire facias on a mortgage. It is conceded that the plaintiff in error executed the mortgage described in the writ of sci. fa. He

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also executed the bond recited in the mortgage. They both bear date the 18th of June, 1873, and the mortgage was acknowledged on the 24th of the same month. On the 18th July following, he executed "a certificate of no defence." It distinctly referred to the bond and mortgage, stating where the latter was recorded, and declared that it, together with the bond accompanying the same, "is justly, fully, and entirely owing, and payable according to the terms and conditions thereof. And I hereby also certify to any person or persons who may desire to purchase the same, that I have no drawback, claim, set-off, or other defence of any kind whatever, to the payment of any part of said mortgage, either principal, interest, or commissions, when due, and payable or collectable, by the terms and conditions therein recited, as aforesaid." On the day after its date he duly acknowledged this certificate. He placed these three written instruments in the hands of Mr. Gill, in anticipation of needing money, and with the view of a subsequent negotiation of the mortgage. Hay, to whom the mortgage was executed and the bond payable, was the law partner of Gill.

The jury has found, and on evidence amply sufficient to justify the finding, that in July following McCandless, the equitable defendant in error, purchased the mortgage of Gill in good faith and for a valuable consideration, and took an assignment thereof from Hay.

It matters not that Gill may have sold the mortgage, and caused it to be transferred before he was authorized so to do under the private instructions given him by the mortgagor; nor that he failed to account to the latter for the money received therefor. These facts are insufficient to defeat a recovery by the assignee. The papers which the mortgagor executed and placed in the hands of Gill, not only impliedly authorized a sale of the bond and mortgage, but invited purchasers by expressly declaring that he had "no defence of any kind whatever." (Ashton's Appeal, 23 P. F. Smith, 153; Gill *v.* Hutchison, decided at the present term, [reported *ante*, 545]. This written declaration fresh from the mortgagor having been shown to the assignee when he was about to purchase, it is idle to say he should have gone to the mortgagor personally and inquired if there was any defence. This certificate was addressed "to all whom it may concern." It could not have been more effective and conclusive notice to one about to purchase, that the mortgagor had no defence, if it had been addressed to the purchaser by name. The main purpose of the execution and delivery of such a certificate is to dispense with personal inquiry. At the same time it gives certainty to the declaration and perpetuates the evidence thereof. It is a well-settled rule that where one of two innocent persons must suffer from the tortious act of a third, he who gave the wrongdoer the means of perpetrating the wrong must bear the consequences of the act. By placing the papers in the hands of his agent and attorney, the mortgagor gave him the means of making sale of the mortgage, and of obtaining the money of the assignee. The fraud which Gill may thereby have practised on the mortgagor cannot operate to the prejudice of the innocent and good-faith purchaser.

It was further contended that the alterations made in the mortgage and in the certificate, after their execution, were sufficient to avoid the instruments. In determining the legal effect of the alteration it is important to consider by whom the alteration was made, and the materiality of the alteration.

1. The assignee was no party to the alterations. He was in no manner privy to their making. They were made by Gill. He was either the agent of the mortgagor, entrusted by him with the papers, and authorized to sell the mortgage, so that the act of the agent became the act of his principal; or he was not such agent, and not interested, and not authorized to act for the mortgagor, in which case the alteration was the act of a stranger. Then, although material, the alteration will not affect the validity of the instrument. (Greenl. Ev., §§ 566, 568; Lewis *v.* Payn, 8 Cowan, 71; Jackson *v.* Malin, 15 Johns, 297; Withers *v.* Atkinson, 1 Watts, 236; Neff *v.* Horner, 13 P. F. Smith, 327.)

2. The alteration in the mortgage was by adding a clause waiving the benefit of a specific Act of Assembly which in fact had been repealed prior to the execution of the mortgage. As, then, the Act mentioned had no validity whereby the mortgage could be affected, an attempt to waive its provisions had no effect. It was simply an immaterial Act, which in no manner prejudiced the mortgagor. As, therefore, the legal effect of the mortgage remained the same, the alteration did not avoid it. (Hunt *v.* Adams, 6 Mass. 519; Nevins *v.* De Grand, 15 Id. 436; Gardinier *v.* Sisk, 3 Barr, 326; Miller *v.* Gilleland, 7 Harris, 119; Miller *v.* Reed, 3 Casey, 244; Burkholder *v.* Lapp's Ex. 7 Id. 322.)

The substance of the alteration in the certificate is a recital that the mortgage was renewed and extended another year. It was the declaration of a fact intended for the benefit of the mortgagor. It was made by Gill long after the purchase by the assignee. It did not destroy the title which the latter had previously acquired.

It may be further observed that after this alteration appears to have been made, the mortgagor obtained policies of insurance on the building covered by the mortgage, in which was

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inserted the clause "loss, if any, first payable to Jas. McCandless, mortgagee." The plaintiff in error thereby clearly evinced knowledge, and implied ratification of the assignment. It is unnecessary to consider all the assignments separately. We discover no error in the answers and charge of the learned Judge.

Judgment affirmed.

Opinion by MERCUR, J.

[See preceding case.]

Oct. & Nov. '79, 33. Oct. 16, 1879.

Nerpel's Appeal.

Decedents' estates—Widows' exemption—Act of April 14, 1851, § 5.

A widow is not entitled to her exemption under the 5th section of the Act of April 14, 1851, out of the proceeds of the real estate of her deceased husband in preference to his mortgagee thereof.

Appeal from the Common Pleas No. 1, of Allegheny County.

This case was heard in the Court below upon exceptions to a special return of a sheriff's sale of the real estate of John Nerpel, deceased.

The property was sold under a mortgage, and the sheriff, after deducting costs and taxes, distributed the balance of the proceeds, $262.15, to the People's Insurance Company, the plaintiffs in the writ, the mortgage being the first lien. Margaretta Nerpel, widow of John Nerpel, the mortgagor, filed exceptions, claiming this balance on account of her exemption under the 5th section of the Act of April 14, 1851 (P. L. 612), which provides as follows, viz.:—

Section 5. That hereafter the widow or the children of any decedent dying within this Commonwealth, testate or intestate, may retain either real or personal property belonging to said estate to the value of $300, and the same shall not be sold, but suffered to remain for the use of the widow and family; and it shall be the duty of the executor or administrator of such decedent to have the said property appraised in the same manner as is provided in the Act passed the 9th day of April, in the year one thousand eight hundred and forty-nine, entitled, "An Act to exempt property to the value of $300 from levy and sale on execution and distress for rent": *Provided*, That this section shall not affect or impair any liens for the purchase-money of such real estate; and the said appraisement, upon being signed and certified by the appraisers and approved by the Orphans' Court, shall be filed among the records thereof.

It was admitted that the Orphans' Court had previously allowed the widow personal property to the amount of $32.05, on account of her exemption, and had awarded the sum of $267.95 to make up $300, to be secured out of the property described in the writ. It was also admitted that the plaintiff's mortgage was not a purchase, money lien.

The Court below dismissed the exceptions, and confirmed the special return (no opinion filed), whereupon the widow took the appeal, assigning the action of the Court for error.

Morton Hunter, for the appellant.

The Insurance Co. having foreclosed the mortgage by *scire facias*, its interest, whatever it may have been theretofore, became merged in the judgment, and at the time of the sale its position was simply that of a judgment creditor. As the mortgage was not a purchase-money lien, the widow is therefore entitled to her exemption.

Spencer's Appeal, 3 Casey, 218.
Hildebrand's Appeal, 3 Wright, 133.
Nottes's Appeal, 9 Id. 361.

S. C. Schoyer (*W. M. McGill*, with him), contra.

The mortgage was a conveyance of the estate to the mortgagee, which left nothing in the mortgagor but the equity of redemption.

Garro *v.* Thompson, 7 Watts, 416.

This equity was the only interest which his estate had in the property, and out of this alone was the widow entitled to her exemption.

Gangewere's Appeal, 12 Casey, 466, 470.

October 27, 1879. THE COURT. The mortgage by the decedent was something more than a mere lien. For all purposes of security to the mortgagee, it was a conveyance of the land. He could have recovered in ejectment possession of the premises, and held until his principal with interest was repaid. Had he resorted to this remedy, and had the mortgagor then died, it is not pretended that the widow would have any right to the exemption. The proceeding under the Act of Assembly by scire facias, is but a substitute for a foreclosure in equity, and the sale which it provides for does not alter the case. It ought not to be that the election of one remedy and not the other, should make a difference in the right of the mortgagee.

Decree affirmed and appeal dismissed, at the costs of the appellant.

PER CURIAM.

Oct. & Nov. '79, 8. Oct. 15, 1879.

Cable's Appeal.

Will—Construction of—Legacy—What sufficient to create a charge on land.

A mere direction by a testator that a devisee shall pay a legacy does not create a charge on land. There must be express words or a necessary implication from the whole will that such was the intention.

The words, "I give and bequeath unto my two sons, J. and E., all my farm . . . but the said J. and E. are to pay, etc.," do not contain such implication.

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Appeal from a decree of the Orphans' Court of Allegheny County.

This case arose upon a petition in the Court below by the children of Jessica Reed, formerly Jessica Cable, deceased, for an order or decree to compel the payment of a certain legacy out of the lands devised by John Cable, Sr., to his sons John and Edward.

The facts of the case were as follows: John Cable, Sr., died about the middle of December, 1856, having, by his last will and testament, provided, *inter alia*, as follows:—

"First. I give and bequeath unto my two sons, John and Edward Cable, all my farm after my death so long as they do live, and after their death to their children. But they the said John and Edward Cable is to pay to my four daughters, as follows . . . to Jessica Reed, my daughter, wife of Joseph Reed, five hundred dollars . . . to be paid in two years after my death; and also my sons, the aforesaid John and Edward Cable, or their heirs, are to find a house for my wife Sarah and daughter Harriet, and keep them and clothe them; also to provide for them everything that is necessary for their comfort as long as they shall live, or remain unmarried."

John Cable, Jr., died during the year 1876, unmarried, and intestate, and letters of administration on his estate were granted to Edward Cable, the appellant.

The Court below (HAWKINS, P. J.) after argument, entered a decree, ordering the payment of the aforesaid legacy, with interest, by the appellant, and in default of such payment within thirty days after the date of the decree, that a levari facias to enforce the payment of the same should issue against the lands devised by John Cable, Sr., to his sons John and Edward.

The appellant took this appeal, assigning as error the decree of the Court.

J. S. Ferguson (*R. & S. Woods* with him), for the appellant.

An intention to do so on the part of the testator, either expressed or implied in the terms of a will, is necessary to create a charge on lands.

Montgomery *v.* McElroy, 3 W. & S. 371.

The direction in the will in this case is that John and Edward shall pay, but there is no provision, in terms at least, in case of the deaths of John and Edward within two years after that of the testator. If they died within that time their estate in the land devised was ended. Their children took not under them, but under the will. Yet there is no direction that their children shall pay, much less any charge upon the land.

There is no appreciable difference between the words used in this will and those used in—

Tower's Appropriation, 9 W. & S. 103.
Hamilton *v.* Porter, 13 Sm. 332.
Buchanan's Appeal, 22 Id. 448.

Malcolm Hay, contra.

An intention to charge lands with the payment of a legacy will be carried out wherever such intention is discovered from anything in the will.

Ripple *v.* Ripple, 1 Rawle, 386.
Witman *v.* Norton, 6 Binney, 395.
Brandt's Appeal, 8 Watts, 198.
Okeson's Appeal, 9 Sm. 99.
Gilbert's Appeal, 4 Norr. 347.

Courts must not reject any of the words used, if they can take effect without violating the rules of law.

Horwitz *v.* Norris, 10 Sm. 281.

The word "but," a simple and strong word, was naturally used by this testator to express his purpose of excepting from his gift to his sons what was required for the suppport of his daughters. Judicial effect has been given to the word "but" as a restricting and limiting word.

Peles' and Jervies' Case, Dyer, 240.
Gainsford *v.* Griffith, 1 Saunders, 59.
Brown *v.* Higgs, 8 Vesey, Jr. 571.

When the construction of a will is doubtful, the law favors a distribution as conformable to the general rules of inheritance as possible, which would make equally sure provision for the daughters.

France's Estate, 25 Sm. 220.
Horwitz *v.* Norris, *supra*.

The testator says, "I give and bequeath *all my farm*," etc. The daughters could be paid only out of that farm, and under such circumstances the legacy is a charge on the land.

Nichols *v.* Postlethwaite, 2 Dall. 131.
Tucker *v.* Hassenclever, 3 Yeates, 294.
Witman *v.* Norton, *supra*.
Com'th *v.* Shelby, 13 S. & R. 348.
Bank *v.* Donaldson, 7 W. & S. 407.
Tower's Appropriation, 9 W. & S. 103.
Riley's Appeal, 10 Casey, 291.
Gallagher's Appeal, 12 Wr. 121.

The acceptance of lands charged with the payment of legacies may create a personal liability in addition to the charge on the lands.

Lobach's Case, 6 Watts, 167.
Montgomery *v.* McElroy, 3 W. & S. 372.

This case is not a mere "direction to pay," as in—

Hamilton *v.* Porter, 13 Sm. 332.
Buchanan's Appeal, 22 Id. 448.

The language used in this will is stronger than that held in the following cases to create a charge on land:

Gause *v.* Wiley, 4 S. & R. 509.
Holliday *v.* Summerville, 3 P. & W. 533.
Downer *v.* Downer, 9 Watts, 60.
Field's Appeal, 12 Casey, 11.
Knepper *v.* Kurtz, 8 Sm. 480.
Gilbert's Appeal, 4 Norr. 347.

October 27, 1879. THE COURT. It is well settled that a mere direction by a testator, that a devisee shall pay a legacy, does not thereby create a charge on land. There must be something more, express words, or necessary implication from the whole will, that such was the intention. In the case before us, there are, certainly, no express words of charge. It is contended, however, that it is necessarily implied

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from the words following the devise to John and Edward Cable, "but the said John and Edward Cable is to pay." But how do those words evince more than the intention that, if his sons accept the devise, they shall be personally liable to pay the legacies, and perform the other duties devolved upon them by the will; among which was "to find a house for my wife Sarah and daughter Harriet, and keep them and clothe them; also to provide for them everything that is necessary for their comfort as long as they shall live, or remain unmarried"? If the pecuniary legacy to his daughter Jessica was a charge, surely these provisions for his wife and daughter Harriet were equally so. In Hamilton *v.* Porter (13 P. F. Smith, 332), the words of the will were, "I will that S. H. H. is to take the land and pay $700 to each of my within named heirs." It was held by this Court not to be a charge. Buchanan's Appeal (22 P. F. Smith, 448), is, if anything, still stronger, indeed almost expressly in point. There the devise was to W., "he paying the legacies," etc. Yet this Court held it was not a charge. In Hoover *v.* Hoover (5 Barr, 351) the words were "yielding and paying thereout," which were held to create a charge —and so it would have been here if the words had been "but they, the said John and Edward, to pay thereout." There are several cases in which, taking the whole will together, an intention has been discovered to create a charge, as in Gilbert's Appeal (4 Norris, 347), but there is nothing in any other part of this will to throw any light upon the question. We are called on to pronounce this a charge from the bare words "but they to pay." We think that they are not sufficient, and that to preserve consistency in our own decisions we are compelled so to hold.

Decree reversed at the costs of the appellee.

Opinion by SHARSWOOD, C. J.

Common Pleas—Equity.

C. P. No. 2. Nov. 1, 1879.

Duncan v. Pennsylvania R. R. Co.

Constitutional law—Art. XVII., sect. 10—Acceptance by corporations of Constitution of 1874, by accepting benefit of subsequent legislation—Eminent domain—Taking for public use of land already appropriated to a different public use—Occupation by railroad company of public streets—Pennsylvania Railroad Company—Charter and legislation relating thereto—Right of said company to make lateral branch roads on lines acquired by purchase since their original charter—City of Philadelphia—Right to authorize railroad companies to occupy public streets—Act of June 9, 1874—Ordinance of councils of October 13, 1879—Provision in Constitution of 1874 for compensation for private property injured or destroyed by corporations exercising right of eminent domain—Effect of, on pre-existing corporations—Equity—Injunction.

Motion for preliminary injunction.

The bill, filed by George R. Duncan against the Pennsylvania Railroad Company, set forth that the complainant was seized in fee of certain premises situate at the corner of Twenty-third and Filbert Streets, and extending to low-water mark in the river Schuylkill, in the ninth ward of the city of Philadelphia; that the corporation defendant proposed constructing a line of railroad from the west side of the river Schyulkill to Merrick Street, in the city proper, the said line of railroad crossing the Schuylkill by a bridge whose eastern abutment was to be erected on Filbert Street, in front of petitioner's premises, and within the warden's line on the east side of the river; that eastward, from the bridge to Merrick Street, the line of railroad was to be continued along Filbert Street; that said road is to be constructed on what is popularly known as the elevated railway plan, and that the defendant proposed erecting on the curb line in front of the petitioner's premises on Filbert Street certain iron pillars for the support thereof. The bill further alleged that the company defendant had no authority to construct said line; that the line and bridge, if constructed, would injure the property of the petitioner in its riparian rights and in its privileges on Filbert Street, impairing its value greatly; and prayed for an injunction to restrain the defendant from erecting the bridge over the Schuylkill and the road along Filbert Street.

The answer, while denying that any damage capable of legal compensation would be done to the premises of the petitioner, set up authority in the company defendant to make the road proposed under its charter (Act of April 13, 1846), under Act of May 16, 1857, authorizing the sale of the public works, and under the Act of April 18, 1856; and that it had been authorized by ordinance of councils of October 13, 1879, to occupy Filbert Street for railroad purposes, and by the Board of Port Wardens of the city of Philadelphia to build the bridge.

M. Hampton Todd and *D. W. Sellers*, for plaintiff.

The Penna. R. R. Co. has no authority to build this road; for such authority, if any, must be derived in one or two ways, either: (1) By virtue

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of the general power to construct branch lines, contained in the incorporating Act of April 13, 1846; or, (2) By virtue of the special power given in the Acts of 16 May, 1857, and 18 April, 1856, which authorized the company to make a railroad to the Delaware River, the Act of 1856 marking out exactly the route of the road. The company has no power in the first case, for that branching power given to it by its charter of 1846 is confined to the original or main line from Harrisburg to Pittsburg, and this power could not have been intended to be extended to the line of public works, extending from Philadelphia to Lancaster, purchased by the company, because at the time of purchase that line was laid out and finished, needing no branches; nor does section 11 of the Act of 1857, which authorized the purchase, include, expressly or by implication, the power of making branches, which was contained in the original charter of 1846. The company has no power to construct the proposed road under the Acts authorizing it to make the "Delaware River extension," because that extension was to be by a designated route, which has, in fact, been followed, and the road is described by the company itself in its report to the stockholders as "completed."

Wayne Mac Veagh and *Chapman Biddle*, contra.

It is contended by the other side that the general branching power given to the Pennsylvania R. R. Co. by its charter of 1846 is confined to its main line between Harrisburg and Pittsburgh, and cannot apply to the lines from Harrisburg to Philadelphia, which were purchased under the Act of 1857. But the eleventh section of that Act expressly provides, "that any company already incorporated by this Commonwealth, becoming the purchaser of the said main line, shall possess, hold, and use the same, *under the provisions of their act of incorporation* and any supplement thereto." How then can the Pennsylvania R. R., the purchaser of said main line, possess it under the provisions of its charter, if the general branching power there given is to be thus stricken out and restrained, so as not to include the purchased line? The Act of 1856, which authorized the Delaware River extension by a certain route was passed before the Act of 1857, which gave a new and express power to extend the line of road to the Delaware. The completion of the extension by the route designated in the Act of 1856, certainly did not exhaust the later power given by the Act of 1857. If the company therefore still possess, under the Act of 1857, a power to extend their road to the Delaware, unquestionably they may extend it to Fifteenth and Filbert Streets.

Commonwealth *v.* Erie, 3 Casey, 339.
Danville R. R. *v.* Commonwealth, 23 Sm. 38.

C. A. V.

Dec. 6, 1879. THE COURT. (HARE, P. J.) The bill avers that the defendant is a corporation chartered by the Commonwealth of Pennsylvania, with authority to locate and construct a railroad having its eastern terminus at Harrisburg, and extending thence to the county of Allegheny; that the Legislature, on the 16th of May, 1857, authorized the sale of a railroad belonging to the State, and reaching from the Susquehanna River at Columbia to the western end of Market Street bridge in the city of Philadelphia, at which latter point it connected with a railroad which had been built by the city under an authority conferred by various statutes; that the defendant proposes to construct a railroad from a point on its present road on the west side of the river Schuylkill north of Market Street to Fifteenth Street on the east side of the said river, and that the proposed line or route is to cross the Schuylkill by a bridge and proceed eastward along Filbert Street to Shoch Street, and thence over land purchased by the defendant to the station at Fifteenth Street; that the track is to be laid at a height of from thirteen to twenty feet above the existing grade of Filbert Street, and used for trains and locomotives, and that the effect will be to impair and depreciate the real estate owned by the complainant. The bill also avers that the corporation defendant has no authority under the Constitution and laws of this Commonwealth to lay out and build such a line of road, and that the erection of a bridge to cross the Schuylkill and the occupation of a street in the city of Philadelphia for such a purpose, are not only *ultra vires*, but contrary to law and prejudicial to rights which the complainant is entitled to enforce.

The defendant's case, so far as it is considered in this opinion, may be briefly stated as follows:—

First. That the seventeenth section of the Act incorporating the Pennsylvania Railroad Company declares that it shall be lawful for the said company "to make such lateral railroads or branches leading from the main line of their said railroad to such convenient place or points in either of the counties into or through which the said main line of the road may pass, as the president and directors may deem advantageous and suited to promote the convenience of the inhabitants thereof, and the interests of said company."

Second. That the Act authorizing the sale of the main line of the public works, including the railroad from Columbia to this city, provided that any company already incorporated by this Commonwealth that might purchase the said main line should possess, hold and use the same under the provisions of their Act of incorporation, and any supplement thereto, and that the defendants subsequently bought in pursuance of this statute.

Third. An ordinance of the city of Philadel-

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phia, reciting that, whereas the Pennsylvania Railroad Company is about to construct a branch line of railroad to extend from its main line in West Philadelphia to the business portion of the city, and it is necessary that a portion of Filbert Street shall be occupied thereby, therefore, the Select and Common Councils of the city of Philadelphia do ordain that the Pennsylvania Railroad Company be and it is hereby authorized to occupy the end of Filbert Street with an abutment for a railroad bridge, and use the line of Filbert Street from said abutment eastward to Shoch Street, with an iron trestle-work for supporting a branch line of railroad: *Provided*, That the said abutment and trestle-work shall not prevent the use of Filbert Street as a public road or highway.

Fourth. An Act approved June 9, 1874, authorizing the counties, cities, and townships of this State to enter into contract with any railroad companies whose roads enter their limits, whereby the said railroad companies may re-locate, change, or elevate their roads within said limits, in such manner as in the judgment of such authorities may be best adapted to secure the safety of life and property, and promote the interest of said city, county, or township, and for that purpose to do all such acts as may be necessary and proper to effectually carry out such contracts.

It is proper to add, for the better understanding of what follows, that the tenth section of the seventeenth article of the new Constitution declares that "no railroad, canal, or transportation company . . . . shall have the benefit of any future legislation, ... except on condition of the complete acceptance of all the provisions of this article."

Reasoning from these premises, the case may be brought within comparatively narrow limits. The Act for the sale of the main line of the public works provided that any company already incorporated by this Commonwealth that might become a purchaser should "possess, hold, and use the same under the provisions of their act of incorporation;" and when the Pennsylvania Railroad Company bought on the faith of this Statute it acquired an indefeasible title to every privilege within the scope of the assurance thus held forth.

The clause of the seventeenth section of the charter which confers the right of making lateral roads or branches, is, therefore, as much a part of the grant under which the corporation defendant holds the line which it acquired by purchase, as it is of that by which it was created, and authorized to build a railway from Pittsburgh to Harrisburg. This conclusion is the more reasonable, because no sufficient ground has been or can be assigned why the power to construct lateral arms or feeders and use them as a means for the collection and distribution of passengers and freight is less necessary and convenient on this side of the Susquehanna than on the other, or why a privilege which may confessedly be exercised in Allegheny County should have been denied in Lancaster, Montgomery, or Philadelphia. Such a franchise is no doubt so far severable that the power to construct a main or trunk railroad may be confided to one party corporate and that of making the branches to another, but both powers should obviously be lodged in the same hand, from motives of policy and convenience. What, however, we have to determine is not what the Legislature should have done, but what they did, and if the power in question was in our judgment unfit or dangerous, we should not be justified in disregarding the plain language of the contract. Public grants should unquestionably be read in the sense which is the most favorable to the State; but this rule, like its converse, *fortius contra proferentem*, which prevails among individuals, has no place unless the language is ambiguous, or admits of two interpretations. Whether the contract bears the seal of the Commonwealth or of a citizen, the real question is, what did the grantor intend? And if his purpose is plainly written, good faith requires that it should be carried into effect.

Another point for consideration is, whether the grant of a right to construct a railway authorizes the taking of land that has been already appropriated to a different and inconsistent public use; or, to put the question in the form in which it is presented here, can the Pennsylvania Railroad Company lay a track in a street in this city without an express authority to that effect? If the question were an open one under the decisions of the Supreme Court, we should have little difficulty in arriving at a conclusion, in view of the general principles of jurisprudence and the authorities in other States. Land which has been taken under the right of eminent domain, and confided to a natural or to an artificial person for a public use, may be again taken by virtue of the same right, and appropriated to any purpose in which the community is interested. But such an intention should not be imputed to the Legislature unless it is distinctly expressed or is a necessary inference from the nature of the grant. Hence the incorporation of a company with authority to construct a railway from one given point to another, may authorize the crossing or intersection of the intervening highways, but will not justify the location of the railway along the line of a public road, or of the streets or avenues of a city.

But for this principle, a newly-incorporated company might intrude on the franchise of its predecessor, and occupy so much of the road-bed

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as suited its convenience, subject to such compensation as might be awarded by a jury. This consideration is of the greater moment, in view of the constitutional provision that, "Any association or corporation organized for the purpose, shall have the right to construct and operate a railroad between any points within this State." The authority is given broadly, and in terms which preclude legislative restriction, and if a turnpike or public street can be occupied by virtue of the right which it confers, I know of no principle which will protect the tracks of the Pennsylvania Railroad Company against a similar interference. We are not, however, free to be guided by our own judgment, because we are bound by the authorities in the Court above, which indicate that the corporation defendant is empowered to occupy the streets and highways of every county through which it passes. The point has arisen in various instances, and has always been determined in the same way; and if each one of these decisions may be explained or qualified when considered separately, they yet as a whole present an unbroken front. The power to enjoin is one that should not be exercised except to prevent some act which is clearly contrary to law; and, in a doubtful case, a chancellor should stay his hand. There is the more reason for caution in the present instance, because an appeal may be at once had from our decision to the Supreme Court, which can much better than a subordinate tribunal define the law and ascertain the exact measure of the right in dispute.

There is another consideration which has largely influenced our judgment. The Pennsylvania Railroad Company cannot be said to come as a trespasser; the gates were thrown open to it by the body which is presumably most competent to speak for the citizens. The ordinance above cited distinctly sanctions what the defendant proposes to do, and all that the complainant would have us forbid. Aside from a doubtful ground that will be presently stated, this ordinance and the Act of June 9, 1874, are decisive of the controversy. Conceding that the defendant has no direct authority from the Legislature to occupy Filbert Street, it may still rely on the grant made by Councils, which is clearly a contract within the broad and comprehensive language of the Statute. It may be said that the city did not receive value for this agreement, but a consideration is not requisite for the support of contracts of record, made by statute or ordinance, or under seal; and, moreover, the undertaking of the railway company "to keep the said railroad and structures in good repair," and "save the city of Philadelphia harmless," is a valuable, if inadequate, consideration. Singular as it may seem, this important Statute was not referred to in the able and otherwise exhaustive arguments made on either side. It was ignored by the railroad company, which disdains municipal concession, and claims a paramount right to use the streets of the city, and the complainant's counsel did not think it worth their while to refute an argument which their opponents had not made. Such might well be the duty of counsel; but it was obviously incumbent on the Court to ascertain the true meaning of an Act which bore directly on the matter in dispute, before proceeding to judgment. Councils have no right to dispose of the streets of the city independently of the Statute; and if it is not applicable, they much exceeded their authority in making such a grant. It is not less plain that if Filbert Street can be occupied without the consent of the city, other thoroughfares may be obstructed in the same way. A re-argument was consequently directed on this point, when it was forcibly contended by the complainant's counsel that the corporation defendant could not claim or exercise any right under the ordinance, because it had not accepted the provisions of the seventeenth Article of the Constitution in the manner required by an Act approved June 5, 1874, which provides that such acceptance shall be signified by filing "in the office of the Secretary of the Commonwealth a certificate in writing, signed by the president and secretary, and attested by the corporate seal of the company," stating . . . . "that all the provisions of said article" have been accepted at a regular or special meeting of the board of directors, with the consent of the stockholders.

The counsel for the Pennsylvania Railroad Company, tacitly conceded that this position was well taken by omitting to notice it in their reply, and basing their client's right exclusively on the power conferred by the charter, which, as they insisted, authorized the Pennsylvania Railroad Company to lay a track and run locomotives in any highway in this county which the board of directors should think fit to use for such a purpose. It does not often happen that the counsel on opposite sides agree, and when they do it is not always safe to differ from them; but the case is one of so much importance to the city and Commonwealth, as well as the parties, that we may be permitted to say, that while recognizing the complexity of the question we are not convinced. What the Legislature is precluded from doing directly, it may not do indirectly, through the instrumentality of a municipal corporation; as, for instance, by authorizing the city of Philadelphia to create canal or railway companies, or enlarge the powers of those already chartered; but it does not follow that a city may not since, as well as before the adoption of the new Constitution, be empowered

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to enter into agreements with railway and transportation companies, for the purpose of facilitating or regulating any work which they are authorized to perform within the city limits, or that will be conducive to the interests of the inhabitants, although the effect should be to enable the company to occupy a street that could not otherwise be diverted from the general use. The primary object of such legislation is to promote the welfare of the city; and the intent should not be frustrated or the municipality denied the right to proceed in accordance with the grant, because the power which it confers cannot be exercised without incidentally benefiting a company that has not accepted the provisions of the seventeenth article of the Constitution. When, therefore, as in the case in hand, the company, though not authorized to take, is entitled under its charter to receive and use, and the obstacle is the city's want of power to convey, an Act enabling the city is not, as I suppose, a "benefit" to the company from "subsequent legislation" within the meaning of the seventeenth article of the Constitution.

There is another aspect of the question. The words of the Constitution are, that no "railroad, canal, or other transportation company . . . shall have the benefit of any future legislation . . . except on condition of the complete acceptance of all the provisions of this article." This language is ambiguous, and may be understood as meaning that acceptance is a condition precedent, or that the use and enjoyment of a privilege conferred by a subsequent statute shall operate as an acceptance. The latter interpretation seems to us to be best calculated to effect the object, which was not to hinder future legislation or prevent it from having full and immediate effect, but to bring corporations which had been chartered prior to the Constitution within its fold. The Constitution, as Mr. Webster well observed, is as much a part of every statute as if it were recited in the preamble; and when a corporation accepts the benefit of a subsequent statute it necessarily assents to the express or implied conditions of the grant. If this view is correct, the Act of June 5, 1874, must be regarded as directory, and the Legislature could not, by prescribing a particular mode of acceptance, prevent any other from having its appropriate effect. On the assumption, therefore, that the license given by the ordinance is such a benfit as the framers of the new Constitution contemplated, the corporation defendant will be as much bound under the seventeenth article by proceeding to extend its road in the manner indicated by Councils, as if it had declared its assent formally in writing, and filed the instrument in the proper office.

We have not determined that the prayer for an injunction must be refused, without some misgivings as to the possible consequences of a conclusion that seems to be an unavoidable inference from the premises, and the decisions of the court above. A citizen of Philadelphia, or, I might add, of any part of the Commonwealth, should not readily assent to the claim advanced by the defendant's counsel. It is that the corporation defendant has a dominion over the highways of Philadelphia, and indeed of every county through which its roadway passes, that cannot be controlled by the courts, the Legislature, or even by the people assembled in convention, short of an amendment of the Constitution of the United States. The case is still more grave, if, as we are told, the power may be used in a way to hinder or prevent ordinary traffic, and that will be detrimental to the owners and occupants of the adjacent buildings, without a liability in damages for the resulting loss. Rails may, it is alleged, be laid at grade, and locomotives run down Chestnut or Market Street, or an elevated railway constructed on a level with the bedchambers on either side of the street. The board of directors are the sole judges of the necessity for the exercise of the power, and their determination cannot be reconsidered elsewhere. If, as we are inclined to believe, the sanction of the municipality is essential to the execution of such a project, there may be less danger of abuse, but this alone will not satisfy the requirements of justice, which are that every one who is injured by such a change shall be indemnified for his loss. Compensation could not be recovered at common law for the appropriation of land or chattels to public use, not because the right was doubtful or denied, but because the law, as it stood then, did not provide a remedy by suit. There was no contract express or implied, and an act done by virtue of the sovereign power of the State could not be treated as a tort. The danger in England was theoretical, because Parliament, though free to withhold if it thought proper, was careful of vested rights and gave an ample equivalent when property was taken for public use. When our system of government came to be organized, it was instinctively perceived that so much latitude could not safely be accorded here. An amendment to the Constitution of the United States accordingly provided that property should not be taken for public use without compensation, and like restrictions were imposed by the Constitutions of the several States. This provision was rigidly construed in this Commonwealth as meaning simply what its letter said. Property taken for public use must be paid for, but no compensation was due for property injured or destroyed. A house might be rendered uninhabitable, or the means of access to it cut off by a change of grade, or an

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embankment, or it might be consumed by a fire kindled by the sparks issuing from the funnel of a locomotive, and the owner have no legal means of redress. This injustice was remedied by the Constitution of 1874, which provides that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction." Our first care at the argument for the injunction was to ask whether this requirement had been fulfilled; but it appeared that counsel on both sides agreed in holding that it did not apply. Two reasons were assigned: one that the bill did not demand compensation, or complain that it was unduly withheld; the other that the Pennsylvania Railroad Company having been chartered long before the adoption of the Constitution, the State could not legally impose any liability that did not exist when it was incorporated. As the former objection might be obviated by an amendment, we think it proper to say that we are not satisfied of the validity of the latter. The Constitution of the United States undoubtedly precludes a State from impairing the obligation of a charter even through an amendment of its organic law; but this restriction has never been held to forbid such remedial legislation as might be requisite to give effect to antecedent rights, or provide a remedy for injuries that previously went unredressed. A child was entitled to support from its father at common law, but could not recover damages for the frustration of this right through the parent's death from injuries occasioned by the negligence of an individual or body corporate. The Act which now affords a remedy for such deprivations, and under which damages are constantly assessed and judgments rendered, is of recent origin, and was passed since the creation of the Pennsylvania Railroad Company, and yet it has never, that I am aware of, been contended that it was invalid as to pre-existing corporations, or impaired their chartered privileges. In like manner the citizen has a natural right to compensation for the consequences of acts done for the public benefit that are injurious to his estate or person, and a statute which affords a remedy cannot justly be assailed as unconstitutional. Such an argument would obviously be fallacious if advanced on behalf of an individual, and the principle is the same when the defendant is a corporation. A power conferred by a charter cannot be abrogated without impairing the obligation of the contract; but the Legislature does not, in making such a grant, contract that persons who are injuriously affected by the exercise of the power, are not entitled to indemnity, nor that it will not provide a means for rendering their demand effectual. This may be tested by supposing the incorporation of a railway company in a State where, as was long the case in Rhode Island, there is no constitutional restraint on the right of eminent domain, and the subsequent enactment of a law providing that land should not be taken for the use of the road without payment. Would any one contend that such a statute impaired vested rights, or was within the prohibition of the Constitution of the United States? If the question must be answered in the negative, the Legislature might obviously proceed to give a remedy for property injured or destroyed.

In dismissing the motion for an injunction, we, therefore, have the satisfaction of believing that the complainant may recover compensation in damages for any injury that he may sustain from the proposed extension of the Pennsylvania Railroad.

The motion for an injunction is refused.

Opinion by HARE, P. J.

Concurring opinion by MITCHELL, J.

As this case involves interests of very great magnitude, and may become a precedent of importance with regard to future litigation, I think it proper to indicate my individual views, though I shall do so briefly and without argument.

I am unable to assent to the conclusion that by the purchase of the line of completed railroad from the State, the Pennsylvania Railroad Company acquired the separate and severable franchise of building branch roads in connection with that line between Harrisburg and Philadelphia. I am, therefore, of opinion that the defendant has no privilege or authority, under the Act of 1857, or any other law that has been shown to us, to build branch roads in the county of Philadelphia.

I am further of opinion that even if the power to build branch roads did exist, it would not authorize the use of a public street for that purpose. There is neither the express grant nor the necessary implication which is required to authorize the taking of property already dedicated to public use for another use, though it be also public.

Under the general rules of law, the city of Philadelphia could not by its permission give the railroad company any authority not contained in its charter, nor could it dispose of the streets which are not its property, but highways of the Commonwealth, without express legislative sanction; and the ordinance relied upon by the defendant would be therefore insufficient as a defence to this bill. Were we, therefore, to rest upon the grounds set up in defendant's answer,

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I should be of opinion that they were wholly inadequate and that the injunction ought to be granted

Under the Act of 9th of June, 1874, however, referred to by the president Judge, the authorities of the city are authorized and empowered to enter into contracts with railroads within its limits whereby the said railroads may re-locate and change their roads in such manner as the city authorities may deem best for the interests of the city, etc. A fair construction of this Act would seem to give the city councils the right to enter into a contract with the defendant railroad by which the latter might re-locate its point of crossing the Schuylkill River, and the terminus at which its rails should stop. By force of this Act, the ordinance of October 13, 1879, is a valid authority to the defendant to make the proposed change in its route, and I concur in the judgment of the Court refusing an injunction, upon this ground alone.

Common Pleas—Law.

C. P. of Cumberland Co. Sept. 17, 1879.

Commonwealth ex rel. Warner v. D. H. Gill, Sheriff.

Tramps—Act of April 30, 1879—One having a fixed place of residence within the county, though guilty of occasional acts of beggary and vagrancy elsewhere within the same county, cannot be held as a tramp under said Act.

Habeas corpus.

The petitioner, David Warner, alleged that he was illegally held as a tramp, under the Act of April 30, 1879 (P. L. 33).* The commitment showed that he had been committed to jail on September 6, 1879, charged with "having within the said county been guilty of begging from door to door, and of being a tramp." At the hearing before the Court, the evidence showed that Warner made his home with his mother at Brushtown, in Cumberland County; that he was in the habit of roaming over the county seeking work, and stopping wherever he could find it; that he had, shortly before his arrest, been across the mountains in Adams County, and on his way back towards his mother's home stopped at Boiling Springs to endeavor to obtain work in the ore banks there, and that being unsuccessful and out of money, he had begged at farm houses for something to eat, and was thereupon arrested as a tramp.

A. M. Rhoads (with him *Duncan Graham* and *S. Hepburn, Jr.*), for petitioner.

Geo. S. Ewing, District Attorney (with him *John Cornman*), for respondent.

Sept. 22, 1879. THE COURT. This writ of habeas corpus was granted on the application of David Warner, a prisoner in the custody of the sheriff of Cumberland County, under a commitment by James A. Green, Esq., a Justice of the Peace, to answer the charge of being a tramp. [The Court here recited the provisions of the Act of April 30, 1879, sect. 1, *supra.*]

It will be observed that, to constitute the offence of being a tramp, it is essential: (1) That the person charged goes about from place to place begging, asking, or subsisting upon charity. (2) That he does so for the purpose of acquiring money or a living. (3) That he has no fixed place of residence or lawful occupation in the county or city in which he is arrested. If any of these essentials be wanting the offence is not complete; for if upon the hearing before the magistrate, or on habeas corpus, he satisfactorily proves that he does not make a practice of going about begging or subsisting upon alms for the purpose of acquiring money or a living, or that he has a fixed place of residence in the county or city in which he was arrested, it is made the duty of the committing magistrate or the Court, as the case may be, upon such proof, to discharge him from arrest.

David Warner, the prisoner, contends that he is not a tramp within the meaning of the Tramp Act, for the reason that he has a fixed place of residence in Cumberland County, the county in which he was arrested, and that he does not make a practice of going about begging or subsisting upon alms for the purpose of acquiring money or a living, and asks to be discharged

* This Act provides:—

SECT. 1. That any person going about from place to place begging, asking, or subsisting upon charity, and for the purpose of acquiring money or a living, and who shall have no fixed place of residence or lawful occupation in the county or city in which he shall be arrested, shall be taken and deemed to be a tramp, and guilty of a misdemeanor, and on conviction shall be sentenced to undergo an imprisonment by separate and solitary confinement at labor, in the county jail or workhouse, for not more than twelve months, in the discretion of the Court: *Provided*, That if any person so arrested can prove by satisfactory evidence that he does not make a practice of going about begging or subsisting upon alms, for the purpose aforesaid, in the manner set forth, he shall not be deemed guilty of the offence hereinbefore described, and upon such proof shall be discharged from arrest, either by the magistrate before whom he is committed, or by the Court upon hearing of the case upon writ of habeas corpus.

SECT. 3. Any act of beggary or vagrancy by any person described by the first Section of this Act, shall be *prima facie* evidence that the person committing the same is a tramp within the meaning of this Act, subject to the proviso contained in Section 1 of this Act. (P. L. 33.)

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from arrest. I have heard the testimony of the witnesses produced on the hearing, and it is most satisfactorily proved that he has a fixed place of residence at Brushtown, in this county, and that this has been his fixed place of residence for many years; that at the time of his arrest he was temporarily absent from his residence, having gone into the neighborhood of the Boiling Springs, but still within the same county, in search of employment, and, whilst there, committed some acts of beggary and vagrancy which led to his arrest. It thus being satisfactorily proved that he has a *fixed* place of residence in this county, within which he was arrested, it is very clear that he is not a tramp within the meaning of the Tramp Act, and that he ought to be discharged.

The prisoner is discharged from arrest.

Opinion by HERMAN, P. J.

C. P. No. 2. Nov. 8, 1879.

City v. Michener et al.

Taxation—Appeal from the assessment by Board of Revision—Laches.

Rule to show cause why appeal should not be dismissed.

This was an appeal by George W. Michener and F. B. McDowell, executors, etc., the owners of premises No. 1830 Mount Vernon Street, from the decision of the Board of Revision of Taxes, in refusing to make a reduction in the valuation of the premises as assessed for taxation for 1877 and 1878. The affidavit set forth that the property was assessed at $8500, while, in truth, it was worth no more than $5000. The application to the Board for reduction was made August 1, 1879, and appeal filed August 4, 1879. The Board sat to hear the owners in the Fifteenth Ward, on December 2, 1876, and December 1, 1877, for the assessments of 1877 and 1878, respectively.

C. Kneass, for the rule.

Since the Act of February 2, 1854 (P. L. 31), there is no appeal to the Court from a decision of the Board of Revision.

Rhoads *v.* City, 2 Phil. 149.

Times for hearing appeals are fixed by statute.

Act March 14, 1865, Purd. Dig. 1375, pl. 123.
Act Feb. 2, 1867, sec. 2, Id. 1378, pl. 134.
Act Feb. 2, 1867, sec. 3, Id. 1378, pl. 135.

The reason for restricting the time of appeal is apparent, for the Board must be sure of the ultimate valuation, or the amount of taxes might be seriously interfered with.

E. O. Michener, contra.

The Act of April 1, 1836 (Purd. Dig. 1361, pl. 28) gives us this appeal, sustained in—

Hughes *v.* Kline, 6 Cas. 227.

By proceedings in analogous cases we are not too late.

Gearhart *v.* Dixon, 1 B. 224.

It would be impossible for the Board to hear all the appeals on the days named by them, and it is their practice to hear such appeals at any subsequent time, providing liens have not been filed.

C. A. V.

Nov. 22. THE COURT. We think this appeal is altogether too late. The taxes were due in 1877 and 1878 respectively, and no application was made for a reduction until August, 1879. Such laches are a sufficient reason for dismissing an appeal, without considering the other questions raised.

Rule absolute.

Opinion by MITCHELL, J.

[See German Society *v.* Philadelphia, 4 WEEKLY NOTES, 213.]

C. P. No. 3. April 12, 1879.

Rosenberry v. City of Philadelphia.

Negligence — Municipal corporation — City of Philadelphia—Nonsuit—The city is not liable for negligence of the officers of the fire department in driving a hose carriage in such a way as to cause damage—Distinction between a servant and a public officer—Freeman v. *City, ante, p. 45, followed.*

Sur rule to take off nonsuit.

Case, to recover the value of a horse and wagon belonging to plaintiff, and destroyed by the alleged negligence of a member of the fire department in recklessly driving a hose-carriage, on the 24th of May, 1875.

At the trial, the plaintiff proved that he was driving his horse up Fifth Street, and was partly across Coates Street, when a horse, attached to a hose-carriage, driven by an employé of the fire department, came galloping down Coates Street, rushed into Fifth Street, struck and instantly killed plaintiff's horse and destroyed his wagon. There was other testimony to show negligence on the part of the driver of the hose-carriage.

The Court, on motion, granted a nonsuit, on the ground that the employés of the fire department were not servants of the city in such a sense as to bind it for their acts of negligence while engaged in the performance of their duty.

Benjamin Daniels, for the rule.

A corporation is liable for the wrongful acts and negligence of its servants and agents, done in the course and within the scope of their regular employment, to the same extent that natural persons are.

Angell and Ames on Corp. 10.
Smith's Master and Servant, 183.
P. W. & B. R. R. & Co. *v.* Quigley, 21 How. 202.

There is no sound reason why a municipal cor-

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poration should be relieved from such liability. Buchanan *v.* The City (2 WEEKLY NOTES, 600) was a suit for injuries caused by the rapid driving of the chief engineer of the fire department. That case decided that the city was liable for the injuries thus caused, and it should be followed here.

Charles E. Morgan, Jr., contra.

This case is the same as Freeman *v.* The City (7 WEEKLY NOTES, 45). The rule in such cases is, that "where the duties to be performed are of a public or governmental nature those to whom they are entrusted, although selected and paid by the city, are not its servants, but public officers, for whose negligence the city is not responsible. The right to establish and maintain a fire department is a part of the governmental power of the State."

Hafford *v.* The City of New Bedford, 16 Gray, 297.
Fisher *v.* The City of Boston, 104 Mass. 87.
O'Meara *v.* The City of New York, 1 Daly, 425.
Hayes *v.* The City of Oshkosh, 33 Wis. 314.

The COURT. Rule discharged.

Orphans' Court.

Oct. 22, 1879.

Hough's Estate.

Devise—Condition in restraint of marriage—When not void—Effect of limitation over upon such condition—Distinction in such case between realty and personalty.

Sur exceptions to adjudication.

The following were the facts as presented before the auditing Judge.

Phineas Hough, Jr., the decedent, in the second clause of his will provided as follows:—

"I give, devise, and bequeath my house and lot No. 521 North Seventh Street, with the appurtenances, unto my wife, Elizabeth Lynn Hough, her heirs and assigns . . . also the interest of the sum of $20,000 of my estate, to be paid to her semi-annually for and during the time of her natural life, if she shall so long remain my widow. In case of her marriage the interest on the said sum to cease, After her decease or marriage, as the case may be, I give, devise, and bequeath the said sum of $20,000, together with all the rest, residue, and remainder of my estate, to my father, Phineas Hough."

The testator appointed George I. Shoemaker, and G. W. Lynn, his brother-in-law, executors and trustees. He left to survive him his widow, who afterwards intermarried with one Bonbright, and his father, but no children. Phineas Hough, Sr., died in May, 1876.

The executors under the will of Phineas Hough, Jr., filed their second trust account in June, 1879, and before the auditing Judge the executors of Phineas Hough, Sr., claimed the fund ($20,000), which he awarded them, holding that the condition annexed to the gift to the testator's widow is such a gift in restraint of marriage as would be held *in terrorem*, and therefore void as against public policy, were it not for the limitation over to testator's father, upon the re-marriage of the widow, which limitation being valid, upon the breach of the condition it followed that the condition itself is also good, and must be sustained to carry into effect the testator's intention, citing—

Weyman on Wills, part 2, p. 280–1, and cases cited.
Fahs *v* Fahs, 6 Watts, 213.
Stahl's App., 2 Barr, 301.
Com. *v.* Stauffer, 10 Barr, 350.
Cornell *v.* Lovett, 11 Casey, 100.
Holtz's Est., 3 Phila. 525, also 2 Wr. 422.
Stroud *v.* Bailey, 3 Grant, 310.
Beck's App. 10 Wr. 527.

To this finding exceptions were filed on behalf of Mrs. Bonbright.

Isaac D. Yocum, for the exceptant.

A conditional bequest in restraint of marriage is void unless there be a limitation over. Where the person takes the same estate under a devise by limitation over as he would under the intestate laws, as is the case here with Phineas Hough, Sr. (Purd. Dig. 807, pl. 15), the latter title, descent, is the better title, and the limitation over is inoperative; therefore the condition forbidding remarriage is against the policy of the law, and Mrs. Bonbright takes the fund absolutely.

Parsons *v.* Winslow, 6 Mass. 178.
Ellis *v.* Page, 7 Cushing, 161.
Whitney *v.* Whitney, 14 Mass. 90.
Cook's Estate, 3 Phila. 60.
Thomas Coke, vol. 2, * page 171.
McIlvaine *v.* Gethen, 3 Wh. 575.

Furman Sheppard, contra, cited—

Walker *v.* Quigg. 6 Watts, 87.
Rodgers *v.* Rodgers, 7 Watts, 15.
Kauffman *v.* Sailor, Ibid. 135.
Brinton's Est. Ibid. 203.
Bennett *v.* Robinson, 10 Watts, 348.
Dixon *v.* Ramage, 2 W. & S. 142.
Sheaffer's App. 8 Barr, 38.

November 8, 1879. THE COURT. The clause in the will upon which this controversy turns, is as follows: "I give and bequeath to my wife the interest of the sum of $20,000, of my estate, to be paid to her semi-annually, for and during all the term of her natural life, if she shall so long remain my widow. In case of her marriage, the interest of the said sum shall cease. After her decease or marriage, as the case may be, I give and bequeath the said sum of $20,000, together with all the rest, residue and remainder of my estate, to my father, Phineas Hough." The father was, under the intestate laws, the nearest of kin to decedent.

That a subsequent condition, whose purpose was to work a forfeiture of a prior freehold estate, was not favored, may be explained upon the feudal principles which underlie the common law. One consequence was that the lord was in danger thereby of losing the services of his feu-

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datory. Hence, notwithstanding a breach of the condition, the original estate was allowed to continue until entry by the heir, and a stranger was not permitted to enter at all. But the gift and transmission of personal property were altogether outside of the application of feudal maxims. At the death of the owner, his goods and chattels were interrupted in their passage to his next of kin by a course of administration, and the fund was liable to be diverted altogether for the payment of his debts. In respect to conditions which were held to be void because in restraint of marriage, and with which alone the present inquiry is concerned, all the learning on the subject was imported by the ecclesiastics from the Roman law. How far the modes of thought, which are the product of a later civilization, have modified the doctrine thus borrowed may be seen in late English and American decisions. The reasoning of a practical common sense as a factor in determining the validity of a rule of law, was perhaps never applied with more force than by C. J. GIBSON, in the case of Commonwealth *v.* Stauffer (10 B. 354), where he held that a general condition in restraint of marriage was good in a devise of real estate. Reading that opinion, it is difficult to see what principle of public policy or of private morals is violated where a testator, after giving his fortune to his wife so long as she shall need it, withdraws it from her when, by a second marriage, another husband has endowed her with all his goods. Whatever may be its policy, however, the rule is clear, that, in a gift of personalty, upon a condition subsequent in restraint of marriage, the condition will be held to have been intended only *in terrorem*, and therefore void, and that it can be validated only by a limitation over of the gift. (Hoopes *v.* Dundas, 10 B. 75: Stahl's Appeal, 2 B. 301; McIlvaine *v.* Gethen, 3 Wh. 574; Stroud *v.* Bailey, 3 Gr. 310; Mickey's Appeal, 10 Wr. 337.) And for other authorities to the rule in devises of realty, see Irvine *v.* Sibbetts (2 Cas. 477); McCullough's Appeal (2 J. 197); Cornell *v.* Lovett (11 Cas. 100). A very nice distinction has been taken in some of the cases between words which import a restraint upon marriage and words which merely mark the extent of the estate to be taken by the wife. Thus, under a bequest to a woman "during widowhood," or "so long as she remains a widow," the wife's estate will cease upon her remarriage. (Rodgers *v.* Rodgers, 7 W. 15; Hotz's Estate, 2 Wr. 422; Fahs *v.* Fahs, 6 W. 213.) The words of this character which import a limitation of an estate, and not a condition, are grouped in Shep. Touchstone, I. p. 125.

To this rule, however, an exception is noted in the books, which, if well founded, disposes of this case. It is laid down in the text of 1 Jarman on Wills, 837, that "a condition that a widow shall not marry, is not unlawful." By "widow" is here evidently meant the widow of the testator. Accordingly, in Lloyd *v.* Lloyd (2 Sim. N. R. 263), where the testator had made bequests to his wife, and to another person, upon condition that the legacies should cease upon remarriage, the Vice Chancellor used this language: "Such a condition is not void as to the wife, the law recognizing in a husband such an interest in his wife's widowhood as to make it lawful for him to restrain her from making a second marriage, by imposing a condition that on such marriage any provision he may have made for her shall cease." It is true that the gift in this instance was of an annuity, out of the proceeds of a sale of realty, but the language and the reason of the decision are broad enough to cover every conditional bequest to a testator's wife.

In the case before us the gift is of personalty for life, coupled with a subsequent condition which is clearly intended to act in restraint of marriage. If the will stopped here this condition would be void, as merely *in terrorem*, and the wife might be held to take an absolute estate. But there is a limitation over, in the event of her remarriage, which shows that the condition was not intended as a menace, but as the basis of a distinct gift.

It is attempted, however, to avoid the effect of the bequest over, upon the ground that it is given to a party upon whom the law itself casts the property, and in support of this position the case of Parsons *v.* Winslow (6 Mass. 169), is referred to. But outside of the single point involved, which was that a limitation to be valid must be an immediate limitation, all that was said in that case upon the question now raised, was the dictum of a divided court. Applied to the case of a devise to an heir, who is already in by inheritance, of the same estate, the doctrine is sufficiently intelligible. The estate vested in him at the instant of the ancestor's death, and, inasmuch as the title by descent is higher than that by purchase, he is bound to hold by the worthier title. In the case, however, of an intestacy of personal estate at the common law, the king was originally entitled to seize upon the goods as the general trustee of the kingdom, a power which was afterwards confided to the Ordinary, in whom, and not in the next of kin, the legal title to the estate vested. The rule which is invoked by the exceptant, appears never to have been applied, except in cases of descent or of intestacy at common law, and cannot be held to embrace the case of a father who was unknown as an heir to that law, and who is clothed with the character by a recent statute.

The exceptions are dismissed, and the adjudication is confirmed.

Opinion by ASHMAN, J.

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WEEKLY NOTES OF CASES.

VOL. VII.] *THURSDAY, DEC. 25, 1879.* [No. 35.

Supreme Court.

Oct. Nov. '78, 211. Oct. 7, 8, 1879.

Hyatt v. Johnston.

Province of Court and jury—Evidence—When sufficient to be submitted to the jury.

If there is evidence from which the jury can properly find the question for the party on whom the burden of proof rests it should be submitted; if not, the case should be withdrawn from the jury.

Since the scintilla doctrine has been exploded, both in England and in this country, the preliminary question of law for the Court is, not whether there is literally no evidence, or a mere scintilla, but whether there is any that ought reasonably to satisfy the jury that the fact sought to be proved is established.

Error to the Common Pleas No. 1, of Allegheny County.

Assumpsit, by Thaddeus Hyatt, on a book account and an accepted draft, against Ross Johnston, impleaded with E. K. Chamberlin and S. Crawford.

At the trial, before COLLIER, J., the following facts appeared: Thaddeus Hyatt, the plaintiff, who carried on business in New York City through Theodore Hyatt, his agent, sold and delivered, prior and up to January 11, 1873, merchandize amounting to some $4000, to the firm of Crawford, Chamberlin & Co., of Chicago, of which Johnston, the defendant, was then a member. About February 18, 1873, Crawford, Chamberlin & Co., who had already made some small payments on account, remitted to Hyatt $1000 cash and two drafts, both dated February 18, 1873, and drawn on and accepted by themselves, for the balance. Hyatt received this remittance, credited it on their account, and closed the account on February 21, 1873. One of these drafts, for some $1400, not being paid at maturity, Hyatt brought this suit, declaring both on the draft and the book account.

About the time these drafts were accepted and remitted, Johnston withdrew from the firm of Crawford, Chamberlin & Co., and his former partners, having taken in a new partner, continued the business under the old firm name. Johnston pleaded payment, etc., claiming that the draft in suit was the acceptance of this new firm, and that plaintiff received it as absolute payment.

At the trial Theodore Hyatt, the agent, testified that they received the draft as the acceptance of their debtors, the old firm; and, although admitting that he was aware of the withdrawal of Johnston, denied having any intention of discharging him from his liability as a member of this firm, or of receiving an acceptance of the new firm as absolute payment. The only evidence offered by the defendant in support of his plea of payment, was four letters, all of them subsequent in date to the transactions out of which this suit arose. Three of them, dated respectively March 1, March 22, and April 1, 1873, from the plaintiff to Crawford, Chamberlin & Co., were objected to by the plaintiff, but admitted by the Court. The fourth, dated March 26, 1873, from this firm to the plaintiff, was admitted without objection. The following are the material parts of those letters:—

New York, March 1, 1873.

Messrs. Crawford, Chamberlin & Co.,

Gentlemen: Enclosed please find statement of account to date, for amount of which you will do me the favor to send check or draft, as you may elect, on the terms agreed upon by us. . . .

THADDEUS HYATT,
Per THEO. HYATT.

New York, March 22, 1873.

Messrs. Crawford, Chamberlin & Co.,

Gentlemen: . . . . . On the 18th inst. I mailed to you for acceptance and the *endorsement* of your Mr. Charles B. Brown, a 60 days draft, for amount due me, as per statement of 1st inst., which you will please have properly executed and returned by *earliest* mail, as I wish to use it at once.

THADDEUS HYATT,
Per THEO. HYATT.

Chicago, March 26, 1873.

T. HYATT, Esq., New York City,

Dear Sir: Your favors of the 18th and 22d insts., arrived in due time. We have not returned you the draft sent for endorsement, because of the dissolution of this firm, which took place on the 23d inst., the copartnership having expired by limitation, on that day. Both Mr. Brown and Mr. Johnston, who comprise the Co., being wealthy men, insure to all creditors payment of paper at maturity, as well as guaranteeing the entire indebtedness of the concern. Neither of the above-named gentlemen desire to continue the business, and we are consequently taking steps toward closing it up. We have on hand at this time quite a stock of your goods, viz.: . . . . which we would be pleased to either return to you (at our expense for freight charges), or to turn them over to the Younglove Co., or whoever you choose as your representative in this city. . . .

CRAWFORD, CHAMBERLIN & CO.

New York, April 1, 1873.

Messrs. Crawford, Chamberlin & Co.,

Gentlemen: Your favor of 26th inst. is at hand, and I regret not receiving the draft accepted by you, as requested in my last. Inclosed you will please find statement of account to date, for amount of which I would like either check or 60 day draft. In regard to the stock on hand that you refer to, I have to say that it was all settled for in your acceptances I now hold, and you are at liberty to dispose of it as you think best. . . .

THADDEUS HYATT,
Per THEODORE HYATT.

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The plaintiff requested the Court to charge, substantially, (2) that all of these letters, read together and in the light of the admitted facts, were not any evidence whatever of an agreement to take an acceptance of the new firm, either as conditional or as absolute payment. *Refused.*

Verdict and judgment for the defendant, whereupon the plaintiff took this writ, assigning for error the admission of the letters and the refusal of his second point.

John B. Herron, Jr., and *Geo. Shiras, Jr.*, for the plaintiff in error.

The draft in suit was received by the plaintiff, credited on the account, and the account closed on February 21, 1873. The letters of March 1, and March 26, being subsequent in date and clearly referring to transactions other than the one in suit, were, therefore, wholly irrelevant. Whilst the acceptances mentioned in the letter of April 1, may have been those of February 18, 1873, one of which is the one in suit, this letter, taken in connection with that of March 26, to which it was a reply, was no evidence whatever that these acceptances were those of the new firm, or that the plaintiff had received them in absolute payment. In using the word "settled," the plaintiff meant simply that the goods which Crawford, Chamberlin & Co., had offered to return had been included in an account stated, which had been agreed to and closed in the manner indicated. This word is used with the same meaning in—

Houser *v.* Irvine, 3 W. & S. 345.
Bevan *v.* Cullen, 7 Barr, 281.
Scott *v.* Strawn, 4 Norris, 471; S. C., 6 WEEKLY NOTES, 132.
Parsons on Part., 284.
Collier on Part., 4 Am. ed., § 373, note (1).
Lindley on Part., Am. ed. 646.

H. Burgwin (*G. C. Burgwin* with him), contra.

The plaintiff admitted that he knew at and before the time the draft in suit was accepted that Johnston had retired. The letters admitted in evidence showed that he was knowingly corresponding with the new firm, and, therefore, when he states in his letter of April 1, 1873, that the stock "was all settled for in *your* acceptances I now hold," he showed beyond all controversy that it was the acceptance of his then correspondents, viz., the new firm, and not that of the old firm in liquidation.

October 20, 1879. THE COURT. While it was conceded by the defendant that the first firm of Crawford, Chamberlin & Co., of which he was a member, was indebted to plaintiff for merchandize, in a larger sum than that claimed in this suit, it was contended that acceptances of the second firm were taken by the plaintiff in absolute payment of that indebtedness, and the defendant was then released therefrom. The plaintiff, therefore, had a clear *prima facie* case, and the burden was on the defendant of proving that the draft in suit was the acceptance of the second firm, and that it was received by the plaintiff in absolute payment of the original debt.

For the purpose of proving these facts, the letters referred to in the bills of exception were offered and admitted. The plaintiff insisted that they were insufficient, and requested the Court to instruct the jury, "That the burden of proving that the plaintiff took an acceptance of the new firm as absolute payment, is on the defendant, and that the defendant has given no evidence from which the jury would be warranted in finding that the plaintiff agreed to take the said acceptance in absolute payment." This was a controlling point in the case, and the refusal of the learned Judge to charge as therein requested is assigned for error.

An examination of the testimony bearing on this proposition leads us to the conclusion that it should have been affirmed. Viewing the testimony in its most favorable light, there was no evidence from which the jury was justified in finding that plaintiff agreed to take the acceptance as absolute payment, and thus release defendant from an acknowledged liability. When it is claimed that a creditor has agreed to accept the note or obligation of another, and in consideration thereof release his debtor, the proof of such novation should be at least clear and satisfactory. In this case it can scarcely be said that there was even a scintilla of evidence to show that the acceptance was taken in absolute payment. Since the scintilla doctrine has been exploded, both in England and in this country, the preliminary question of law for the Court is, not whether there is literally no evidence, or a mere scintilla, but whether there is any that ought reasonably to satisfy the jury that the fact sought to be proved is established. If there is evidence from which the jury can properly find the question for the party on whom the burden of proof rests, it should be submitted; if not, it should be withdrawn from the jury. (Ryder *v.* Wombwell, 4 L. R. Exch. 39.)

The letter of April 1, 1873, was offered for the purpose of showing "the kind of transactions carried on between the plaintiff and the" second firm, and also to show that the goods purchased by the first firm were paid by the acceptances, one of which is the draft in suit. Standing alone, as it did when offered to the Court, the letter would appear to be revelant, and perhaps material; but when read in connection with that of March 26, 1873, to which it is a reply, it contains nothing to justify the inference sought to be drawn from it. In the last-mentioned letter,

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Crawford, Chamberlin & Co., after referring to the dissolution of the firm, say, "Both Mr. Brown and Mr. Johnston, who compose the Co., being wealthy men, insure to all creditors the payment of paper at maturity, as well as guaranteeing the entire indebtedness of the concern." There is not the slightest intimation here that defendant was released; on the contrary, his continued liability is distinctly recognized. They then refer to the stock purchased from plaintiff, out of which the indebtedness to him arose, and propose to return a portion of it. It was in reply to this proposition that plaintiff wrote, "It was all settled for in your acceptances I now hold." Even if this could be regarded as an admission that the acceptances were those of the second firm, it surely cannot be construed to mean that they were taken in absolute payment. The language of the letter, especially when considered in connection with the one to which it is a reply, does not justify such an inference.

The letters of March 1 and 22, 1873, offered to show, among other things, that plaintiff was negotiating with the second firm for the closing of the old account, knowing that defendant was not a member of that firm, etc., were wholly irrelevant for that purpose. It is quite clear that neither of these letters refers to the old account, on which plaintiff's claim is based, nor to the acceptances by which that account was balanced on his books. They evidently relate to subsequent transactions, having no connection with plaintiff's claim against the first firm.

If there was an agreement to take the second firm for the debt of the first, and release defendant from all liability, it was somewhat singular that none of the parties were called to prove the fact. The plaintiff's testimony was distinct and positive that no such transaction occurred, and there is nothing in the correspondence given in evidence to contradict him. He says he drew on the first firm, by whom the debt was contracted, for a sum sufficient to cover their indebtedness, and when he received their acceptances he credited them, and thus balanced the account. There is nothing in the testimony, when properly considered, that is inconsistent with the continued liability of the defendant.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by STERRETT, J.

Oct. & Nov. '75, 110 & 130. Nov. 22, 1878.

Stoughton's Appeal.
Rankin's Appeal.

Guardian and ward—Power of a guardian to dispose of his ward's real estate, with approval of the Orphans' Court—Power to lease his ward's land for oil purposes—When equivalent to sale of realty—Confirmation by the Court necessary to the validity of such a lease—When confirmation nunc pro tunc should not be decreed—Practice—Reference of case to an auditor, by Supreme Court, after appeal perfected.

A guardian has, ordinarily, power to lease any of his ward's property that is of such character as makes it the subject of a lease, but without the approval of the Orphans' Court he cannot dispose of any part of the realty.

Oil *in situ* is a mineral, and being a mineral, is part of the realty. When, therefore, conveyance is made of it by a guardian, whether that conveyance be called a lease or deed, it is, in effect, the grant of part of the *corpus* of the estate, and is of no force, binds nobody, and is notice to nobody until properly approved by the Court.

Sec. 3 of the Act of April 14, 1854, gives the Court authority to confirm such a conveyance *nunc pro tunc*, but this ought not to be done on the application of the lessees against the consent of the guardian, and when it would interfere with the vested rights of other parties.

These were two appeals, one by William G. Stoughton *et al.*, and the other by David C. Rankin, guardian of Lewis and Minerva Brown, from decrees of the Orphans' Court of Butler County, setting aside the confirmation of an oil lease of the lands of the wards to Stoughton, and confirming, *nunc pro tunc*, an oil lease thereof to A. L. Campbell and James M. Lambing.

After the appeals had been taken the Supreme Court, upon motion of appellant's counsel, and after argument thereon, continued the hearing, and appointed an Auditor (C. B. M. Smith) "to take further testimony on both sides, and to report the facts upon all the evidence in the cases, together with his opinion upon the questions arising thereupon."

The facts as found by the Auditor were substantially as follows: On December 4, 1871, David C. Rankin, guardian of Lewis and Minerva Brown, made a lease for oil purposes of a part of his wards' farm, situate in Fairview Township, Butler County, to A. L. Campbell, and James M. Lambing.

The lease provided, *inter alia*, that the lessees were to have the sole and exclusive right to bore and dig for oil in said lot for the term of twenty-one years, and contained certain conditions as to the commencement and continuance of the work, which unless complied with by the lessees were to make it void. Shortly after its making the lease was duly acknowledged and recorded, but it was not made under the direction nor with the approval of the Orphans' Court, except as hereinafter mentioned, nor was it ever presented to the Court, with the consent of the guardian, for confirmation. The lessees, Campbell and Lambing, did not comply with the conditions of the lease, nor did they take possession

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of the land until about two years after the date of their lease, and then being notified of the Stoughton lease, next hereinafter referred to, they left it.

In the meantime Rankin, the guardian, believing the Campbell and Lambing lease forfeited, leased for oil purposes the whole of his wards' farm, including the above-mentioned part, to William G. Stoughton. This lease was, upon petition of the guardian, approved by the Orphans' Court, and then acknowledged and recorded. Stoughton sub-leased the farm and his lessees immediately commenced work thereon, expending about $40,000.

After this, upon petition of Campbell and Lambing, the first lessees, naming as respondents Rankin, the guardian, and Stoughton and his sub-lessees, the Orphans' Court rescinded its confirmation of the Stoughton lease, and confirmed the Camphell and Lambing lease *nunc pro tunc*.

These decrees were both appealed from, and the following reasons, except the third, which is peculiar to the rescinding of the confirmation of the Stoughton lease, were assigned in both cases. (1) The lease of Campbell and Lambing was forfeited long before the date of the original decree, and they had no interest at that time or title to lands within the Stoughton lease. (2) By the acts and conduct of the appellees they were estopped from setting up this alleged lease, and having the decree made approving it *nunc pro tunc*. (3) The original decree in this case, having been made June 11, 1873, and the parties having entered into the possession under it, and having expended large sums of money in developing said lease, on the faith of said decree, and a great length of time having elapsed before the vacation or revocation of the decree was asked for, and the lessees, Stoughton and those under him having obtained vested rights under the said decree of June 11, 1873, the Court had no power to revoke it. (4) The decree was unauthorized, and could only be made on the petition of the guardian, and not in an adverse proceeding against him.

The Auditor after finding the facts, and stating his opinions thereon, in an elaborate report, recommended the following decrees, viz.:—

Appeal of Rankin *et al.*, and now to wit: . . It is considered, adjudged, and decreed, that the decree of the said Court be reversed and set aside, and that the record in this case be remitted to the said Court, with directions to dismiss the petition of James M. Lambing, John A. Lambing, A. L. Campbell and R. L. Brown, at the costs of the petitioners, and that the appellees pay the costs of this appeal. And—

Appeal of Stoughton, and now, to wit: . . . It is considered, adjudged, and decreed, that the decree of the said Court, made February 25, 1875, vacating in part a former decree made in said case June 11, 1873, and taking off the confirmation of the lease by David C. Rankin, guardian of the minor heirs of Josiah Brown, deceased, so far as the same might affect the forty acres of land theretofore leased by said guardian to A. L. Campbell and James M. Lambing, be reversed and set aside, and that the appellees pay the costs of this appeal.

Charles McCandless and *John M. Thompson*, for appellants.

Edward S. Golden and *L. Z. Mitchell*, contra.

It may be admitted that the Supreme Court has the discretion to refer cases appealed from the Orphans' Court to auditors when in their discretion they may think proper, but it is certainly very unusual to do so, the general rule being that an Appellate Court will hear the case upon the facts found and exceptions filed in the Court below. To this rule there is scarcely an exception.

Kittera's Estate, 5 Harris, 425.

But such reference should never be made where the party has had full opportunity of hearing in the Court below and has neglected to avail himself of such opportunity. And it should be made to appear beyond doubt that justice required the action. Nothing of the kind appears in this case. The appellants had over a year to prepare for the hearing in the Court below. The case was argued there by their counsel, and they took the chances of a decree in their favor, and already have delayed this cause much beyond the usual period for its determination. Besides this, this Court should not, as was done here, allow issues to be raised in the Appellate Court which were not presented to the Court below.

By virtue of the Act of April 13, 1854 (Purd. Dig. 1246), the Court below had power to ratify and confirm the lease to Campbell and Lambing at any time subsequent to its creation, and they therefore had the power to vacate the approval of Stoughton's lease so far as it interfered with the prior one. Nor was it necessary that the application for the approval of the Campbell and Lambing lease should be made by the guardian —any person interested may make such application.

Jan. 6, 1879. THE COURT. A guardian has, ordinarily, power to lease any of his ward's property that is of such character as makes it the subject of a lease, but without the approval of the Orphans' Court, he cannot dispose of any part of the realty. Oil, however, is a mineral, and being a mineral, is part of the realty. (Funk *v.* Haldeman, 3 P. F. S. 229.) In this it is like coal or any other natural product, which, *in situ*, forms part of the land. It may become, by sev-

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erance, personalty, or there may be a right to use or take it, originating in custom or prescription, as the right of a life tenant to work opened mines or to use timber for repairing buildings or fences on a farm, or for fire bote. Nevertheless, whenever conveyance is made of it, whether that conveyance be called a lease or deed, it is, in effect, the grant of part of the *corpus* of the estate, and not of a mere incorporeal right. In the case above cited, this is said to be so as to leases of coal lands, for the purpose of mining, and there is no reason why the same doctrine should not apply to oil leases.

Not infrequently the oil forms by far the most valuable part of an estate, and to permit a guardian to dispose of it at will, and without security, would often lead to consequences disastrous to his wards. Now Rankin's lease to Campbell and Lambing, as well as that to Stoughton, was, in fact, a sale of all the oil within the limits of the leased territory. Its terms, *inter alia*, were, "the party of the second part to have the sole and exclusive right to bore and dig for oil in said lot, and gather and collect the same therefrom for the term of twenty-one years from the date hereof." This certainly amounts to an absolute sale of all the oil contained within the land described in the lease, subject only to the royalty therein provided for. If we suppose a similar lease of timber growing upon, or coal, or other mineral found in land, we can determine without hesitation, that it is but an attempt to dispose of the realty, and so beyond the power of a guardian. As oil is not less part of the realty than timber and coal, and not less valuable, there is no reason why it should not also come within the protective and supervisory powers of the Court.

It follows that the lease to Campbell and Lambing was of no force, bound nobody, and was notice to nobody until properly approved. By force of the 3d Section of the Act of 13 April, 1854, *prima facie* the decree of the Orphans' Court rendered this lease effective from its date, and if allowed to stand, it settles the controversy between these parties definitely in favor of the appellees. Two substantial reasons are urged why this ought not to be permitted; first, it interferes with the vested rights of other parties; second, it was made without the consent of the guardian. The Stoughton lease was approved, on petition of Rankin, June 11, 1873, whilst that of Campbell and Lambing was not approved until the 25th of February, 1875. Not only so, but the Court, at that time, vacated so much of the former decree as affected the land embraced in the Campbell and Lambing lease. This was not done on the motion of the guardian, or on the ground of fraud or mistake in the procuring or entering of the decree, but on the petition of the lessees alleging want of notice to them of the previous action of the Court. This was wholly irregular, since, for such reason, the Court had no power to vacate a decree regularly made some twenty months previously. Supposing these parties to have been entitled to notice, in order to make the confirmation of the subsequent lease binding on them, it but follows that without such notice the decree could not conclude them; it could only conclude the parties to it, hence, their rights were in no way jeopardied, and the Court would certainly have exhausted its power in confirming their lease, and so leaving them to settle their controversy with Stoughton and his vendees, by an action of ejectment.

Rankin's lease, however, amounted to nothing more than a mere proposition, from which, at any time before it received the approval of the Court, he might recede. Campbell and Lambing knew they were dealing with a guardian, and they should have known that he could not, on his own motion, dispose of his wards' property. They took nothing by their lease, and had no rights which were entitled to consideration in the confirmation of the subsequent contract. We will not say that a case might not occur where the Court might approve a contract, notwithstanding the dissent of the guardian, but we do not think this such a case. According to the finding of the Master, Campbell and Lambing had, by their laches, forfeited their contract, so, that had it been originally binding, they were not entitled to have it enforced, and, consequently, Rankin, in making the lease with Stoughton, but exercised a sound legal discretion, which the Court properly approved.

It is thus manifest, that on no point, found in this case, can the decrees under review be sustained.

It is ordered that the decree reported by the Master for this, Stoughton's appeal, be adopted, and entered as the judgment of this Court.

Also that the decree reported by the Master for the case of Rankin's Appeal, No. 110, Oct. & Nov. Term, 1875, be adopted and entered as the judgment of this Court.

Opinion by GORDON, J.

Jan. '77, 189. Feb. 19, 1879.

Black v. Seipt.

Equity—Conveyance—Evidence—Admissibility of parol evidence to contradict deed—Partnership—Tenants in common.

A conveyance to one by a deed absolute on its face may be shown by parol to have been in fact a conveyance to

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him for the use of himself and his co-partner, the grantor, as tenants in common.

Parol evidence is competent to rebut such testimony by showing that it was owned by them as partnership property.

Abbott's Appeal (14 Wr. 234), and Le Fevre's Appeal (19 Sm. 122), followed.

SHARSWOOD, C. J., and GORDON and TRUNKEY, JJ., dissent.

Appeal from the Common Pleas No. 3 of Philaphia Co.

Bill in equity, filed by Wm. R. Black, assignee in trust of the estate of Oliver Benner, against Anthony P. Seipt, assignee in trust of the estate of Christian Freyer.

The bill alleged that, prior to the assignment to the plaintiff, the said Benner was the owner in fee of certain premises on Sepviva Street in the City of Philadelphia, and for the purpose of having the same divided into building lots, and of having mortgages created thereon in his own favor, he vested the title thereto temporarily in one Yerkes; that said Yerkes thereupon executed to the said Benner eighteen mortgages, and immediately thereafter, by direction of the said Benner, conveyed the legal title to Christian Freyer, by whose assignment for the benefit of creditors, the legal title vested in the defendant; that these conveyances were without consideration, and were made for the purpose of enabling Benner to raise money on the mortgages for the improvement of the property, and on the failure of that purpose, the mortgages were, by agreement between the parties, surrendered and cancelled.

The bill prayed for a conveyance of the premises to the plaintiff.

The answer while admitting the conveyances recited in the bill, averred: that Freyer & Benner had been co-partners in business, and the premises were the property of the firm; that the defendant held the title thereto, under the assignment from Freyer, in trust to dispose of the same for the benefit of the creditors of the firm, and that his right to do so had always been acquiesced in by the plaintiff; that the plaintiff in the inventory of the estate of Oliver Benner, filled by him as assignee, described the premises as the "property of Oliver Benner, Christian Freyer, and Jacob S. Frederick, partners," and in a suit in equity wherein the present plaintiff and defendant were co-plaintiffs, the said premises were described as the property of the firm; that the plaintiff Black was the holder of a judgment against Benner, which was a lien on the said premises, and the defendant being about to advance his own money to complete the unfinished buildings thereon procured from Black an agreement in writing, that he would not claim any lien on or right of payment out of the said premises on account of the said judgment until the money advanced by the defendant had been first repaid to him, and that the said Black would from time to time execute releases of the lien of said judgment to the purchasers of the premises, provided, however, that such releases should not impair the right of the said Black to claim against the fund arising from the sale of the premises, *as real estate*, after re-payment to the defendant of the money advanced by him for the completion of the buildings; that the buildings were completed with moneys advanced by the defendant, and were afterwards sold by him at public sale without any objection thereto on the part of the plaintiff; that some of the purchasers at said sale required that the plaintiff should join in the deeds of conveyance with the defendant, but the plaintiff refused to execute any such deeds unless the defendant would consent that the proceeds of the sale should be applied to the satisfaction of the said judgment of Black *v.* Benner, and of another judgment of Whitall *v.* Benner.

In conclusion, the answer asserted that the object of the plaintiff in seeking a re-conveyance of the premises was not to protect the creditors of the said Benner, but to secure a special advantage and preference to himself and to the said Whitall in the distribution of the Trust Estate.

The cause was referred to an Examiner and Master (Wm. H. Ruddiman) who found the following facts: In the month of February, 1868, Oliver Benner and Christian Freyer, both of the city of Philadelphia, entered into a co-partnership for the purpose of carrying on, in the said city, the art and trade of manufacturing and selling bricks under the name or firm of Oliver Benner. The co-partnership continued to exist until the 30th of August, 1872, when the said Oliver Benner made and executed to the plaintiff an assignment of all his estate, real, personal, and mixed for the benefit of his creditors; which was, on the 17th of October, 1872, followed by a like assignment by Christian Freyer, to the defendant herein, as assignee for the benefit of the creditors of said Freyer.

In June, 1871, one Stokes was the owner of the property described in the bill; one Hutchinson owned a lot on Chestnut Street; Benner and Freyer each owned a lot; and the two were together seized of two certain other lots, "being the same lots of ground which James A. Mitchell granted and conveyed unto Oliver Benner and Christian Freyer in fee." These last four lots were exchanged for the Sepviva Street property. The transaction was a double one—Hutchinson taking the four lots thus owned severally and together in exchange for the house and lot on Chestnut Street, and Stokes taking the premises on

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Chestnut Street, giving in exchange therefor the lot on Sepviva Street, for which he made title to Oliver Benner in his own name. The matter of the conveyance from Stokes to Benner was conducted by Stokes and Benner alone.

In June, 1872, took place the conveyances described in the bill and admitted in the answer. Upon the assignment of Oliver Benner for the benefit of creditors being made, an inventory and appraisement of all his estate, real and personal, were scheduled and filed by Charles T. Paschal and James T. Rowand, appraisers duly appointed, in which, designated under the following head, "III. Combined Estate—The property of Oliver Benner, Christian Freyer, *and Jacob S. Frederick* partners"—appears this item: Lot of ground on Sepviva Street and nine unfinished brick houses ready to roof in, $10,000.00.

Three books, having apparently some relation to the business of Benner and Freyer, and entitled, respectively, "Rent Book," "Stock Book," and "Ledger," were put in evidence on the part of the defendant. In the "Rent Book," under the names of Benner and Freyer, are entries respecting dwelling-house No. 209 Susquehanna Avenue, dwelling-house No. 211 Susquehanna Avenue, and store and dwelling No. — Susquehanna Avenue. But it does not appear, either by the book itself, or from any other source, excepting that they were situated on Susquehanna Avenue, that these properties were at all connected with the Sepviva Street transaction, or were the same as were conveyed to Joseph B. Hutchinson in the manner already stated. In the "Stock Book," under the "Inventory of Stock, January 1, 1870," two entries are made as to one store and two dwellings on Susquehanna Avenue: but nothing further is given to furnish any explanation concerning them, or what reference they necessarily bore to the property now in question. By the "Ledger" various accounts with the Sepviva Street property are exhibited in which numerous quantities of bricks charged to the Sepviva Street buildings, are set forth and other matters indicated, some in ink and others in pencil; but not important beyond showing the extent of the trade supplied by Benner and Freyer to the houses then in course of erection. Besides the books themselves, nothing was offered to explain their nature or by whom they were kept, or in what particulars and to what extent they represented the business affairs of the co-partnership, or what the accounts purporting to have been detailed in them, really were intended to compass. Nor do they seem to offer either by themselves, or in combination with other things adduced in evidence, any light by which the Master may be guided towards a satisfactory termination of the work committed to him.

The facts alleged in the answer were substantially proved.

Upon the argument, the counsel for the plaintiff contended that Benner took the legal title for himself and Freyer as tenants in common, by virtue of the trust thereby resulting; and that when the whole legal title subsequently passed to and was vested in Freyer, without consideration from him, and in order that the mortgages should not merge, and that deeds of conveyance should be made by him to purchasers at the direction of Benner, the trust was shifted from Benner to Freyer, and he held the land subject to any interest Benner might have therein as tenant in common with him.

The Master reported as follows: "The land in controversy—the consideration for which was the premises, several and in common, heretofore described, of Benner and Freyer was *not necessary for the purposes or business of the partnership*, as seems to be clearly shown in paragraph 4 of the bill, and paragraph 3 of the answer, in both of which it is stated that means were adopted for its *improvement* and for *the sale of portions of it*. It was conveyed to Benner, alone, and not to him as a member of the firm, nor to the co-partnership in any wise; *nor is there anything from which it appears that it was ever so regarded by the partners themselves*. And there is no evidence of any deed or other writing of record, by which was manifested their intention to bring it into the partnership or to use it for partnership purposes.

"The doctrine by which must be ascertained and fixed the distinguishing features or characteristics of partnership property, and property held in common by those who are conducting business together as co-partners, and the rights of contending creditors as to the same, has not been without frequent judicial considerations: and in the Supreme Court of our own State, the principle which determines and separates between the two, has received repeated examination and announcement. (Ridgway, Budd & Co.'s Appeal, 3 H. 177; Coder & Peterman *v.* Huling, 3 C. 84; Ebbert's Appeal, 20 Sm. 79; Jones' Appeal, 20 id. 169; Appeal of Belle D. Foster, 13 Am. Law Reg., N. S., 300.)"

The Master found that the property was not the partnership property of the firm composed of Benner and Freyer, but was the estate in common of Benner and Freyer, and that the bill should be sustained and appropriate relief granted.

The Court sustained exceptions to the Master's report, YERKES, J., delivering the following opinion: "Upon the argument the counsel for plaintiff contended that the title of Freyer was for himself and Benner as tenants in common. The Master reports in favor of the view taken by counsel upon the argument. If the title had been in Oliver Benner and Christian Freyer, this

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view would have have been undoubtedly the correct one. A glance at LeFevre's Appeal (19 P. F. S. 122), where all the Pennsylvania cases are commented upon, will at once show this. The principle there enunciated, and which runs through all the Pennsylvania cases, from McDermot *v.* Laurence (7 S. & R. 438), to the Appeal of the National Bank of Titusville (Leg. Int. 1877, p. 48), is that real estate conveyed to individuals, who may be partners, will not be treated as partnership assets where purchasers and creditors are concerned, unless the intention so to treat it appears in the deed or otherwise of record. This rule seems without exception where the title is in the names of all the co-partners. It is true where the partnership funds have paid for the land.

"But this is not a conveyance to the two partners. It is a conveyance to one made with the knowledge and presumably at the request of the other. It is true that both partners were interested in the real estate which was the original consideration, but beyond this there is no evidence. There was no agreement that this property was to be held in common. By the deed the partners impressed the character of real property upon the interest of Freyer, and by the mortgages the character of personal property upon that of Benner. Without the mortgages, the deed moving so directly from Benner is inconsistent with his retaining an interest in the realty. A man who obtains money from a friend to invest in real estate in his own name does not make his friend a tenant in common simply because one-half of the consideration came from the friend. The relation would be that of debtor and creditor. The plaintiff's evidence does not seem sufficient to show any interest in the real estate as real estate in Benner. In LeFevre's Appeal, *supra*, Justice SHARSWOOD says that where creditors are concerned, the deed or other paper of record is the true index of ownership, not only where all of the partners take title in their own names, but even where one with the assent of others buys real estate in his own name with partnership funds. The principle so announced must apply to a case like the present, and be invoked against the plaintiff.

"As already stated, the only evidence upon which the plaintiffs rely is the title of the properties exchanged for these premises. The rule that the deed is the badge of ownership where purchasers and creditors are concerned does not hold where the contests are simply between partners, but the real ownership may be shown by parol testimony to be in the firm; Abbott's Appeal (14 Wright, 234). Now it does not appear that at the time of exchange of these four properties there could have been any questions, except as between partners. Therefore the parol testimony is clearly admissible, and the evidence in this case—the books of the firm—show that they were considered firm property, and being the only evidence, the fact that the four properties exchanged were the property of the firm seems to be established.

"The plaintiff, representing the creditors of Benner, sets up an equitable title in Benner, and defendant sets up an equitable title in the partnership. There is no reason why parol evidence should not be admissible. The cases relied on in argument and by the Master were cases where equitable titles, evidenced only by parol, were set up against record titles and against creditors having liens. Here no creditor was misled by the title being in Benner. It is certainly, as between these litigants, a proper case for inquiring into the real ownership. We have the positive evidence of the answer that the several properties on Sepviva Street belonged to the partnership; we have the evidence of the firm's books that they were treated as partnership property, and we have the acts of the plaintiff which corroborate the defendant's answer and testimony. We do not deem the acts of plaintiff conclusive, or that he is estopped, except as against the reimbursement to the defendant of the cost of the completion of the buildings, which was done on the faith of plaintiff's word and acts, but his acts and words have some force as evidence. Against this, plaintiff relies on the titles to the properties exchanged, and under the evidence and authority of Abbott's Appeal we attach little importance to the fact that those titles were not in the firm.

"As between these litigants we decide that the property in dispute is partnership property; we are not called upon and do not decide any questions between individual and partnership creditors of Christain Freyer."

The plaintiff took this appeal, assigning for error the dismissal of his bill.

Geo. W. Thorn (with whom was *John Roberts*) for the appellant.

The land was not necessary to the partnership business, but was bought for a purpose entirely outside of it. The ownership of the consideration which purchased the land draws to itself the beneficial or equitable title, such equitable title is exempted from the operation of the statute of frauds.

Edwards *v.* Edwards, 3 Wr. 369.
Beck *v.* Graybill, 4 Cas. 66.
Lynch *v.* Cox, 11 Har. 268.
Stewart *v.* Brown, 2 S. & R. 461.

Where a partner purchases real estate for the joint use of himself and his co-partner, not necessary for partnership purposes, with funds in which each is equally interested, and takes a conveyance of it in his own name, the other partner

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has an equitable estate in the land to the extent of one-half, and it is not partnership property, but they own it as *tenants in common.*

Coder and Peterman *v.* Huling, 3 C. 84.

When partners intend to bring real estate into partnership, their intention must be manifested by deed or writing placed on record, that purchasers and creditors may not be deceived.

Kramer *v.* Arthurs, 7 B. 165.
Ridgway *et al.* Appeal, 3 H. 177.
Jones's Appeal, 20 Sm. 170.
Lancaster Bank *v.* Myley, 1 H. 550.
13 Am. Law Reg., N. S. 300.
Ebbert's Appeal, 20 Sm. 79.

Here the contest is between creditors. An agreement to make property held in common partnership property, must be in writing.

Le Fevre's Appeal, 19 Sm. 122.

Where one partner buys land, not necessary for or intended for the purpose of the partnership with partnership funds or property, he will be held to be a trustee of one-half for his co-partner. They will not in fact be owners as partners but joint owners, one holding the legal title and the other *an equitable title to his share.* Especially is this true where each of the partners has contributed, as in this case, his individual property as well as that held in common with his co-partner to make the purchase. The land in question was not bought with partnership funds, nor treated as such by the partners.

Foster's Appeal, 24 Sm. 391.

As the rights of third persons were involved, it was not competent to prove and in fact it was not attempted to be proved that the estates given as the consideration of the purchase of this lot in question were otherwise than as stated in the respective deeds, in which it appeared Benner owned in fee one house—Freyer in fee another, and the two as tenants in common owned the third and fourth.

McDermot *v.* Laurence, 7 S. & R. 438.
Geddes's Appeal, Leg. Int. 1877, 330.
Appeal of Second National Bank of Titusville, 2 N. 203.

George M. Dallas, for the appellee.

That the land in question was not necessary to the partnership business, is not deducible from the evidence. The inference from the proof is that, being engaged in the brick business, the firm entered upon the purchase of land, and the erection of buildings thereon, as a method of disposing of their stock on hand.

For the very reason that the contest is between creditors, the Court was right in leaving the legal title to this property just where the parties had placed it; and in postponing, until the appellee's account shall bring all the creditors into Court, any determination of their respective rights in the proceeds of the land.

Singmaster's Appeal, 6 WEEKLY NOTES, 14.

This case is ruled by Driver's Appeal (3 Wr. 535); but even if not, the bill is not maintainable, because—

(1) The assignee takes as upon assignment in bankruptcy.

Ludwig *v.* Highley, 5 B. 138.

No property held by a bankrupt in trust passes by the assignment.

Bump's Bankruptcy, 539.
Rev. Statutes, Sec. 5053.

(2) Under the Statute of Frauds (Purd. Dig. 724), this trust cannot be enforced.

Barnet *v.* Dougherty, 8 C. 371.
Alcott *v.* Bynum, 17 Wall. 44.

(3) That which the appellant asks now is not in accord with the prayers of the bill. A variance between the bill and the proof is fatal.

Grislup's C. Ev. (Am. Ed.) 170.
2 Dan. Ch. Pr. 856.
Brightly's Ex. 425, 515.

(4) The appellant has a remedy at law.

An equitable title will support an action of partition.

Willing *v.* Brown, 7 S. & R. 467.

Or an action of ejectment.

Hill *v.* Hill, 7 Wr. 527.

An ejectment bill cannot be sustained.

Coal Co. *v.* Snowden, 6 Wr. 488.
Tillmes *v.* Marsh, 17 Sm. 507.
Schlecht's Appeal, 10 Id. 172.

May 7, 1879. THE COURT. This was a bill to compel the reconveyance of certain real estate. It was filed by the assignee in trust of the estate of Oliver Benner against the assignee in trust of the estate of Christian Freyer. The legal title to the premises was in the name of the appellee. The bill prayed for a conveyance of the whole land; but on the hearing before the Master, the claim was narrowed to an undivided moiety thereof. The Master sustained the claim and reported accordingly. On exceptions filed to the report, they were sustained, and the bill dismissed. This is the alleged error.

The ability of the appellant to sustain his assignment of error depends on his establishing that Freyer held the legal title to the premises in question in trust for himself and Benner *as tenants in common.* In 1868 Benner and Freyer entered into co-partnership in the business of manufacturing and selling brick; it continued until the last of August, 1872, when Benner made an assignment for the benefit of his creditors, to the appellant. In October following, Freyer made an assignment for a similar purpose to the appellee. Benner acquired title to the lands in question in June, 1871. The consideration of the conveyance to him was the transfer of four separate properties. The title to two of these properties was in "Oliver Benner and Christian Freyer;" of the other two one was in Benner and the other in Freyer. In June, 1872, Benner, without consideration, con-

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veyed the title thus acquired to one Yerkes, and the latter on the same day and without consideration, at the request of Benner, conveyed the same to Freyer, who retained it down to his assignment. No trust was declared in any of the three deeds. It is neither averred nor proved that the conveyance of this land was made under any agreement, that either Benner or Freyer should hold it in trust as to a moiety as tenant in common for the other. The conclusion is it ought to be deduced from the other facts and circumstances shown. It is claimed to follow primarily, from the fact that the title to the lands transferred as the consideration, for the conveyance to Benner, stood in their individual names, that the Master has found the lands in question were not purchased, and were not necessary for the benefit of the partnership, and that no consideration was paid by Freyer on the conveyance to him.

Several books of the firm of Benner & Freyer, by the respective entries therein, clearly indicate that they recognize real estate as stock, and from which they received rent. While those entries do not specifically identify any of the premises to which we have referred, yet in the absence of evidence that they referred to others, we think the inference a fair one that these lands were held and treated by them as partnership property. The fact that for the purpose of placing mortgages on the lands without creating personal liability, they were conveyed to a third person in their transmission from Benner to Freyer, in no wise tends to establish a joint tenancy in them.

Certain it is that after the assignment to the appellant, he recognized this as partnership property. In the inventory which he filed, he designated it as belonging to the firm of Benner & Freyer. Afterwards in a bill filed jointly by the appellant and the appellee, this identical land was averred to be partnership property.

It is unnecessary to refer to many of the authorities cited on the argument. The facts in this case do not admit of their application. This is not the case of a conveyance to Benner and Freyer as tenants in common, and an attempt to show by parol that it is partnership property. It is the case of a conveyance to one by a deed absolute on its face, and an attempt to show by parol that it was in fact a conveyance to him for the use of himself and his co-partner as tenants in common. Parol evidence is most assuredly competent to rebut that evidence by showing it was owned by them as partnership property. The learned Judge committed no error in dismissing the bill.

Decree affirmed, and appeal dismissed at the costs of the appellants.

Opinion by MERCUR, J.

SHARSWOOD, C. J., and GORDON and TRUNKEY, JJ., dissent.

Common Pleas—Law.

C. P. No. 1. Oct. 25, 1879.

Sheetz v. Whitaker.

Feigned issue, devisavit vel non, directed by Register to Common Pleas—Parties—A party plaintiff, after having voluntarily joined in the proceeding, cannot withdraw his name from the record, though he may require the real parties maintaining the issue to indemnify him against costs—The Common Pleas have no jurisdiction to substitute parties, or change the form of the issue in any respect—Attorneys-at-law—Warrants of attorney—When too late to require filing thereof—Practice.

Two rules heard together, viz.:—

(1) To show cause why the attorneys of the parties maintaining the issue, and seeking to be substituted as plaintiffs on the record, should not file warrants of attorney.

(2) To show cause why another person should not be substituted as plaintiff in the feigned issue, in place of Daniel Sheetz, he being unwilling to continue to act as such.

The Register of Wills had directed a feigned issue to try the question whether a certain paper offered for probate was the will of Robert Whitaker, deceased. Daniel Sheetz, who was nominated as executor in the alleged will, was made plaintiff in the issue. On the trial, in C. P. No. 1, a verdict was taken, by consent, against the validity of the alleged will; but this verdict was set aside by the Court, and a new trial granted (see *ante*, 403). The above rules were thereupon taken.

(1) As to the rule to file warrants of attorney.

H. McMiller, showed cause.

It is too late, after pleading to issue, to require warrants of attorney.

Campbell *v.* Galbreath, 5 Watts, 423.
Mercier *v.* Mercier, 2 Dall. 142.

We have the warrants, but decline to file them unless required by the Court.

S. Dickson, for the rule.

If this were strictly a motion in the original case, it might be that it would be too late. But new parties have intervened, and are asking now to become parties to the record. It thus becomes virtually a new suit, and the attorneys of the party whom it is proposed to substitute as plaintiffs should be required to file their authority, that the contestants may know that such authority comes from persons competent to give it. It is analogous to the right of removal to the Federal Court, where a new party, brought in by interpleader, may remove, though the original parties could not do so.

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Healy *v.* Prevost, 6 WEEKLY NOTES, 579.

(2) As to the rule to substitute a plaintiff.

H. McMiller (with him *Furman Sheppard*) for the rule.

A party plaintiff in a feigned issue ought not to be forced to prosecute the case against his will. The matter is within the control of the Court.

Mintzer *v.* Baker, 5 Phila 483.

S. Dickson, contra.

The Common Pleas has no power to change the frame of an issue, directed by the Register, in any respect. It must try the issue as it is sent.

Dotts *v.* Fetzer, 9 Barr, 88.

The real parties in interest may indemnify the nominal plaintiff against costs, and may then use his name.

Mumper's Appeal, 3 W. & S. 441.

Royer's Appeal, 1 Harris, 569.

Should it, in any case, become *necessary* to change the form of the issue, the proper practice, by analogy to an issue directed by a Court of Chancery, would be for this Court to return the præcipe to the Register, to make the required change. But it is unnecessary here; the nominal plaintiff came here originally by his own choice, and if he desires to withdraw he may, on being indemnified, do so virtually, without suffering injustice, allowing his name merely to be used. The jurisdiction of the Court in this proceeding is strictly statutory, and there is no Act of Assembly permitting such change.

Sheppard, in reply.

It must be admitted that the legislation is not very clear on this point of the substitution of parties, nor are the decisions altogether satisfactory. In Vansant *v.* Boileau (1 Binn. 444) Chief Justice TILGHMAN indicates the Register as the proper person to make this change, but the tendency of Mintzer *v.* Baker is the other way. This is indeed a proceeding *in rem*, but it is to be tried as if *inter partes*. If a vacancy should occur in the parties, what shall the Court do, unless it has power to fill it? There are two ways of moulding the parties to an action—by addition and by withdrawal. There can be no reason why the one should not be allowed as well as the other. In Patton *v.* Allison (7 Humphrey's Tenn. 320), a withdrawal was permitted by the Court, and it was said the Court had power to permit parties to intervene.

C. A. V.

Nov. 8, 1879. THE COURT. This is an application for the substitution of some other person as plaintiff in this issue, in place of Daniel Sheetz, who, by writing filed, declines to act as such.

This brings up the question of the power of the Court of Common Pleas, in an issue sent into it by the Register of Wills to try the validity of a paper purporting to be the last will of a decedent, to change the parties to it by substituting, as in this case, a plaintiff for the plaintiff who was named as such when the issue came into this Court.

We think this question is ruled by Dotts *v.* Fetzer (9 Barr, 88). The Supreme Court, in that case, said: "It is the business of the Court which awards a feigned issue to name the parties to it, and prescribe the form of it; and as this was done by the Register's Court, the Common Pleas had no power to disturb it." The Court further said: "The fixing on parties to give form to the issue, is a matter of arbitrary arrangement; and those who have not an interest in the question to be tried, pay no costs. The real parties —those who have taken an active part in the contest—are sought out and compelled to pay by a writ of attachment."

The plaintiff in this case, Daniel Sheetz, came into the contest voluntarily, and perhaps it might be said that he has no right to embarrass it by withdrawing from it before the issue is decided. If he wishes no longer to take an active part in the contest, there is a way open to him, through which he can protect himself from the future costs and expenses of the issue.

The Supreme Court in Mumper's Appeal (3 Watts & Sergeant, 441), said: "The person named as executor in the writing, when advised that its validity as a will is about to be contested, ought to give notice to those who are named in it as legatees or devisees, so that they may employ counsel, if deemed requisite, or authorize him to do so at their expense. If they, after being so notified, do not choose to employ counsel, or authorize any to be employed on their behalf, they must abide the consequences, and will have no reason to complain if the writing be not established as a will, seeing they were not willing to encounter the expense with which the employment of counsel would have been attended."

The same principle is affirmed in Royer's Appeal (1 Harris, 569). If, therefore, the plaintiff in this issue desires to protect himself from the future responsibility and expenses of the contest, he should give notice to the parties interested in the controversy that he has withdrawn from it, and will assume no further responsibility of carrying it on.

As he can protect himself from further responsibility in respect of it, we see no reason, as indeed we have no power, to withdraw his name as party plaintiff to the issue.

The petition is dismissed.

There was also a rule granted in this case to show cause why the attorneys of the parties maintaining the issue should not file their warrants of attorney. This application comes too late. A rule on plaintiff's attorney to file his warrant must

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be moved for before plea pleaded. (Mercier *v.* Mercier, 2 Dallas, 142; Campbell *v.* Galbreath, 5 Watts, 423.)

Rule discharged.

Opinion by PEIRCE, J.

C. P. No. 1. Nov. 22, 1879.

Ralston v. Ralston.

Husband and wife—Divorce—Jurisdiction of Court—Desertion, what constitutes—Where parties reside in another State, and the husband removes to this, the mere refusal of the wife to come and live with him does not constitute such desertion as is contemplated by the Act of Assembly—The domicile of the husband is not necessarily that of the wife so as to give the Courts of the husband's domicile jurisdiction to decree a divorce.

Rule for divorce *a vinculo matrimonii.*

The evidence of the libellant in support of the rule was as follows: Libellant was married in June, 1865, being at the time an officer in the U. S. revenue marine service. He remained in the service until July, 1870, during which period he resided while on shore with his wife. After 1870 the respondent lived in Wilmington, Del., with her mother, where the latter had resided since the marriage. From 1870 to 1872 libellant was in Philadelphia, employed or seeking employment. When out of employment he was at Wilmington. In 1872 he entered the employ of the Reading R. R. Co., and is still employed by them, and is so constantly occupied as to be unable to go to his wife's present home except at very rare intervals. At first he resided with his mother in Philadelphia from 1872 to 1876, when the latter died. The respondent had, before this, on many occasions said she would never come to Philadelphia to live. He testified that on the occasion of his mother's funeral he spoke of bringing her to Philadelphia to live, and offered to take a house or to board, as she preferred. "I said to her, 'I don't suppose you will come' (knowing her opposition and her having frequently before refused). I was afraid to put the question directly, for fear she would say no. I was in hopes in this way of prevailing upon her, and she replied, 'Yes, I will.'"

In April, 1876, libellant went to see respondent, when she said she would not come to Philadelphia to live. He asked why. She said she could not leave her mother. He told her to bring her mother along, and he would take care of her. She said she could not think of taking her mother from Wilmington where she had lived so long. Respondent has never lived with libellant since. He has, however, sent her about $40 per month.

James L. Ferriere, for libellant.

The evidence establishes a wilful and malicious desertion. The wife must follow her husband, unless she has such reasonable cause for declining as would of itself entitle her to a divorce.

Butler *v.* Butler, 1 Parsons, 329.
Eshbach *v.* Eshbach, 11 Harris, 344.
Cutler *v.* Cutler, 2 Brewster, 513.
Angier *v.* Angier, 63 Penn. St. 450.

The only case not consistent with this doctrine is Bishop *v.* Bishop (6 Casey, 412), which decides that the refusal of the wife to follow her husband to a foreign country is not, *per se*, a wilful and malicious desertion.

C. A. V.

Nov. 29, 1879. THE COURT. That the domicile of the husband is not by implication that of the wife when the purpose is to destroy her marital rights, was decided in Bishop *v.* Bishop (6 Casey, 416); Colvin *v.* Reed (5 P. F. S. 375); Reel *v.* Elder (12 P. F. S. 308); and that, although the law of the place of the actual *bona fide* domicile of the parties gives jurisdiction to the proper Courts to decree a divorce, it means the domicile of both parties. And that nothing but the possession of the person of the wife before or at the time of the proceeding can warrant another State in subjecting her to its jurisdiction. The injured party must seek redress in the forum of the defendant, unless the defendant has removed from what was before the common domicile of both.

The case here is almost identical with that of Colvin *v.* Reed (*supra*). The husband and wife residing in Wilmington, Del.; he gets employment in Philadelphia, and finds his return to his home irksome and inconvenient. He asks his wife to accompany him to Philadelphia to live, and she replies that she cannot leave her mother. At the end of two years, without further communication, he asks to be divorced here, on the ground of wilful and malicious desertion on her part. As he had never previously provided a home for his wife, but had lived with her at her mother's, he had placed his wife under obligations to her mother, in addition to those which a child naturally owes to a parent. It certainly was natural, therefore, that she should at least hesitate to obey his first summons. His first summons, however, appears to have been his last, for he does not pretend that he ever repeated the request. It is rather stretching a point, therefore, we think, to hold that this was persisting in her desertion for two years, even if we brought ourselves to the belief that it was wilful and malicious in its inception. The complainant by his own oath makes out a technical demand and refusal, with two years' absence, sending funds to his wife in the meanwhile, and then in a jurisdiction foreign to their only joint domicile which he has left, he applies for a divorce

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from his wife. In questions of divorce, a case technically made out is not one which recommends itself to our favorable consideration. Husbands who are too willing to have their iniquities made manifest, and wives who acquiesce with such cheerfulness in their misfortunes as to supply all the necessary evidence to establish them, generally fail to convince us that, in the words of the Act of 1815, "the application is not made out of levity or collusion, or for the mere purpose of being separated from each other." If the husband was wilfully and maliciously deserted here, he certainly has borne it with wonderful philosophy and patience. We think, therefore, that even if we had jurisdiction over the person of the wife, the evidence here presented would fail to satisfy us of her wilful and malicious desertion, without adequate cause, for the space of two years from her husband. But as the wife has never resided within our jurisdiction, we think, in conformity to the cases cited, the motion should be discharged.

Rule discharged.

Opinion by BIDDLE, J.

C. P. No. 3. Dec. 6, 1879.

Dewees v. Evans.

Interpleader—Practice—Costs against the defendant in the feigned issue when the verdict is against him are not of course—Circumstances under which they will not be allowed.

Rule to show cause why fi. fa. for costs against defendant in sheriff's interpleader should not be set aside.

The affidavit in support of the rule set forth that the affirmant, Charles Evans, obtained a judgment against one Peter Dewees on certain notes for the sum of $725.97, the same being for coal sold and delivered to said Dewees for use in his business and family; that execution was duly issued, and a levy made at Dewees's place of business, whereupon one Newton R. Dewees, a son of defendant, claimed the goods levied on, though at that time the defendant was apparently in possession of them, and conducting the business, and the affirmant is informed it so appeared on the trial hereafter mentioned; that an interpleader was awarded, and on the trial thereof Newton R. Dewees showed that his father had given him a confession of judgment about the time that the above suit together with a large number of others was brought against him, and that before any of said suits ripened into judgment the said son issued execution against his father, and at sheriff's sale bought in all the goods and stock, etc., of the father's business; that thereupon the father became employé, and the son employer, thus reversing the positions which they had for a long time previously held, though to a stranger this change was not apparent. At the said trial the father and son swore that the judgment confessed by the father to the son was on a contract made years before for the father to pay the son $18 per week, of which sum $3 per week was to lie and accumulate on the father's hands, and the accumulation for which judgment was confessed amounted to $1500. Affirmant being unable to contradict this statement, his counsel abandoned the levy, and consented that the verdict be for the plaintiff. Affirmant acted in good faith, the relationship of the parties and apparent want of change in possession making the case sufficiently suspicious to require the claimant to show some consideration for said judgment, and when this was done the affirmant at once withdrew.

Hannis, for defendant.

Costs against an unsuccessful defendant in a sheriff's interpleader are not of course. The rule is that where the creditor has good reason to believe the goods belonged to the defendant in execution, as, when they are found in his possession, and under circumstances which give rise to a presumption of title, costs are not awarded against the defendant in the interpleader.

Bank *v.* Emerson, 7 WEEKLY NOTES, 392.
Mansley *v.* Moore, 1 Id. 268.

The contract between father and son had of necessity to be proved, because a son who works for his father after he is of age does not establish a debt against the father as against creditors unless there has been a previous contract on the part of the father.

Eberle *v.* Groff, 9 H. 255.
Hack *v.* Stewart, 8 B. 213.
Bash *v.* Bash, 9 B. 260.
Tube *v.* Miller, 4 H. 488.

Rule absolute.

C. P. No. 4. Oct. 25, 1879.

City of Philadelphia, to use of Murray, v. Estate of Wm. T. McNeely, dec'd.

Municipal claim—Sewers—Sewers constructed by public authority but emptying into private sewer—Ordinance not averring approval of sewer by Board of Surveys—Approval assumed unless expressly denied.

Rule for judgment for want of a sufficient affidavit of defence.

Scire facias sur municipal claim for the construction of a culvert along Montgomery Avenue, authorized by Ordinance of June 29, 1874 (C. O., p. 238).

The affidavit of defence filed by Robert K. McNeely, a part owner with the defendant estate of property upon which a *pro rata* assessment

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had been levied for the cost of the sewer in question, set forth as follows: "That the culvert, for the cost of which the said plaintiff seeks to recover, was constructed, as the deponent is advised and believes, without authority of law, in this, that the same being a branch sewer the consent or authority of the majority of the owners of the property in front of which the same was laid was never obtained; but, on the contrary, the said sewer was constructed against the wishes and remonstrances of the said owners, and after legal proceedings had been taken to enjoin the said plaintiff from commencing the said work; of all of which the said plaintiff had due and timely notice; and further, that it does not appear by the Ordinance of Councils, under which the said work was done, that the construction of the said sewer had been approved by the Board of Surveys, and that the same was in the opinion of the Councils required for the health, comfort, or convenience of the inhabitants of the city, as provided by the Act of Assembly of April 20, 1869 (P. L. 1190), but, on the contrary, the deponent avers that the said sewer was not required for the health, comfort, or convenience of the inhabitants of the city, and was, therefore unauthorized by law, and no recovery can be had for the costs of constructing the same. The deponent further alleges and says that the price charged for the work done and materials furnished in the construction of the said sewer is greater than the value thereof, and is at least one-third more than it is really worth. And this deponent further avers that the said sewer was so defectively planned and constructed that it is of little, if any, practical use or benefit to the properties in front of which it is laid, that the outlet of the said sewer is considerably below the level of the sewer into which it empties, and is therefore unable to carry off all the ordinary drainage, with which the said sewer is consequently at all times filled, to the danger of becoming a nuisance to the properties having connection therewith. And the deponent further says that the said sewer was unlawfully constructed in this that it has no connection or outlet into the public sewers of the city, except by and through a private sewer, constructed by the Pennsylvania Railroad Company for a distance of over three hundred feet through the private grounds of the said company, which said sewer not being under the control or supervision of the said city, may at any time be closed up, and the work for which the plaintiff seeks to recover in this action may be thus rendered absolutely worthless; and he further says that he is informed and believes, and expects to be able to prove, that no authority or license whatsoever was given by the said Railroad Company to the said plaintiff to connect the present sewer with the said private sewer of the said Company."

Henry C. Terry, for the rule.

The consent of owners of abutting property is not required by law.

Act of March 27, 1865, P. L. 791.
Act of April 20, 1869, P. L. 1190.

It is not necessary that it should be stated in the Ordinance that the construction of the sewer had been approved by the Board of Surveys, and was required in the opinion of Councils for the health, comfort, or convenience of the city. The Ordinance of June 22, 1874, under which this sewer was constructed, is in the same form as every other Ordinance relating to branch sewers passed since the Act of 1869, *supra*. And every intendment being in favor of the proper exercise of a discretion vested in public officers, it is to be presumed that the Board of Surveys approved the Ordinance before it was passed. Further the defendant must swear positively that the Board did not approve; every point not covered by positive averment in an affidavit of defence being assumed as against it. Councils are the sole judges of the necessity of sewers, and their judgment is conclusive on that point.

City *v.* Sellers, 6 Phila. 253.
Lips *v.* City, 2 Wright, 503.
City *v.* Tryon, 11 Casey, 401.
Stroud *v.* City, 11 Sm. 255.

The question of the just value of an assessment cannot be inquired into. Councils, by Act of March 13, 1866 (P. L. 354), are authorized to fix rates and assessments.

City *v.* Cottage, 9 Phila. 84.

The remainder of the affidavit relates to the *plan* of the sewer; the question as to the failure of the contractor to comply with the terms of his contract and specifications is not raised. The city having adopted the work by giving him the assessments in suit the defendant cannot now avail himself of any breach of the said contract.

Phila. *v.* Brooke, 31 Sm. 23.

The *plan* of the sewer is solely within the power of the municipal authorities, and neither the court nor a jury can encroach upon the functions committed to other public officers.

Carr *v.* Northern Liberties, 11 Cas. 329.

On the whole case this Court has already had the matter before them in—

City *v.* Church, 1 WEEKLY NOTES, 299.

George W. Thorn, showed cause.

This sewer not only empties into a private drain of the Pennsylvania Railroad, and is therefore liable to be closed up at any time, but it does not even do its work effectually in its present condition.

There is no case which goes so far as to say that the city may build a nuisance along the front of a man's property and make him pay for it without any possible redress. The affidavit is as strong as could be desired.

C. A. V.

Nov. 10, 1879. Rule absolute.

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Orphans' Court.

O. C. of Montour County. May, 1879.

Benfield's Estate.

Partition in the Orphans' Court—Act of March 29, 1842—Owelty—An allotment to heirs by name of parcels of land charged with owelty, without being appraised, is improper under the terms of the Act—Right of election defeated by such procedure, if allowed—In partition, if there be a widow, and the estate cannot be divided between her and the heirs, the inquest has power only to appraise the property.

Rule to set aside inquisition in partition.

Thomas Benfield died seised of certain real estate, leaving a widow and lineal descendants. A petition for an inquest to make partition was filed and commissioners appointed. The inquest, finding that no part of the estate could be set apart to the widow without prejudice to or spoiling the whole, proceeded to allot the land to the heirs, dividing it into two parcels, without appraising them, and designating the portion which each should have. They also valued the interest of the widow, and charged owelty upon the two parcels.

This rule to set aside the inquisition was thereupon taken.

Comly, for the rule.

Balay, contra.

May 26, 1879. THE COURT. The Act of 29 March, 1832, provides in express terms, that when any estate cannot be divided among the lineal descendants, or the *widow* and lineal descendants, without prejudice to or spoiling the whole, the inquest *shall* make and return an appraisement thereof to the Orphans' Court; and thereupon, but *not otherwise*, the said Court may order the same to the eldest son, etc.

In this case the writ contained these plain requirements of the statute. But the inquest, finding that no part of the estate could be set apart to the widow without prejudice to or spoiling the whole, proceeded to allot the land to the heirs, dividing it into two parcels and designating the portion which each should have; they also valued the interest of the widow, and apportioned the amount between the two parcels. The parcels were not appraised, unless it can be implied from the value of the widow's share in the parcels. This is not the direct appraisement which the statute requires.

The statute of 1832 gives to the widow the right to have set out to her her statutory interest where it can be done. (Bishop's Appeal, 7 W. & S. 251.) In Gourley *v.* Kinley (16 P. F. Smith, 273) it is said, per WILLIAMS, J., that "a widow's share may be laid off by metes and bounds." (Steel's Appeal, 5 Norris, 224.) In McCall's Appeal (6 P. F. Smith, 363) it was said, per READ, J.: "The land is to be appraised where it cannot be divided between the *widow* and lineal descendants." In Painter *v.* Henderson (7 Barr, 51), while it was held that a widow cannot elect to take land at the valuation, the duty of the inquest to return an appraisement when the widow's share cannot be set apart is clearly recognized in the opinion of the Court, delivered by ROGERS, J.

The 46th section of the Act of 1832 provides for like proceedings where there is a widow and collateral heirs, with this difference, that in the latter case the mansion house is to be set apart to the widow if that can be done, the value of the house being taken into consideration by the inquest. (Kline's Estate, 1 Legal Gazette Rep. 428.) In Steel's Appeal (*supra*) it was said that it is seldom an estate can be so divided as to set apart a portion of it to the widow for life. When this cannot be done, the Act in express terms requires that there *shall* be an appraisement. This is not alone in the interest of the widow. By this mode of proceeding the heirs have a right to bid upon the property above the appraisement. But if the inquisition here is confirmed no such right will remain. There is no warrant for the power exercised by the inquest in this case. The command of the writ was that if they could not divide the land between the persons entitled thereto without prejudice to or spoiling the whole, etc., that they value and appraise the same. Surely this did not authorize *an allotment* of the parcels to the heirs by name, burdened by specific sums of money upon each.

I know of no power in the Court to compel the heir who objects to these proceedings to take the lands set apart to her with the burden. But if we confirm this inquest, we prevent bidding by the heirs for the purparts, we compel the widow to look to the parcels designated by the inquest for her statutory rights in the whole estate, and we compel an heir, against her will, to take the land with an incumbrance. Her right to elect to take or refuse to take at a valuation is defeated by the present mode of proceeding.

After careful examination, I am of opinion that in every case of partition in the Orphans' Court, if there be a widow, and the estate cannot be divided between her and the heirs, the inquest has no power to do more than to appraise the property as a whole, or the parcels into which they may divide it.

Inquisition set aside.

Opinion by ELWELL, P. J.

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U. S. District Court—Admiralty.

June 27, 1879.

The Tug Ceres.

Admiralty jurisdiction—Collision—Locality the test of jurisdiction—Character of the injured res, when immaterial—Floating dry-dock.

The jurisdiction of Admiralty, as respects torts, depends entirely on locality. If committed on the high seas or other navigable waters, the jurisdiction is unquestionable. The character of the object injured or of the thing by which injury is inflicted is unimportant.

The dry-dock of the libellant floating in the Delaware, moored to a wharf, having been injured by the negligence of the respondent's tug:—

Held, that the jurisdiction of the Court of Admiralty attached.

Libel, by Simpson *et al.*, owners of a floating or sectional dry-dock, against the steam-tug-boat *Ceres*, for damages caused by collision. The dock, while lying in the river Delaware, opposite Philadelphia, moored to a wharf, resting wholly on the water, was negligently run into and injured by the steam tug, respondent. The dock was designed for use solely as a floating dock, and was capable of being navigated from place to place; the only object of its attachment to the wharf, by a cable, was to secure it from blowing or drifting away.

J. H. Gendell and *H. R. Edmunds*, for the libellants.

J. Warren Coulston, for the respondent.

August 15, 1879. THE COURT (after stating the facts). That the injury was caused solely by negligence of the respondent, is not controverted, nor open to doubt. It was the respondent's duty to keep off. She did not; and is without excuse. The only question raised is one of jurisdiction. The respondent denies the cognizance of the Court.

After a long period of vacillation and uncertainty, the jurisdiction of Admiralty (as a legal proposition), is well defined. A discussion of the subject would be a useless expenditure of time, and might seem like an affectation of learning. The opinion of Judge STORY in De Levio *v.* Boit (2 Gallison, 398), covers the entire field, and exhausts the argument. As respects *torts* (with which, alone, we have to do,) the jurisdiction depends, entirely, on *locality*. If committed on the high seas, or other navigable waters, the act and its effects being there fully consummated, the jurisdiction of Admiralty is unquestionable. The character of the object injured, or of the thing by which injury is inflicted, is unimportant. As is said in the Plymouth (3 Wallace, 36), jurisdiction does not depend on the wrong being done by a vessel, or those aboard of it: or against a vessel, or those connected with it; "but on the *locality* where it occurred. Every species of tort, however occurring, . . . if upon the high seas or navigable waters, is of Admiralty cognizance:" (Parsons on Shipping and Adm., vol. 2, 347; Parsons on Maritime Law, vol. 2, 652; Railroad Co. *v.* Towboat Co., 23 How. 209; The Propeller Commerce, 1 Black, 574; The Agincourt, 1 Hagg. 271; The Lowther Castle, Ibid. 384; Brown *v.* Overton, 1 Sprague, 462; Chamberlain *v.* Chandler, 3 Mason, 242; West *v.* Steamer "Uncle Sam," 1 McAllister, 505; Sherwood *v.* Hall, 3 Summer, 127; The Plymouth, 3 Wall. 34; Taber *v.* Jenny, 1 Sprague, 315; the Sylph, 2 Law Rep. Adm. and Ecc. 24; Atlee *v.* Packet Co. 21 Wall. 389; Fretz *v.* Bull, 12 Howard 466; The Maud Webster *v.* Howell, 8 Benedict, 547.)

The Virginia Ehrman *v.* The Agnese (7 Otto, 309), shows a recovery for injury to a *steam dredge*. Objection to the jurisdiction was not even suggested. A recovery was allowed in this Court for a similar injury, against objection, in the Albany Dredging Company *v.* The Steam-tug Gladiolus (No. 2 April Sessions, 1874), and sustained on appeal by the Circuit Court. Although no case precisely similar to the one before me has been found, I feel no hesitation in determining the question raised against the respondent. Under the general principle stated, the Court has jurisdiction. As before remarked, the dock was in the river, floating upon the water, when injured. That it was moored to the land is unimportant. So are all vessels at anchor. That the attachment was at the water's side, instead of under, is immaterial.

As we have seen, the character of the structure injured does not enter into the question. If it did, the character of the structure here involved would not admit of objection, on this ground. It is essentially marine.

Opinion by BUTLER, J.

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BY

RICHARD C. DALE, Esq.

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ADVANCEMENTS. To establish an advancement, the intent must be proven to have existed at the time of the transaction, and by the contemporary acts and declarations of the parties. Subsequent verbal declarations are insufficient; they must be shown to be a part of the *res gestæ*, and accompany the acts done; but in connection with evidence of acts done, or declarations made at the time, tending to show an intent of advancement, subsequent acts and declarations in recognition of the original act and intention are entitled to weight. Merkel's Appeal, 120.

AFFIDAVIT OF DEFENCE LAW. Generally. When proceedings are begun by attachment under the Act of March 17, 1869, the plaintiff, having filed a copy of original book entries, is entitled to judgment for want of an affidavit of defence, in a case where the attachment has been served personally upon the defendant. (C. P.) Bayersdorfer *v.* Hart, 487.

In an action against a married woman for necessaries, judgment cannot be entered for want of an affidavit of defence. (C. P.) Cooper *v.* Wallace, 468.

A copy filed cannot be amended, after the time allowed for filing it, even as to a clerical error manifest upon its face. (C. P.) Burkhart *v.* Haviland, 486.

If, when the statutory time for judgment arrives, the plaintiff is not entitled to judgment, he cannot better

AFFIDAVIT OF DEFENCE LAW—*Continued.*

his position by an amendment of the record. (C. P.) Bradley *v.* Dusenberry, 146.

Where an action is brought upon two promissory notes, and an affidavit of defence is filed setting up that as to one of them the action is prematurely brought, leave will be given to the plaintiff to withdraw one note from suit without prejudicing his right to proceed for the same in another action. (C. P.) Burkhart *v.* Haviland, 521.

The defendant in a supplemental affidavit is not limited to an explanation of the grounds of defence set forth in the original affidavit of defence, but when a new defence is thus set up, the course of the defendant is suspicious, and cannot be too closely scrutinized. Callen *v.* Lukens, 28.

Instruments within the Act. An interest coupon detached from the bond is such an instrument as will entitle the plaintiff to judgment for want of an affidavit of defence. (C. P.) Gilmer *v.* P. & R. R. R. Co., 15. (C. P.) Parrish *v.* Phila. and Read. C. & I. Co., 196.

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Affidavit, when insufficient. In an action by a landlord against his tenant, where the affidavit merely states facts from which a jury might infer a surrender of the term, but does not allege in terms that there was a surrender accepted by the landlord, judgment will be entered for want of a sufficient affidavit of defence. Breuckman *v.* Twibill, 188.

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AFFIDAVIT OF DEFENCE LAW—*Continued.*
vit of defence, must be precise and certain as to time. Markley *v.* Stevens, 357.
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When personalty has been included in the body of a writ of habere facias, the Court will permit the plaintiffs to amend the record by striking from the writ the list of personalty. (C. P.) Herring *v.* Reade, 522.
The plaintiff cannot entitle himself to judgment for want of a sufficient affidavit of defence, by striking from the record the names of defendants who in the affidavit it is alleged are improperly joined. (C. P.) Bradley *v.* Dusenberry, 146.
Where an action has been brought against several defendants as members of an unincorporated society, and it appears upon the trial that the association was incorporated, the plaintiff cannot amend the record and thus avoid a nonsuit. (C. P.) Meyers *v.* Elkins, 280.
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A condition precedent to a valid appeal from an award of arbitrators is the payment of costs within the twenty days allowed for the appeal. Payment by check or draft is not sufficient, but where the record shows that the costs have been paid, it cannot be contradicted by depositions showing that payment was made by check. Constein *v.* Rice, 355.
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Where a suit has been begun by attachment under the Act of 1869, judgment been obtained and a vendition exponas issued, the defendant is in time in claiming the benefit of the exemption law of April 4, 1849, if he present his claim after the issuing of the vendition exponas and before the advertisement of the sheriff's sale of the property attached. Cornman's Appeal, 513.
Where a writ of attachment under the Act of 1869 is personally served upon the defendant, even though the attachment be dissolved, the proceeding is assimilated in all respects to an action commenced in the usual manner by summons; but when the writ has not been served personally, and the defendant has not appeared, the course of proceeding is to follow that which is provided in the case of foreign attachment. (C. P.) Bayersdorfer *v.* Hart, 487.
ATTACHMENT, DOMESTIC. Trustees in domestic attachment are not mere ministerial officers, but are clothed with extraordinary discretionary powers, and where they act in good faith and under the advice of counsel are not responsible for an error of judgment or a mistake of law. Bradley's Appeal, 181.

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ATTACHMENT EXECUTION. See EXECUTION.

ATTACHMENT, FOREIGN. See FOREIGN ATTACHMENT.

ATTORNEY AT LAW. When it appears in proceedings undertaken by the Law Association of Philadelphia that an attorney at law has embezzled moneys belonging to his client, such an attorney will be disbarred even though it appear that he has effected a settlement with his client. (C. P.) *In re* Samuel Davies, 506.

Communications from an attorney to his client are not privileged if they relate to the perpetration of a crime by the attorney. (U. S. C. C.) *In re* C. C. Cole, 114.

Where an attorney at law neglects to bring a suit until his client's rights are barred by the statute of limitation, the latter's right of action against the attorney will be barred in six years from the time of such neglect. (C. P.) Moore *v.* Juvenal, 375.

Counsel appointed by the Court to defend a pauper prisoner cannot recover from the county compensation for professional services nor for expenses incurred in preparation for trial. It is an incident of the office of counsel who like other officers of the Court hold office *cum onere*, to render gratuitous services in such cases. Wayne County *v.* Waller, 377.

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AWARD OF ARBITRATORS. See ARBITRATION.

BAILMENT. A national bank, receiving a special deposit for safe keeping without reward, is not responsible for a breach of ordinary care and diligence, but is liable only for gross negligence. First National Bank of Allentown *v.* Rex, 167.

Gross negligence is the failure to take that care which the most inattentive person takes. The burden of proving gross negligence rests upon the plaintiff. Ib.

Though one who voluntarily assumes to do something without consideration be not liable for nonfeasance, yet if he does anything he is bound to do it rightly according to his agreement. Fairlamb *v.* Hempshire, 92.

A bailee of stock who has improperly pledged the same for his own debt cannot recover from the pledgee any excess over the debt which such pledgee has realized from a suit against the corporation in which the stock is held, for a refusal to transfer said stock in consequence of a notice received from the true owner. Persch *v.* Consolidation Bank, 128.

BANKRUPTCY. An assignee in bankruptcy will be permitted to become a party to the record of suits begun by the bankrupt in his own name. (C. P.) Silk Company *v.* Disston, 63.

A. agreed to save B. harmless from all liability upon certain bonds executed by B. for the benefit of A. B. was subsequently adjudicated a bankrupt and obtained his discharge. In an action by B. to the use of C., the holder of the bonds, against A., B.'s discharge in bankruptcy was specially pleaded, the plaintiffs demurred, and the Court entered judgment for the

BANKRUPTCY—*Continued.*

defendant upon the demurrer. (C. P.) Knap *v.* Duncan, 343.

See LIMITATIONS, STATUTE OF.

BANKS AND BANKING. National Banks. The State and Federal Courts have concurrent jurisdiction in actions by and against national banks. Stephens *v.* Monangahela National Bank, 491.

Section 5200 of the Revised Statutes of the United States, limiting the amount of liabilities of any person, firm, or company to a national bank, is a rule laid down to regulate the loans of a bank for its own best interest, not to regulate its customers. A violation of this section exposes the bank to loss of its franchises at the suit of the comptroller of the currency, but a contract otherwise lawful with a national bank is not void though purposely made in evasion of this section. Ib.

A national bank is not by its charter nor by its statutory nor its incidental powers authorized to act as broker or agent in the purchase of bonds and stocks. First National Bank of Allentown *v.* Hoch, 298.

The president is the executive agent of the board of directors as to the ordinary business of the bank, but cannot bind it by a contract outside thereof without special authority. When a paper on its face shows that a transaction was not within the usual course of business of a bank, it is not binding on the bank although signed by the president. Ib.

The liability of a stockholder in a national bank is not such a "bad or doubtful debt" as is contemplated by section 5234 of the Revised Statutes of the United States, and therefore a court cannot order it to be "sold or compounded." (U. S. C. C.) Price *v.* Yates, 51.

The State statute of limitations is a bar to an action brought in the Federal court to enforce the liability of a stockholder in a national bank, where the comptroller of the currency does not direct the receiver to bring suit until more than six years after his appointment. Ibid.

Liability of national banks as special bailees. See BAILMENT. First National Bank *v.* Rex, 167.

See TAXES AND TAXATION. USURY.

BILLS AND NOTES. Where the consideration of a promissory note is an agreement by the payees to abstain from prosecuting the son of the maker for forgery, the note is void. National Bank of Oxford *v.* Kirk, 256.

Where in an action upon a note it appears that without fraud or duress it was given by the defendant in fair compromise of a disputed right, he will not be permitted to gainsay his own act and to reopen the dispute. Heysham *v.* Dettre, 207.

An indorsement on a note of a payment of interest, in the handwriting of the holder, proven to have been made within six years of the date of the note and action brought, does not toll the statute of limitations upon a joint and several note. Lazarus *v.* Fuller, 217.

The statute of limitations does not begin to run upon a promissory note until the expiration of the third day of grace. (C. P.) Scattergood *v.* Carberry, 213.

In an action upon a note against an indorser, an affidavit of defence, that the note sued upon was given by the maker to a corporation of which the defendant was president, and by him indorsed as president, and given to the plaintiff in payment of a debt of the corporation, is sufficient. Seyfert *v.* Lowe, 39.

One who signs a promissory note as maker, for the accommodation of the payee, cannot free himself from liability to the holder by showing that the holder took it with notice that the maker received no consideration. The payee of an accommodation note may sell or discount it, or pledge it as collateral security for an

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BILLS AND NOTES—*Continued.*
antecedent debt, for he has a loan of the maker's credit without restriction. Stephens *v.* Monongahela National Bank, 491. Twining *v.* Hunt, 223.

Where a note is made by a lunatic and indorsed over by the payee, it is competent for the lunatic or his committee to defend against the indorsee, either by showing that he had knowledge of the lunacy, or that the note was originally obtained fraudulently or without proper consideration. Moore *v.* Hershey, 478.

An accommodation indorser of a promissory note given in renewal of a note for a similar amount indorsed by him while of sound mind, who was found by inquisition to have been a lunatic at the time of indorsement of the renewal notes, is liable to a bona fide holder who received the note before the inquisition and without notice of the indorser's lunacy. Snyder *v.* Laubach, 464.

Where in an action upon a note by the holder against the maker it is set up in the affidavit that the note was given to the payee, an employé of the maker, for the purpose of having it discounted, but he fraudulently passed it to the plaintiff, whom the defendant avers had knowledge of the fraud, the case must go to a jury. (C. P.) Williams *v.* Williams, 388.

One who in good faith purchases a note given for a patent-right without notice of the nature of the original consideration, is not affected by the Act of April 12, 1872; and his rights are not altered by the fact that, by misrepresentation, he is induced to exchange the note for one with the words "given for a patent-right" written upon it. (C. P.) Martin *v.* Smith, 32.

BILLS OF LADING. Bills of lading properly indorsed are symbols of the property covered by them, serving all the purposes of actual possession, and so remain until there is a valid and complete delivery of the property to some person entitled to the possession under the bill of lading. Heiskell *v.* Farmers and Mechanics' Nat. Bank, 249.

BILLS OF REVIEW. See ORPHANS' COURT PRACTICE.

BOND. When no time of payment is mentioned in a bond, it is payable immediately. Rhoads *v.* Reed, 520.

Where a bond is assigned in the manner provided by the Act of May 28, 1815, it becomes the property of the assignee, and suit may be brought upon it in his own name. Hoopes *v.* Beale, 337.

BRIDGES. See ROADS, HIGHWAYS, AND BRIDGES.

BROKER. Stock gambling. See CONTRACT.

BUILDING ASSOCIATIONS. A by-law of a building association which is in conflict with its charter is ultra vires and void. (C. P.) Rodgers *v.* Southwestern Mutual Saving Fund and Building Association, 95.

A share-holder in a building association who has assigned his stock as collateral security for a loan which is also secured by a judgment against him, may elect, upon a sheriff's sale of his real estate, to have the actual value of his stock deducted from the amount of the judgment before the latter is allowed to participate in the fund arising from the sale. Early and Lane's Appeal, 184.

An attachment of the stock after such an election binds nothing but the defendant's interest, if any remains after the stock has been applied to the payment of the judgments. Ib.

Suit against building association by withdrawing stockholder, what a sufficient defence to the action. (C. P.) Wittman *v.* Building Association, 80.

BUILDING LAWS. Where a back building is so altered as to practically make four separate dwelling houses fronting upon a narrow court, each constituting a cheap tenement house for a family, an injunction will be granted to compel the owner to comply with the provisions of the Act of April 21, 1855; but the power of the Court under this Act does not extend to prohibiting the separate leasing of the several parts of the building. Brice's Appeal, 239.

CAPIAS, affidavit in support of, when sufficient. See PRACTICE. (C. P.) Flaherty *v.* Lindsay, 79.

CERTIORARI, in landlord and tenant cases. See LANDLORD AND TENANT. (C. P.) Tyrell Building Assoc. *v.* Daughen, 244. Graver *v.* Fehr, 429.

CHARITIES. Taxation of. See CONSTITUTIONAL LAW. S. M. C. A. *v.* Donohugh, 208.

CHECK. Duty of holder to present immediately. See SURETY. Fegley *v.* McDonald, 71.

CHURCH. See CORPORATION.

COLLATERAL INHERITANCE. See DECEDENTS' ESTATES. (U. S. C. C.) Kintzing *v.* Hutchinson. 226. (U. S. C. C.) Allen *v.* Saving Fund, 231.

COLLISION. See ADMIRALTY.

COMMISSIONS. See DECEDENTS' ESTATES. TRUSTEES. MORTGAGE.

COMMON CARRIER. A shipper of goods has no right to exercise his right of stoppage in transitu, after a sale by his vendee to a third party; and the refusal of the master of the carrying ship to deliver to the second vendee is at the master's peril, and if loss occur, as by reason of a falling market, he is responsible to such vendee. (U. S. D. C.) Schmidt *v.* Steamship Pennsylvania, 98.

When merchandise for which a bill of lading has been issued by a carrier is delivered to one not authorized to receive it, without the production of the bill of lading, no title passes to the goods as against the holders of the bill of lading. Heiskell *v.* Farmers and Mechanics' National Bank, 249.

Whether a common carrier receiving express packages contracts to forward them to destination or merely to deliver them safely to the connecting carrier at a point on its own line nearest and most convenient to destination, is a question of fact for the jury, dependent upon the circumstances. Phila. and Reading R. R. Co. *v.* Ramsey, 285.

Action against railroad company by passenger. See NEGLIGENCE. Delaware, Lackawanna, etc., R. R. Co. *v.* Napheys, 233.

COMPROMISE. Where parties to a dispute fairly agree to compromise, and a note is given by one to the other in accordance with the terms of the settlement, the maker cannot, in an action upon the note by the payee, reopen the dispute. Heysham *v.* Dettre, 207.

CONDITION, in restraint of marriage, when not void. See WILL. Hough's Estate, 559.

CONFLICT OF LAWS. Choses in action within the State of Pennsylvania belonging to one domiciled in another State are not liable to the Pennsylvania collateral inheritance tax on the failure of lineal descendants, no administration on the estate having been taken in Pennsylvania. (U. S. C. C.) Kintzing *v.* Hutchinson, 226. (U. S. C. C.) Allen *v.* Savings Fund, 231.

CONSTITUTION OF PENNSYLVANIA.
Art. I. §§ 6, 7, 9, 149.
Art. III. § 7, 7.
Art. III. § 29, 307.
Art. IV. § 8, 21.
Art. V. §§ 1, 3, 265.
Art. V. § 24, 149.

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CONSTITUTION OF PENNSYLVANIA— *Continued.*
Art. IX. § 1, 208.
Art. XIV. § 2, 22.
CONSTITUTION OF THE UNITED STATES.
Art. I. § 8, 524.
CONSTITUTIONAL LAW. The Act of Congress of July 8, 1870, relating to the registration of trade-marks, is unconstitutional, there being no warrant in the Constitution for Congressional legislation upon the subject. United States *v.* Steffens, 524.
A trade-mark is neither an invention or discovery, nor the writing of an author, within the meaning of the clause of the Constitution securing to authors and inventors the exclusive use of their writings and discoveries. Ib.
As a regulation of commerce, if trade-marks can be in any case the subject of Congressional action, that action is limited by the Constitution to their use in commerce with foreign nations, among the several States, and with the Indian tribes. Ib.
The legislation of Congress in regard to trade-marks contains nothing in its terms or in its essential character which looks to a regulation thus limited, but in its language it embraces, and was intended to embrace all commerce, including that between citizens of the same State. Ib.
As the statute is so framed that it is impossible to separate that which has reference to commerce within its control, and that which is not, and as Congress certainly did not intend to pass the limited registration law which such a construction would imply, the whole legislation must fail as being void for want of constitutional authority. Ib.
In criminal cases, the jury, having the legal power finally to dispose of a case by a verdict of not guilty, notwithstanding the charge of the Court, are the judges of the law as well as of the evidence. Kane *v.* Commonwealth, 149.
In such cases the instructions of the Court, while they furnish the best evidence of what the law is, and may well be accompanied by recommendations why they should be so received by the jury, ought to be nothing more than arguments addressed *ad verecundiam.* Ib.
The provision in the Constitution of 1874, for a writ of error in criminal cases, does not alter the rule that the jury are judges of the law in such case. Ib.
The Act of May 13, 1871, providing a method by which purchasers of lands in Schuylkill County at sheriff's sale may obtain summary possession of the same, is not unconstitutional. It in no respect impairs the right to trial by jury of any question which the defendant is entitled to have submitted to a jury. Wyncoop *v.* Cooch, 53.
The Act of April 8, 1851, conferring on the Board of Port Wardens jurisdiction of controversies as to wharfage between owners of adjoining wharves, dealing as it does with statutory rights, is not in derogation of the right of trial by jury. Simpson *v.* Neill, 85.
The Act of May 1, 1861, authorizing in certain counties trials of certain offences before a justice of the peace and a jury of six, is plainly unconstitutional, and an acquittal upon a trial for larceny before a justice and a jury of six under that act, is not pleadable in bar of a second indictment. Commonwealth *v.* Eagles, 324.
The Constitution of 1874 is to be regarded as an amendment of the existing Constitution, not as a new Constitution. All laws in force at the time of its adoption, not inconsistent therewith, continue as if the Constitution had not been adopted. County of Allegheny *v.* Gibson, 441.
The Act of 1841, imposing upon certain municipalities liability for property destroyed by rioters, is not in contravention of any constitutional provision. Ib.
The constitutional provision against special legislation is purely prospective; it does not repeal prior special laws. Ib.
When a corporation, chartered prior to the Constitution of 1874, accepts the benefit of any legislation subsequent to the Constitution, it becomes subject to all the provisions of the Constitution without the formal acceptance prescribed by the Act of June 5, 1874. (C. P.) Duncan *v.* Pennsylvania R. R. Co., 551.
Where a building, owned by a corporation organized for purposes of purely public charity, is used partly for the purposes mentioned and partly for producing an income by renting portions of it for stores, the assessment is to be apportioned, and taxes are payable only on such portion of the building as is used for business purposes. (C. P.) Young Men's Christian Assoc. *v.* Donohugh, 208.
The Young Men's Christian Association is an institution of purely public charity. Ib.
An Act of Assembly providing that a corporation may call a meeting of its bondholders and stockholders, and authorizing them to adopt a plan to relieve the company from financial embarrassment, which plan shall be binding upon all stockholders and bondholders who do not, within three months of the meeting, signify their dissent in writing, is unconstitutional in that it impairs the obligation of a pre-existing contract, and the plan adopted at such meeting is not binding upon a bondholder who fails to signify his dissent therefrom, even though he had full knowledge of the meeting and its proceedings. (C. P.) Gilfillan *v.* Union Canal Co., 179.
The provision in the Constitution of 1874, that owners of property *injured*, as well as of that *taken* by the exercise of the right of eminent domain, shall receive compensation, is binding upon pre-existing corporations as well as those subsequently chartered. It impairs the obligation of no contract, but only gives a remedy which did not previously exist. Per HARE, P. J. (C. P.) Duncan *v.* Penna R. R. Co., 551.
The Act of April 2, 1872, providing for the adoption of children by deed, does not give validity to a deed of adoption executed in 1863, by a person who died prior to the passage of the Act, and whose estate had vested in his heirs. Such divesting of a vested estate by subsequent legislation would be an impairment of the obligation of contracts within the meaning of the Constitution. Ballard *v.* Ward, 254.
An action of covenant lies against the vendee of land who has taken it subject to a ground-rent prior to the Act of June 12, 1878. That act is not retroactive upon rights vested prior to its passage. (C. P.) Miller *v.* Kern, 504.
Art. III. § 7 prevents the classification of cities or counties except by population. Geographical distinctions cannot be resorted to without coming in conflict with the constitutional provision against special legislation. Commonwealth *v.* Patton, 6.
The constitutional provision against the increase of municipal debts cannot be invoked against parties seeking to recover a judgment against a municipality for injuries suffered through the negligence or wrongful act of the municipality or its servants. County of Allegheny *v.* Gibson, 441.
The constitutional provision against the increase of

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CONSTITUTIONAL LAW—*Continued.*
municipal debts cannot be invoked by the city of Pittsburgh as a defence to a suit upon bonds issued prior to the adoption of the Constitution, for street improvement purposes. Comm'th *v.* Pittsburgh, 409.

The assessment of a tax against rural property for improving highways according to the "front foot rule," is unconstitutional; hence, upon the trial of a scire facias issued upon a claim filed for paving in front of such property, the defendant is entitled to show that the work was not called for by any reason save as a public improvement. Craig *v.* City of Philadelphia, 117.

CONTRACT. What words import consideration. An agreement in writing expressed to be "for value received," whereby D. promises, one year after his death, to pay to the order of K., one city bond of $1500, is not a testamentary paper, but a non-negotiable promissory note, for which the words "value received" import a consideration. (O. C.) Dewald's Estate, 422.

Invalid consideration. Where the consideration of a promissory note is a promise by the payee to abstain from prosecuting the son of the maker for forgery, the note is void. National Bank of Oxford *v.* Kirk, 256.

The maker of a note discounted by a bank in violation of its charter, in that the bank had loaned to the maker a sum greater in amount than one-tenth of its capital stock, cannot relieve himself from liability in a suit against him by the bank, upon this ground. The charter provision is directory, and was intended for the protection of the bank, not as a means of enabling those to whom the bank makes injudicious loans, to escape from the payment of their just debts. Stephens *v.* Monongahela National Bank, 491.

Stock-gambling transactions in stocks by way of margins, settlement of differences, and payment of the gain or loss, without any intention to deliver the stock, are mere wagers, and cannot be made the basis of an action at law. North *v.* Phillips, 151.

A broker who advances his own money to settle the losses suffered by his principal in stock gambling, cannot recover from the principal the amount thus loaned. There is no distinction recognized in Pennsylvania between actions between principals to recover differences on wagering contracts relative to the price of stocks, and an action by a broker against his principal for the recovery of money loaned to pay those differences. (C. P.) Thomas *v.* Smith, 390.

A secret agreement between an agent employed to purchase and the vendee that such agent shall receive a share of the profits of the sale, renders the contract fraudulent and voidable, and it cannot be enforced against the purchaser. Ritter *v.* Lehigh Valley R. R. Co., 122.

A conditional subscription toward the establishment of an uncertain charity at an uncertain time cannot be enforced against the estate of a decedent. (O. C.) Baird's Estate, 439.

Consideration. The payment of usurious interest after a debt becomes due is not a valid consideration for an agreement to give time. Shaffer *v.* Clark, 459.

Though one who voluntarily assumes to do something without consideration be not liable for non-feasance, yet if he does anything, he is bound to do it rightly according to his agreement. Fairlamb *v.* Hempshire, 92.

Mutual promises are in themselves a sufficient consideration to uphold an agreement. Hence, where a number of persons agree to subscribe the amounts respectively affixed to their names, upon the express condition that none of the subscriptions shall be binding unless $6000 be subscribed before a certain date, and it appears that the condition has been fulfilled, the amount of his subscription can be recovered from the estate of a subscriber who dies before paying. (C. P.) Hart's Estate, 162.

A party may sue on a promise made on sufficient consideration for his use and benefit; though it be made to another and not to himself. Merriman *v.* Moore, 425.

A principal can maintain an action against the Recorder of Deeds upon a false certificate of search issued to the conveyancer or agent of the plaintiff. Peabody Building Asso. *v.* Houseman. 193.

Contracts by public officers. The Act of April 11, 1862, prescribing that school teachers can be selected only by a vote of the school board, is to be strictly followed, and a contract made by the president and secretary of the board cannot be enforced. School District of Denison *v.* Padden, 220.

Entire or severable. A contract for the delivery of 50,000 tons of coal per annum in monthly instalments, interpreted to be severable and not entire. Scott *v.* Kittanning Coal Co., 289.

Where there has been part performance of a severable contract, and the thing received has been paid for and consumed, the fact that another article was substituted for that contracted for does not give the right to rescind; the appropriate remedy is by set-off or action for damages. Ib.

Right of married woman to sue for breach of contract. See Husband and Wife. Freeman *v.* Walsh, 296.

Disabilities of infants. See Infant. Anwalter *v.* De Haven, 311. People's Bank *v.* Spering, 435.

See Insurance.

CONTRIBUTORY NEGLIGENCE. See Negligence.

CONVERSION. Where real estate is ordered by will to be sold, the parties interested may elect to take the land as such, and such election may be manifested by matters in pais. (O. C.) Sterr's Estate, 35.

The mere fact that a petition to the Orphans' Court for the sale of lands, which otherwise comes properly within the purview of the Act of March 29, 1832, recites that the petitioners are desirous that the land be sold "so as to bar any estate or remainder therein," will not of itself be sufficient to bring the case within the fifth section of the Act of April 18, 1853, so as to cause the proceeds of the sale to retain their character as realty; if there be no contingent remainders or entails (such as are contemplated by the latter act), these words are mere surplusage, and a conversion takes place. Wagner's Appeal, 90.

See Will. Peterson's Estate, 300.

CORPORATIONS. After an application for a charter has been made and refused, the petitioners will not be given leave to withdraw their application. (C. P.) *In re* Philadelphia Relief Association, 146.

The Legislature has no greater power by legislation to affect the rights of bondholders of a corporation than of the creditors of an individual; hence a statute providing for the liquidation of the bonds of a canal company by a plan to which all bondholders will be presumed to have assented who do not within three months after its adoption formally signify their dissent is unconstitutional. (C. P.) Gilfillan *v.* Union Canal Co., 179.

The executors of a non-resident surviving trustee resident in a State where the executors of a trustee succeed to the execution of a trust, are not entitled to

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CORPORATIONS—*Continued.*
a decree against a Pennsylvania corporation upon a bill in equity for the transfer of stock, assets of the trust estate, unless the cestuis que trustent are parties to the proceeding. Lehigh Coal & Nav. Co.'s Appeal, 106.

The president of a corporation, who indorses as president a promissory note given to the corporation, and passes it in payment of a corporation debt, is not personally liable upon his indorsement to such indorsee. Seyfert *v.* Lowe, 39.

A church corporation is concluded by a decree entered in a proceeding relating to the same subject-matter prosecuted by its members as individuals. Third Reformed Dutch Church's Appeal, 26.

An unincorporated charitable association is a quasi corporation, not a partnership. (O. C.) Maguire's Estate, 214.

Execution against building association stock, assigned to corporation as collateral security for a loan. See CONSTITUTIONAL LAW. BUILDING ASSOCIATION. Early & Lane's Appeal, 184.

Taxation of corporations. See TAXES AND TAXATION. Columbia Conduit Co. *v.* Commonwealth, 489.

COSTS. Witnesses residing in Roxborough, although within the city limits, are entitled to mileage. (C. P.) Weir *v.* Shaw, 280.

Where plaintiff's counsel places a case on the trial list before issue joined, the plaintiff, although the issue be subsequently determined in his favor, cannot recover fees for witnesses in attendance when the case was wrongfully on the list. (C. P.) Dickerson *v.* Labe, 257.

Where service of a writ of summons is set aside upon the ground that the defendant was decoyed into the jurisdiction, the costs of taking depositions in support of the rule will not be allowed against the plaintiff. (C. P.) Sloan *v.* Green, 408.

Where a party, having reason to believe that a material witness cannot be produced in court at the trial, issues a commission to another State and takes his testimony, he is entitled upon judgment in his favor to tax as costs the expenses of the commission as well as witness fees for the witness who returns to the jurisdiction, and is present at the trial. (C. P.) Bancroft *v.* Freeman, 64.

Where a claim is reduced to a sum under $100, by payments made after suit brought, the plaintiff does not lose his right to costs. (C. P.) Samuel *v.* Scott, 438.

The allowance of costs against an unsuccessful defendant in a feigned issue under a sheriff's interpleader is a matter within the discretion of the Court. Costs will be allowed in a case where the claimant was compelled to interplead without there being reasonable ground of belief that the goods belonged to the defendant in the execution. (C. P.) Bank *v.* Emerson, 392.

Circumstances under which they will not be allowed in such an interpleader. (C. P.) Dewees *v.* Evans, 573.

Costs in admiralty are given or refused according to the sound discretion of the Court. (U. S. C. C.) Lubker *v.* Schooner A. H. Quinby, 409.

The question of costs, though perhaps not per se the subject of an appeal, is reviewable when a case is properly in the appellate court. Ib.

In cases of salvage, when a libellant has refused a tender, and subsequently recovers only the same amount as was tendered him, he is always chargeable with his own costs which have accrued since the

COSTS—*Continued.*
tender was made, and generally with the owners' costs also, unless there are some special circumstances to modify the rule. Ib.

Although it is in the power of the Court to impose the costs of an audit upon a party ordering a fund into court, the power will not be exercised in a case where the application for payment into court was made under the advice of counsel who acted upon reasonable grounds. If parties desire to impose the costs upon the party ordering the fund into court, the proper time to raise the question is before the auditor before his report is filed (C. P.) Dinsmore *v.* Davis, 295.

Master's fee, by whom to be paid. See EQUITY. Kase *v.* Greenough, 535. See PRACTICE. Goss *v.* Gerhard, 51.

COUNTIES. The county of Allegheny, under the Acts of May 31, 1841, and March 20, 1849, is liable for the destruction of property by rioters or a mob, even though the mob is of such a size that the civil authorities are unable to cope with it, and the State military are called in to quell it. County of Allegheny *v.* Gibson, 441.

All real or personal property in the county, including goods in transitu belonging to non-residents, is within the protection of the Act. Ib.

A property owner is not required by the Act to give notice to the county officials unless he has a knowledge of an intention on the part of the mob to destroy his property, and sufficient time intervenes to give the notice contemplated. Such notice is not necessary where such officials already have knowledge of the intention or attempt to destroy the property. Ib.

Counsel appointed by the Court to defend a pauper prisoner cannot recover from the county compensation for professional services, nor for expenses incurred in preparation for trial. Wayne County *v.* Waller, 377.

The necessary expenses of the Supreme Court, such as the purchase of a law library, for which no statutory provision is made, are to be borne by the county in which the Court is sitting at the time they are incurred. (C. P.) Barrington *v.* City of Philadelphia, 178.

When a new county is erected, a "vacancy" in its offices "happens" within the meaning of Art. IV. § 8 of the Constitution. Walsh *v.* Commonwealth, 21.

Where the next general election occurs within three calendar months after the proclamation of the new county, an election for county officers cannot be held until the second general election, and the governor's appointees are entitled to hold over until the term of those who should be chosen at such election. Ib.

COUPONS. An action either of covenant or debt may be maintained upon interest coupons of a corporation bond, but an action upon the case cannot be maintained. (C. P.) Copeland *v.* P. & R. C. & I. Co., 15.

An interest coupon detached from its bond is an instrument of writing for the payment of money upon which judgment can be entered for want of an affidavit of defence. (C. P.) Gilmer *v.* P. & R. R. R. Co., 15.

Interest coupons though still attached to their bonds are instruments in writing for the payment of money upon which judgment can be entered for want of an affidavit of defence. (C. P.) Parrish *v.* P. & R. R. R. Co., 196.

COURTS. It is within the power of a court to make and enforce a rule allowing the admission in evidence of an instrument sued on without proof of its execution, unless notice is given to the other side of an intention to impeach it. Reese *v.* Reese, 275.

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COURTS—*Continued.*

The Federal courts have not jurisdiction of an action brought by the executors of a New Jersey decedent against a Pennsylvania defendant, where two of the executors are citizens of Pennsylvania, and two of New Jersey. (C. P.) Middleton's Executors *v.* Middleton, 144.

The State Court will dismiss a petition for a removal where the status of the parties, as disclosed by the record, does not warrant a removal. Ib.

The Northern Pacific R. R. Co., being chartered by an Act of Congress, is entitled to remove all actions brought against it in the State courts into the Federal courts at any time before trial or final hearing. (C. P.) Eby *v.* Northern Pacific R. R. Co., 145.

The State courts have jurisdiction over suits brought against Federal officers to recover fees illegally exacted by them. American S. S. Co. *v.* Young, 393.

The State courts have jurisdiction of actions against National banks, to recover usurious interest received by them. Stephens *v.* Monongahela Bank, 491.

The Constitution of 1874 deprived the Supreme Court of power to issue writs of mandamus to State officers, and jurisdiction in such cases was not under Article V. § 3 of said instrument conferred by inference on the lower courts. Commonwealth *v.* Wickersham, 265.

The Act of April 7, 1870, did not confer upon the Court of Common Pleas of Dauphin County such jurisdiction. Ib.

The Courts of Quarter Sessions have no power to vacate streets laid out and dedicated to public use in incorporated boroughs; such power is confined to the municipal authorities. *In re* Osage Street, 400.

Although the Court of Quarter Sessions has no power to issue the prerogative writ of mandamus, it has the right to issue an order in the nature of a mandamus to enforce a judgment standing upon its records. *In re* Sedgely Avenue, 1.

The Orphans' Court has no jurisdiction to adjudicate upon the claim of one who asserts that a fund there to be distributed was not the estate of the decedent. Braman's Appeal, 304.

The Orphans' Court is a Court of limited statutory jurisdiction, and consent of the parties cannot confer jurisdiction in a case not covered by the statute. (O. C.) Peterson's Estate, 507.

Where a testamentary trust is imposed upon executors *nominatim*, the Orphans' Court and Court of Common Pleas have concurrent jurisdiction; but where the executors are trustees *virtute officii*, the jurisdiction is exclusively in the Orphans' Court. Anderson *v.* Henzey, 39.

Liability of counties for incidental expenses of Supreme Court. See COUNTIES. (C. P.) Barrington *v.* City of Philadelphia, 178.

COVENANTS. What implied from words "grant, bargain, and sell." An assessment on account of benefit from opening of street is an incumbrance suffered by the grantor, although the municipal claim upon the assessment be not filed until after the execution of the deed. (C. P.) Trotter *v.* Page, 469.

Liability of landlord under the covenant for quiet enjoyment. See LANDLORD AND TENANT. (C. P.) Lanigan *v.* Kille, 293.

CREDITOR'S BILL. A bill filed by an execution creditor, in aid of execution against his judgment debtor and others who have fraudulently combined with him to conceal his property, is not multifarious, although there is no averment of a common conspiracy between all the defendants, and though it is not alleged that each defendant was cognizant of the fraudulent acts of any of his co-defendants other than those in which he himself took part with the judgment debtor. (U. S. C. C.) Prevost *v.* Gorrell, 261.

CREDITOR'S BILL—*Continued.*

CRIMES, CRIMINAL LAW, AND PROCEDURE. Counsel appointed by the Court to defend a pauper prisoner cannot recover from the county compensation for professional services nor for expenses incurred in preparation for trial. Wayne County *v.* Waller, 377.

Where a lease has been interlined to make it conform to what was the understanding and agreement of the parties at the time it was executed, such alteration, not being made fraudulently or to the prejudice of another man's right, will not support an indictment for forgery. Pauli *v.* Commonwealth, 396.

Bribery. Attempt to bribe a member of the legisture. Constitutional provisions relative to, discussed by PEARSON, P. J., in charge to grand jury. (Q. S.) *In re* Riot-Bill Bribery Investigation, 306.

A tax collector proceeding under a warrant duly granted by a borough council, directing the collection of a tax properly levied by the borough, is not criminally responsible for the collection of the tax from a person afterwards shown to have been improperly assessed by the assessor and county commissioners. Buck *v.* Commonwealth, 241.

The Act of May 27, 1841, is intended to prevent the voluntary payment of illegal taxes for the evasion of the election laws, and will not support an indictment on a charge of enforcing an illegal payment. Ib.

A prisoner upon trial upon a charge of murder will not be admitted to bail during the adjournments of the Court. (Q. S.) Commonwealth *v* Rusk, 486.

A fugitive from justice, afterwards surrendering himself, is not entitled to the benefits of the "two term" rule. (Q. S.) Commonwealth *v.* Superintendent of the County Prison, 359.

To support the plea of *autrefois acquit* in an indictment for larceny, the defendant must show affirmatively that, on the former trial, his liberty was in legal jeopardy. If it appear that the Court had no jurisdiction, or that there was clear error which would have necessarily required a reversal of the sentence on a writ of error, or that an Act of Assembly under which the defendant was tried was clearly and palpably unconstitutional, the plea of former trial and acquittal is not a bar of a second indictment in the Quarter Sessions for the same offence. (Q. S.) Commonwealth *v.* Eagles, 324.

It is the general rule, where a civil and a criminal suit growing out of the same transaction are pending at the same time, to try the civil cause first, though it is entirely within the discretion of the Court. (Q. S.) Commonwealth *v.* Dickerson, 433.

In criminal cases, the burden of proof is on the Commonwealth; it is error to charge the jury that they must find a theory that will lead to a verdict of "not guilty" conclusively, and that will have substance to it, not a mere shadow. Pauli *v.* Commonwealth, 396.

Right of jury in criminal cases to judge both of the law and fact. See CONSTITUTIONAL LAW. Kane *v.* Commonwealth, 149.

DAMAGES, when too remote. In an action upon a promissory note, the defendant offered to prove, as a set-off, that the plaintiff had agreed upon a given consideration to satisfy a judgment which he held against the defendant, that he failed to do so, and that, as a consequence, the defendant had been unable to raise money upon his property. The evidence was re-

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DAMAGES—*Continued.*
jected upon the ground that the damages were too remote. Sloan *v.* Chamberlain, 536.

Whether in any particular case the damages are too remote is a question for the Court. Ib.

Measure of damages. In cases of failure to deliver stock where the parties stand *in equali jure*, and there is no fraud shown, the measure of damages is the same as for any other marketable commodity, *i. e.*, the value of the stock on the day when it should have been delivered, with simple interest. North *v.* Phillips, 151.

Where a purchaser or lessee of real estate has been evicted, without fraud on the part of the vendor or lessor, the measure of damages is the consideration paid. (C. P.) Lanigan *v.* Kille, 293.

Compensation is the true criterion for damages in actions for breach of contract, and is ordinarily attained by taking the difference between the contract price and the market price at the time the contract ought to have been fulfilled, but this measure is not always sufficient. Scott *v.* Kittanning Coal Co., 289.

A purchaser at sheriff's sale, who fails to comply with the terms of sale, is liable for the difference between his bid and the amount realized from a subsequent sale. Schoening *v.* Leeds, 243.

In an action against a corporation for negligently causing the death of the plaintiff's son, it is error to leave to the discretion of the jury the assessment of damages without the application of any rule of law. Philada. and Read. R. R. Co. *v.* Adams, 329.

In an action against a corporation for negligently causing the death of the plaintiff's son, a man twenty-eight years of age, who, having been unsuccessful in business upon his own account, had returned to his father's house shortly before the accident, and at the time of his death was assisting his father in business without compensation, there was evidence that the son intended to remain with his father, and that his services were of value to him; the question was left to the jury whether there was a reasonable expectation of pecuniary advantage accruing to the plaintiff which was defeated by the death of the son. North Penna. R. R. Co. *v.* Kirk, 473.

In such an action it cannot be shown in mitigation of damages that the parents had received the amount of a policy of life insurance taken out by them upon their son's life. Ib.

Measure of damages in ejectment. See EJECTMENT. Carman *v.* Beam, 453.

Damages for injury to fishery. See FISHERY. Tinicum Fishing Co. *v.* Carter, 322.

Damages for opening roads, power of Quarter Sessions to enforce payment of, by mandamus. See ROADS, HIGHWAYS, AND BRIDGES. *In re* Sedgley Avenue, 1. See EMINENT DOMAIN.

DEBTOR AND CREDITOR. Wages of labor earned and due to a citizen of Pennsylvania may be attached for a debt in another State where no law exists prohibiting the attachment of wages. Bolton *v.* Penna. Co., 155.

In a suit in Pennsylvania by the defendant in the attachment against the garnishee, it is not necessary that the affidavit of defence should allege notice by the garnishee to the defendant in the attachment. Ib.

Whether a person holding personal property in pledge for money loaned can retain such property as security for advances subsequently made, depends upon the understanding and agreement of the parties at the time such subsequent advances were made. James *v.* Harper, 58.

DEBTOR AND CREDITOR—*Continued.*
Retention of possession by vendor, when fraudulent as to creditors. Adams Express Co. *v.* Lyons, 421.

See SURETY.

DECEDENTS' ESTATES. A promise in writing to pay, one year after the death of the promisor, one city bond of $1500, is not a testamentary paper, but a non-negotiable promissory note. (O. C.) Dewald's Estate, 422.

A conditional subscription to an uncertain charity cannot be enforced against a decedent's estate. (O. C.) Baird's Estate, 439.

Claim for nursing decedent during a long illness preceding his death will not be allowed where it appears that claimant received a certain weekly sum from the decedent during the entire illness. (O. C.) Maguire's Estate, 214.

Estate of husband, when liable to wife for rents collected from the tenants of her separate estate. (O. C.) Hart's Estate, 162.

Widow's claim. A widow, who fails to claim her exemption for ten years after the death of her husband, is barred by her own laches. (O. C.) Wallington's Estate, 488.

A widow is not entitled to her exemption under the fifth section of the Act of April 14, 1851, out of the proceeds of the real estate of her deceased husband in preference to his mortgagee thereof. Nerpel's Appeal, 549.

Executors and administrators, rights, duties, and liabilities of. The Orphans' Court cannot compel the exercise of a power of sale by executors in whom the testator has vested a discretion. (O. C.) Peterson's Estate, 507.

Where a judgment belongs to a decedent's estate, the executors may, in order to promote the interests of the estate and save the security, purchase real estate at a sheriff's sale. In such cases the title vests in them extra the will, and they hold it not as executors, but as trustees for the estate. Chase *v.* Irvin's Executors, 529.

Purchase by administrator of the real estate of his decedent. See TRUSTEES. Mayer *v.* Senyard, 224.

Although generally it is the duty of an executor to convert the assets of an estate into cash, and if a trust is imposed upon him to invest the proceeds in legal securities, the rule is different where the will directs the trustee to "manage the estate carefully so as to preserve and keep the same productive of income." In such a case, where the trustee permits investments of his testator to remain unchanged, he will not be liable for their depreciation in value. (O. C.) Williamson's Estate, 82.

An acknowledgment of the estate's indebtedness by an administratrix is inadmissible to establish a claim against the estate. Orr's Appeal, 126.

The administrator of an insolvent estate cannot by his mere agreement bind the estate in such a manner as to take the assets out of the course of distribution provided by law. James *v.* Harper, 58.

Judgment against an administrator *de terris intestatoris*, and of assets *quando acciderunt*, when not granted. (C. P.) Knap *v.* Duncan, 342.

An administration bond is not an instrument in writing upon which judgment can be entered for want of an affidavit of defence. (C. P.) Commonwealth *v.* Laws, 80.

To maintain a suit against a surety upon an administration bond, it is not necessary that the administrator should be pursued to insolvency. (C. P.) Commonwealth *v.* Wilson, 62.

Administrator failing to pay in accordance with the

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DECEDENTS' ESTATES—*Continued.*
order of the Court may be attached for contempt; circumstances under which his discharge from custody will be ordered. (O. C.) Stevenson's Estate, 65.

Distribution. In a proceeding for distribution in the Orphans' Court no one can claim but through the decedent as creditor, legatee, or next of kin. Braman's Appeal, 304.

The personal estate of a decedent is the primary fund for the payment of all debts, and a judgment which was a lien on the real estate of the decedent in his lifetime is entitled to share pro rata with the unsecured debts in its distribution. Mason's Appeal, 9.

For purposes of distribution, there is no distinction between solvent and insolvent estates; the order of paying the debts is the same in both cases. Ib.

Where land is devised by a father to one of his six children, "he to pay for it $5500," the latter sum to be equally divided among his other children, no disposition being made of the personal estate, or for the payment of debts, on deficiency of the personal estate to pay the debts, the devise and the legacies must abate pro rata. Grim's Appeal, 517.

Under what circumstances a wife can recover from the estate of her husband rents of her separate estate collected by him during his lifetime. (O. C.) Bardsley's Estate, 48.

The statutory right of a widow to elect not to take under her husband's will is purely personal, and if she dies without having exercised it her heirs or personal representatives cannot make such election. Crozier's Appeal, 197.

Where a widow elects to take against the will of her husband, the proceeds of real estate sold under a direction in the will, so far as her interest in them is concerned, are to be regarded as land. (O. C.) Hart's Estate, 162.

Under the Act of April 27, 1855, the children of deceased uncles and aunts of an intestate take per stirpes the share to which their parents, if living, would have been entitled, and not per capita. Hayes's Appeal, 11.

Counsel fees, when not payable out of the estate. (O. C.) Gray's Estate, 542.

Commissions. Where the assets of an estate must be converted in order to effect a settlement, the executor is entitled to his full commission of five per cent., even though at the time of the adjudication the assets remain unconverted. But where a portion of the estate, which will pass to the residuary legatee, consists of indebtedness due by such legatee, upon their amount two and one half per cent. will be allowed as a commission. (O. C.) Dewald's Estate, 422.

Where owing to the complicated nature of the business in winding up an estate it becomes necessary to employ several clerks to facilitate the business, this will not cause a reduction of the commissions allowed to the executors. (O. C.) Hart's Estate, 162.

See ESCHEAT. INTESTATES. ORPHANS' COURT. WILLS.

DEED. A material alteration of a deed, if made by a stranger, will not affect the validity of the instrument. An immaterial alteration, even if made by a party thereto, or his agent, does not invalidate the instrument, or make it inadmissible as evidence. Robertson *v.* Hay, 546.

Construction of a deed granting a right of fishery. Harvey *v.* Vandegrift, 481.

In the absence of statutory enactment requiring the Recorder of Deeds to record certain instruments of writing in a particular book, such instruments are properly recorded in any of the books kept by him, and a mortgage or a builder's contract is validly recorded although recorded in the deed book. Glading *v.* Frick, 134.

DEED—*Continued.*
A deed is in contemplation of law recorded when it is left for record at the recorder's office, and is valid notice from that time, though it be recorded in the wrong book, and omitted from all the deed and mortgage indices. Croll *v.* Thomas, 138.

DEVISE. Abatement of, upon deficiency of assets. See DECEDENTS' ESTATES. Grim's Appeal, 517.

DISTRIBUTION. See DECEDENTS' ESTATES.

DIVORCE. See HUSBAND AND WIFE.

DOCKAGE. See WHARVES AND DOCKS. Easby *v.* Patterson, 219.

DONATIO CAUSA MORTIS. What sufficient evidence to sustain. (O. C.) McCarven's Estate, 261.

DOWER. See DECEDENTS' ESTATES. HUSBAND AND WIFE.

DURESS. See CONTRACT. Illegal consideration. National Bank of Oxford *v.* Kirk, 256.

What not evidence of. Heysham *v.* Dettre, 207.

EASEMENT. The pendency of an action of trespass to determine the validity of a claim to a right of way prevents the party claiming such right from enjoying such peaceable, quiet, and adverse possession of the same as can be made the basis of title to the easement by prescription. Workman *v.* Curran, 101.

A privilege or servitude annexed to a property in favor of an adjoining property must be palpable and manifest, and notoriously permanent in its character. Where an examination of the premises would show nothing more than a mere temporary arrangement for the convenience of tenants, a sheriff's vendee will take the property free from the burden of such an arrangement. Adams's Appeal, 86.

See ALLEY-WAY. EQUITY. (C. P.) Meyer *v.* Young, 60.

EJECTMENT. A tender of unpaid purchase money is not a prerequisite to an ejectment by an equitable vendee where the vendor, claiming under an adverse title, intrudes on the lawful possession of his vendee. Chase *v.* Irvin's Executors, 529.

The admissibility of the record of a prior ejectment as persuasive evidence on the question in issue depends upon whether the same title was passed upon in that action. Ib.

In an ejectment by one of four heirs, a general verdict for the entire tract in favor of the plaintiff will not be set aside upon writ of error when no exception to the form of the verdict was taken at the trial. Hess *v.* Gourley, 157.

In an ejectment upon an overdue mortgage a conditional verdict is erroneous. Bower *v.* Fenn, 431.

In an equitable ejectment one verdict and judgment are conclusive of the title. (C. P.) Winpenny *v.* Winpenny, 112.

An equitable ejectment is one adjudged and determined upon equitable principles. Ib.

Mesne profits are recoverable in an action of ejectment, although the plaintiff had acquired the legal title and possession after suit brought; he must, however, show that the title was in him at the time from which he seeks to recover the profits. Carman *v.* Beam, 453.

ELECTION. See DECEDENTS' ESTATES.

ELECTIONS. Although the contingency be not expressly provided for by the Act of Assembly, either party may contest when a tie vote is returned. Erdman *v.* Barrett, 340.

In a contested election proceeding, the proper parties are the candidates voted for at the election which is the subject of the contest. The incumbent of the office, although he holds his office until his successor

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ELECTIONS—*Continued.*
is qualified, is not a proper party to the proceeding. Erdman *v.* Barrett, 340.

EMINENT DOMAIN. Although land which has been taken under the right of eminent domain for a public use may again be taken by virtue of the same right and appropriated to any purpose in which the community is interested, an intention so to re-appropriate land will not be imputed to the Legislature, unless it is distinctly expressed, or is a necessary inference from the nature of the grant. (C. P.) Duncan *v.* Penna. R. R. Co., 551.

Corporations chartered prior to the Constitution of 1874, as well as those since chartered, are to make full compensation to the owners of property *injured*, as well as taken, by the exercise of the right of eminent domain. Ib.

Damages cannot be recovered for injury to a fishery by the erection of a bank and wall under the authority of the State to keep out the overflow of water. Tinicum Fishing Co. *v.* Carter, 322.

Such damages are purely consequential, and the constitutional provision as to compensation does not apply. Ib.

See CONSTITUTIONAL LAW. DAMAGES. RAILROADS. ROADS, HIGHWAYS, AND BRIDGES.

EQUITY. The proper construction of a deed is not a subject of equitable jurisdiction, and in the absence of fraud, accident, or mistake, a Court of Equity cannot undertake its reformation. Grubb *v.* Grubb, 349.

When a person not a tenant in possession but possessing a right to dig ores takes more than his right calls for, he commits neither waste nor trespass, and it is not within the province of a Court of Equity to restrain him by injunction. Ib.

In such cases equity will not decree an account where the items are a mere matter of charge for a certain number of tons of ore, with no entries on the other side. Ib.

Where the jurisdiction of a Court of Equity has attached to a case, the Court has power to decree such relief as will completely settle the rights of the parties. Early and Lane's Appeal, 184.

The erection of frame buildings within the city of Philadelphia contrary to the Ordinance of April 11, 1863, will be restrained by injunction. (C. P.) Horstman *v.* Young, 309.

The Chief Commissioner of Highways will not be enjoined from severing a sewer connection improperly made. (C. P.) Assay *v.* Baldwin, 160.

Injunction to restrain building upon ground claimed as an alley-way. (C. P.) Meyer *v.* Young, 60.

Injunction to stay waste. (C. P.) Dunlap *v.* Riddell, 466.

Injunction to restrain building of elevated railroad by the Pennsylvania R. R. Co., when not granted. (C. P.) Duncan *v.* Penna. R. R., 551.

The power to enjoin is one that should not be exercised except to prevent some act which is clearly contrary to law, and in a doubtful case a chancellor should stay his hand. Ib.

Injunction to restrain infringement of trade-mark. See TRADE-MARK. (C. P.) Sheppard *v.* Stuart, 498.

Bill to remove cloud upon title. (U. S. C. C.) Prevost *v.* Healy, 263.

Where trust property of a character which passes by delivery is in the hands of a de facto trustee against whom a bill for an account has been filed by the rightful trustee, the Court will appoint a receiver, though no fraud or misconduct of the respondent be alleged. (C. P.) Fidelity Co. *v.* Huber, 278.

EQUITY—*Continued.*
Where an ejectment is pending involving the title of oil lands from which the oil is being taken by the defendants from a flowing well, a receiver of the oil will be appointed by the Court, unless the defendants enter security to pay the plaintiff whatever may be found due him as mesne profits upon the determination of the ejectment. (C. P.) Dunlap *v.* Riddell, 466.

Under what circumstances a trust fund can be followed. (C. P.) People's Bank *v.* Spering, 435.

A joint judgment debtor who has been forced to pay the whole debt, and who subsequently shows that he was in fact only a surety in the joint judgment, is not entitled to be subrogated to the rights of the creditor in the judgment as against subsequent judgment creditors, unless he has exercised due diligence in having the judgment assigned to his use. Gring's Appeal, 54.

Cestuis que trustent must be made parties defendant to a bill by the executors of a non-resident trustee against a corporation for the transfer of corporate stock. Lehigh Nav. Co.'s Appeal, 106.

A bill filed in aid of an execution is not multifarious because of the joinder as co-defendants of the several vendees of separate pieces of real estate, although there be no averment of a common conspiracy between all the defendants, nor that each defendant was cognizant of the fraudulent acts of any of his co-defendants, other than those in which he himself took part with the judgment debtor. (U. S. C. C.) Prevost *v.* Gorrell, 261.

A Court of Equity may require security for costs from one applying to be made a party to the suit, and may determine the amount of the master's fee in proceedings relating to such application. Kase *v.* Greenough, 535.

Where a master has been appointed by the United States Circuit Court to investigate the affairs of a national bank upon a creditor's bill for discovery, the master's costs and fees will be ordered to be paid by the receiver who has been subsequently appointed by the Comptroller of the Currency, it appearing that the services rendered by the master were beneficial to the corporation. (U. S. C. C.) McElhenny *v.* Bank, 115.

Place of taking testimony of witness, when changed to accommodate witness. (U. S. C. C.) Prevost *v.* Gorrell, 264.

ERRORS AND APPEALS. The constitutional provision for a writ of error in criminal cases does not alter the rule that the jury are judges of the law as well as of the facts in such cases. Kane *v.* Commonwealth, 149.

Irregularities in appointing arbitrators, or in their proceedings when apparent on the record, may be corrected by writ of error, but those which are made apparent by extrinsic proof can be corrected only by the Court below. Wilcox *v.* Payne, 419.

The granting or refusal of a tavern license is entirely within the discretion of the Court of Quarter Sessions of the proper county, and no appeal can be taken from their decree. Toole's Appeal, 206.

At the close of the plaintiff's evidence, the defendants moved for a non-suit unless the Court should be of opinion that they would thereby be precluded from offering any evidence if the motion should be overruled. An expression of opinion by the Court that the defendants would be thereby so precluded cannot be made the foundation of a writ of error. North Penna. R. R. Co. *v.* Kirk, 473.

The Act of April 4, 1877, allowing an appeal from the refusal to open a judgment entered by confession, does not apply where the judgment so entered is after-

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ERRORS AND APPEALS—*Continued.*
wards revived by agreement of the parties. Lamb's Appeal, 189.

The refusal of the Court to strike off a judgment of non pros. for want of a narr., entered by the Prothonotary under a rule of Court, is not assignable for error; it is a matter resting in the sound discretion of the Court. Singer Manufacturing Co. *v.* Hackett, 45.

Neither the refusal of the Court to strike a case from the list, nor its refusal of a rule for a new trial, is subject to review upon a writ of error. George *v.* Bell, 110.

The exercise of jurisdiction upon rules to open judgments entered on warrants of attorney, has always been held to be within the sound discretion of the Courts. The Act of April 4, 1877, providing for an appeal to the Supreme Court in such cases, has not changed the law in this respect. Earley's Appeal, 515. Hockernell *v.* Flickinger, 515.

On a trial parol evidence was admitted to explain the words of a deed. Its admission was not assigned for error, but the Court was asked to charge the jury as matter of law on the construction of the words in question. This was equivalent to a motion to strike out the testimony already given, and the refusal of the Court so to charge was error. Harvey *v.* Vandegrift, 481.

In a criminal case too great care cannot be observed in commenting upon evidence. Where the Court charged the jury erroneously as to the evidence parties had given, representing it as more damaging to the defendant than it really was, judgment will be reversed. Pauli *v.* Commonwealth, 397.

A judgment will not be reversed because of the erroneous rejection of unimportant evidence. Heysham *v.* Dettre, 207.

Where incompetent but prejudicial evidence is admitted, and not withdrawn until after argument thereon, judgment will be reversed. Albert *v.* Miller, 477.

Although parts of a charge when taken alone may seem erroneous and may clearly show the opinion of the Court as to the questions of fact at issue, yet it is not error if taking the charge as a whole the questions are fairly left to the jury. Reese *v.* Reese, 275.

On a certiorari, the Court will review only what actually appears on the record. Esling's Appeal, 76.

The findings of the Orphans' Court upon questions of fact will not be reviewed unless the entire testimony is brought up. D'Arros's Appeal, 125.

An appeal will be dismissed where no exceptions have been filed by the appellant in the lower court. Ib.

Though the question of costs is perhaps not *per se* the proper subject of an appeal, yet it is reviewable when a case is properly in the appellate Court. (U. S. C. C.) Lubker *v.* Schooner A. H. Quinby, 509.

On appeal in a case of salvage the whole case—as well the adjudication of the amount of salvage as incidentally the costs—is before the appellate Court for review; and that tribunal is not bound by the decree of the Court below, but can decree a greater or less sum, or nothing. Ib.

Upon a reversal of a judgment by the Supreme Court, a *venire facias de novo* is not grantable of course, even where the plaintiff's declaration sets forth a good cause of action. Penna. R. R. Co. *v.* Fries, 433.

It is error for a lower court, for the purpose of enforcing a decree of the Supreme Court, to engraft thereon an order of restitution not contained in it. Hughes's Appeal, 518.

See EVIDENCE.

ESCHEAT. The Act of 16 December, 1869, limiting the time within which proceedings for an escheat

ESCHEAT—*Continued.*
can be maintained, only applies to causes where the person for defect of whose heirs the escheat happens dies in actual possession of the property. Commonwealth *v.* Naile, 203.

The Commonwealth cannot enforce the escheat of an interest in remainder until the expiration of intermediate life estates. Ib.

Where a trust under which property sought to be escheated has expired, and the trustee has no active duties to perform, an escheat may be enforced. Ib.

ESTOPPEL. A subscriber to the capital stock of a corporation who gives his demand note in lieu of the proportion of cash required to be paid in under the Act of Feb. 19, 1849, is not estopped from setting up the absence of such payment as a defence to an action of assumpsit brought upon his subscription. Boyd *v.* Peach Bottom R. R. Co., 351.

The bondholder of a corporation who fails to express his dissent to a plan of refunding its indebtedness, under an Act of Assembly which provided that bondholders failing to express their dissent within six months after the adoption of the plan should be regarded as assenting, is not estopped from afterwards asserting his dissent to the refunding plan. (C. P.) Gilfillan *v.* Union Canal Co., 179.

What evidence sufficient to estop a successful plaintiff in ejectment from claiming mesne profits. Carman *v.* Beam, 453.

See MORTGAGE. Gill *v.* Hutchison, 545. Robertson *v.* Hay, 546.

See CORPORATION.

EVICTION. See LANDLORD AND TENANT.

EVIDENCE. It is within the power of a Court to make and enforce a rule allowing the admission in evidence of an instrument sued on without proof of its execution, unless notice is given to the other side of an intention to impeach it. Reese *v.* Reese, 275.

An expert cannot be admitted to give his opinion as to whether an instrument was written by a certain person when his acquaintance with the person's handwriting was obtained for the purpose of testifying. Ib.

Where the question at issue is whether the body and signature of a certain instrument were written by the same person, an expert may be asked whether in his opinion the two parts are in the same handwriting. Ib.

Verbal declarations of a decedent, unless shown to be part of the *res gestæ* are insufficient to establish an advancement. Merkel's Appeal, 120.

The notes of testimony of a witness taken before an auditor, without any proof of their genuineness or accuracy, are not depositions and are inadmissible in evidence as such. Matthewson *v.* Wilson, 29.

Formal proof of a foreign law must be made before the Court will take judicial notice of it. (C. P.) South *v.* Pool, 178.

Parol to vary writing. Parol evidence is admissible to show that a deed made to one was in fact a conveyance to the grantee for the use of himself and his copartner as tenants in common.

Parol evidence is also admissible in rebuttal to show that the property was not held by a tenancy in common, but as partnership property. Black *v.* Seipt, 565.

The rule which allows the giving of extrinsic evidence to explain a deed as to the extent of the subject sold has no application where a subject-matter exists which satisfies the terms of the instrument of conveyance. Harvey *v.* Vandegrift, 481.

Parol evidence is not admissible to show that, at the time of the execution of a mortgage, the mortgagee

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EVIDENCE—*Continued.*

agreed to notify the mortgagor of the time when the interest should fall due, for the purpose of defending against a *scire facias* issued upon the mortgage for non-payment of interest. (C. P.) Gerke *v.* Jacoby, 438.

Parol evidence is admissible to show a collateral agreement, between the vendor and purchaser of a house, that the gas fixtures and heaters should pass with the house to the purchaser of the latter under a written agreement. Heysham *v.* Dettre, 207.

Parol evidence is admissible to show that an agent, whose duty it was to take down answers to questions in the application for a policy of insurance, had either negligently or intentionally written an erroneous or ambiguous answer. Smith *v.* Farmers' Ins. Co., 365. Eilenberger *v.* Protective Mutual Ins. Co., 363.

Parol evidence to reform written instruments must be clear, precise, and indubitable; but these words are to be accepted with their inherent limitations, for parol evidence can never be beyond all possible doubt and controversy. Spencer *v.* Colt, 333.

Evidence of what was said or done at the time of executing a writing is admissible, but evidence to show the unexpressed intent, motive, or belief existing in a party's mind is inadmissible. Ib.

To render evidence of a contemporaneous parol agreement admissible to vary materially or contradict a writing, it must be alleged that upon the faith of the parol agreement the written agreement was signed. Callen *v.* Lukens, 28.

Clear and precise parol testimony of what occurred at the execution of a written instrument is always admissible to contradict, vary, or even avoid that instrument, where it is proved that but for the oral stipulation it would not have been executed, excepting only in the case of negotiable paper. Hoopes *v.* Beale, 337.

In theory a record imports absolute verity, and as a general rule it should be so regarded in practice. Affidavits or depositions to contradict it or explain it away are only admissible in cases where to permit the record to stand would work injustice. Constein *v.* Rice, 355.

Commission to take testimony. Where the process of the U. S. Circuit Court is sought in aid of a commission issued from the Court of another circuit, the regularity of the proceedings there will not be inquired into, but witnesses will be compelled to answer all questions not privileged. (U. S. C. C.) *In re* C. C. Cole, 114.

Costs of taking testimony of absent witness afterwards present at trial, when allowed. See COSTS. (C. P.) Bancroft *v.* Freeman, 64.

Competency of witness. The Act of April 15, 1869, having made the testimony of parties in their own behalf competent, the unsupported evidence of a defendant, although positively contradicted by the plaintiff, cannot be withheld from the jury. Shaffer *v.* Clark, 459.

The Act of April 15, 1869, is an enabling statute, and renders no one incompetent to testify who before its passage was competent. Vidal's Appeal, 159.

An executor is a competent witness to disprove a claim against the estate of his testator, though the claimant be dead and the testator, if living, would have been incompetent. Ib.

In a suit by the administrator of the assignee of a bond the obligor is not a competent witness to prove an agreement between himself and the obligee, restricting his own liability, although the obligee be living at the time of trial. Hoopes *v.* Beale, 337.

In an ejectment by executors who bought in land to protect a judgment belonging to the estate of their testator, the defendant is a competent witness, because

EVIDENCE—*Continued.*

the plaintiffs are in fact trustees holding the land, not executors within the protection of the proviso in the Act of April 15, 1869. Chase *v.* Irvin's Executors, 529.

In an action upon a firm debt against the executor of a deceased partner, a surviving partner is, on the ground of interest, incompetent as a witness to prove the partnership. Hogeboom *v.* Gibbs, 399.

In the statutory sense, the assignor of the thing or contract is he whose right therein or thereunder, at or before the time of decease, passed by his own act or by law to a party in the action. Hess *v.* Gourley, 157.

Quære. Whether members of an unincorporated beneficial association are competent to prove a claim of the association against the estate of a decedent. (O. C.) Maguire's Estate, 214.

Other matters. If there is evidence from which the jury can properly find a verdict for the party on whom the burden of proof rests, it should be submitted; if not, the case should be withdrawn from the jury. Hyatt *v.* Johnson, 561.

In proving the defendant's admissions from his notice of special matter, the plaintiff must give the whole notice in evidence; but having done so, he is not precluded from contradicting parts of the notice. George *v.* Bell, 110.

The plea of non-assumpsit entitles the defendant to prove any matter of defence springing from or immediately connected with the transaction sued on, and impeaching the consideration of the contract averred by the plaintiff. Scott *v.* Kittanning Coal Co., 289.

If the defendant plead the general issue to a demurrable count, the plaintiff is entitled to introduce in evidence the matters set forth in the count, even though it would have been the duty of the Court, if asked, to have charged that the plaintiff could not recover on the evidence, and though the evidence was not admissible under the other counts. Philadelphia & Read. R. R. *v.* Ervin, 73.

Scope of examination in issues involving the question of negligence discussed. Ib.

Incompetent evidence which strongly tends to prejudice a party and impair the credibility of a witness, is not deemed as effaced from the mind of the jury by its withdrawal after argument upon it by counsel. It should be withdrawn before the argument, and in such a manner as to leave it reasonably certain that it did not taint the relevant testimony. Albert *v.* Miller, 477.

EXECUTION. The assignment of stock of a corporation to itself as collateral security for a loan divests the title of the assignor so far as to prevent a sale of it under a *fi. fa.* against the assignor. Early and Lane's Appeal, 184.

A *fieri facias* levied upon goods which belong to trustees under a domestic attachment takes nothing, since the property was *in gremio legis* at the time the execution issued. Bradley's Appeal, 181.

Exemption. The Court will not interfere with the sheriff in allowing or refusing exemption, unless for some special reason making an exceptional case. He acts upon his official responsibility, which is regarded as sufficient protection to the rights of the parties. (C. P.) Kiker *v.* Walker, 521.

The defendant may claim the benefit of the exemption laws as to property attached under the Act of 1869, at any time before it is advertised for sale. Cornman's Appeal, 513.

The claim for the benefit of the exemption laws, by a defendant who is served in an attachment execution, must be made at the term to which the process is returnable and before the plaintiff has filed his interrogatories. Malany *v.* Entriken, 374.

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EXECUTION—*Continued.*

An administrator who fraudulently appropriates the assets of an estate cannot claim the benefit of the exemption laws upon a levy on his own property under an execution issued upon a decree of the Orphans' Court directing him to pay over the embezzled assets. (O. C.) Wood's Estate, 84.

Interpleader. The failure of a claimant in an interpleader to give bond does not cause him to lose his rights, and if the property is sold the fund will be ordered into Court to await the determination of the interpleader. (C. P.) Barnum *v.* O'Brien, 82.

A non-resident defendant in an interpleader will not be required to enter security for costs. (U. S. C. C.) Goss *v.* Gerhard, 51.

Goods in possession of a claimant under a claim property bond cannot be levied upon under a magistrate's execution. (C. P.) Ward *v.* Whitney, 95.

While an interpleader is pending, a warrant of arrest cannot be issued upon the judgment. For if the interpleader should terminate in favor of the plaintiff in the judgment, the sheriff would sell and thus satisfy the debt. (C. P.) Fletcher *v.* Freeman, 96.

Costs upon interpleader, when allowed against execution creditor. See Costs. Bank *v.* Emerson, 392. Dewees *v.* Evans, 573.

A *fieri facias* against personal property may be issued by the Prothonotary of the Court of Common Pleas upon a transcript from a magistrate which shows execution issued and a return of "nulla bona." (C. P.) Techner *v.* Karpeles, 258.

Proceeds of sale of personalty, when ordered into court. (C. P.) Geisel *v.* Jones, 82. Barnum *v.* O'Brien, 82. Kirk *v.* Ruchholdt, 81. Matthews *v.* Webster, 81.

Attachment execution. Wages of labor earned and due to a citizen of Pennsylvania may be attached for a debt in another State, where no law exists prohibiting the attachment of wages. Bolton *v.* Pennsylvania Company, 155.

A seat in the Philadelphia Stock Exchange is not the subject of an attachment execution. Pancoast *v.* Gowen, 457.

After the election by a member of a building association to have his stock applied in liquidation of his debts to the association, an attachment execution upon the stock only takes what remains after the payment of his debts to the association. Early and Lane's Appeal, 184.

There is no presumption of priority between an assignment for the benefit of creditors executed, and an attachment execution issued upon the same day. The question is one of fact to be investigated by a jury. (C. P.) Smethurst *v.* Oppenheimer, 146.

Where the answers of the garnishees in an attachment execution against executors show that a sum greater in amount than the judgment will be payable to the defendant, judgment will be entered against the garnishees, although their account has not been finally adjudicated in the Orphans' Court, but no execution can issue against them until such final adjudication. (C. P.) Adams *v.* Harland, 129.

Mandamus against City Treasurer to enforce payment of road damages. See Roads, Highways, and Bridges. *In re* Sedgley Avenue, 1.

Sale of realty. A sheriff's sale of realty, while additions and repairs are being made, passes the estate to the purchaser freed from liability to mechanics' claims for such additions or repairs made prior to the sale. (C. P.) Eldridge *v.* Madden, 226.

In an action by the sheriff against a purchaser failing to comply with the terms of sale, the measure of

EXECUTION—*Continued.*

damages is the difference between the price subsequently realized by the sheriff and the sum which the defendant fails to pay. Schœning *v.* Leeds, 243.

The fact that there is a second sale, at which a greater sum is bid than at the first, does not help the defaulting purchaser at the first sale unless the terms of the second sale are complied with. Ib.

Taxes are to be paid out of a fund produced by the sale of the right, title, and interest of a defendant in lands which had been conveyed by him in fraud of his creditors before the execution upon which the sale was made. Dungan's Appeal, 252.

Costs of audit, when not imposed upon creditor ordering the fund into Court. See Costs. Dinsmore *v.* Davis, 295.

Upon the distribution of the proceeds of a sale of real estate under a first mortgage, the second mortgagee may show that the amount claimed by the first mortgagee is excessive because it contains usurious interest. (C. P.) Lennig *v.* Meyer, 325.

When purchaser of property at sheriff's sale takes it discharged from an alleged easement. See Easement. Adams's Appeal, 86.

The Act of May 13, 1871, providing a speedy method, before a justice of the peace and a jury of six, for the recovery of possession by the purchaser at sheriff's sale of real estate in Schuylkill County, is not unconstitutional. Wyncoop *v.* Cooch, 53.

Habere facias possessionem. A writ of habere facias possessionem must not contain a schedule of the personalty upon the real estate to be delivered to the plaintiff. (C. P.) Herring *v.* Reade, 522.

EXECUTORS AND ADMINISTRATORS. See Decedents' Estates.

EXECUTORY DEVISE. See Will.

EXEMPTION. See Attachment under Act of 1869. Decedent's Estates. Execution.

EXPERT TESTIMONY. See Evidence. Reese *v.* Reese, 275.

FEES, collected by the shipping commissioner in violation of the Act of Congress and under an erroneous construction thereof, may be recovered back in an action of assumpsit. American Steamship Company *v.* Young, 393.

FEIGNED ISSUE. Interpleader. See Execution.

FISHERY. Damages to a right of fishery, by the exercise of the right of eminent domain in the construction of river banks under the authority of the Legislature, cannot be recovered from the company constructing the banks. Tinicum Fishing Co. *v.* Carter, 322.

Construction of a deed conveying a fishery. See Deed. Harvey *v.* Vandegrift, 481.

FIXTURES. See Vendor and Vendee. Heysham *v.* Dettre, 207. (C. P.) Wilson *v.* Freeman, 33.

FOREIGN ATTACHMENT. The sheriff's return to a writ of foreign attachment against real estate must show that it was served upon the tenant in possession as garnishee. Bryan *v.* Trout, 402.

Where a foreign attachment is served upon the first day of a term, the plaintiff is not entitled to judgment for want of an appearance until the third succeeding term. (C. P.) Shuster *v.* Bonner, 17.

FRAUD. A secret agreement between the vendor and the agent of a purchaser, that such agent shall receive a share of the profits of the sale, renders the contract fraudulent and voidable, and it cannot be enforced against the purchaser. Ritter *v.* Lehigh Valley R. R. Co., 122.

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FRAUD—*Continued.*

Retention of personal property by vendor, when fraudulent as to creditors. (C. P.) Adams Express Co. *v.* Lyons, 421.

Purchase by trustee at his own sale. See TRUSTEES. Mayer *v.* Senyard, 224.

See USURY.

FRAUDS, STATUTE OF. In order to take a parol gift of land out of the statute of frauds, improvement incapable of pecuniary compensation must combine with possession by the donee. Ballard *v.* Ward, 254.

Lease not exceeding three years. See LANDLORD AND TENANT. Sheetz *v.* Allen, 108.

A parol contract for the sale of a school building, erected by permission upon the lands of another, is not within the statute of frauds. School District of Wilkins *v.* Mulligan, 42.

Promise to pay the debt of another. Fairlamb *v.* Hempshire, 92.

What is such a promise to pay the debt of another as to require a writing. (O. C.) Gheen's Estate, 66.

FREIGHT. See SHIPS AND SHIPPING. The Brig Muriel, 147.

GAS FIXTURES. Not realty. See VENDOR AND PURCHASER. Heysham *v.* Dettre, 207.

GIFT. Parol gift of land. See FRAUDS, STATUTE OF. Ballard *v.* Ward, 256.

GROUND RENT. See LANDLORD AND TENANT.

GUARDIAN AND WARD. Although primarily a testamentary guardian is not required to enter security for the faithful performance of his duty, if it be shown to the Court that he has failed to invest the funds of the estate in legal securities in his name as guardian, security will be ordered. The fact that the guardian is solvent and the owner of valuable real estate is immaterial. (O. C.) Stanton's Estate, 18.

A guardian has ordinarily power to lease any of his ward's property that is of such a character as makes it the subject of a lease, but without the approval of the Orphans' Court he cannot dispose of any part of the realty. Stoughton's Appeal, 563.

An oil lease of a ward's property is in fact a conveyance of a part of the realty, which the guardian has no power to make without the approval of the Court. Ib.

The Act of April 14, 1854, giving the Court authority to confirm such a conveyance *nunc pro tunc*, has no application to a case where lessees invoke its aid against the consent of the guardian. Ib.

Duties of guardians as to the filing of inventory and triennial accounts reviewed. (O. C.) Stanton's Estate, 18.

The triennial accounts of a guardian will not be audited, and the final account should include all the items included in the triennial accounts. (O. C.) Braining's Estate, 34.

Where the Court of this county appoints a guardian for non-resident minors, who subsequently remove into another county of this State, and there obtain the appointment of a guardian, the Orphans' Court of this county will not direct the transfer of the assets to the new guardian. Ib.

What must be shown before an order of maintenance is made. (O. C.) Stanton's Estate, 18.

Liability of surety upon guardian's bond. See PRINCIPAL AND SURETY.

HEATERS AND RANGES not realty. See VENDOR AND VENDER.

HIGHWAY. See ROADS, HIGHWAYS, AND BRIDGES.

HUSBAND AND WIFE. The power of a married woman to charge her separate estate for repairs, etc., results from construction and implication, and not from the express words of the statute. In order to maintain a charge against her or her estate for repairs or improvements, it is necessary to show that she was an owner of the property, that she herself made the contract for the work, and that the work was necessary for the proper use and enjoyment of the property. (O. C.) Lewis's Estate, 97.

A mechanic's claim, filed against the separate estate of a married woman, without joining her husband or averring that the work was done upon the credit of her estate, will be stricken off. (C. P.) Van Roden *v.* Sterrett, 196.

In a suit against a married woman and her husband for necessaries furnished to the wife, judgment cannot be entered for want of an affidavit of defence. (C. P.) Cooper *v.* Wallace, 468.

In a suit against a husband and wife for necessaries furnished to wife, a plea by the husband of "non assumpsit," and by the wife of "coverture," are demurrable. (C. P.) Darlington *v.* Ervin, 456.

A married woman can recover damages for the breach of a contract to convey real estate, although the agreement to convey is not acknowledged under the Act of 1770. The defendant cannot allege want of mutuality. (C. P.) Freeman *v.* Walsh, 296.

A married woman's incapacity to make a lease of a separate estate, except as provided by the Act of 1770, cannot be taken advantage of by the surety of the lessee who has occupied the premises and failed to pay rent. (C. P.) Riley *v.* Cullen, 114.

A married woman's incapacity to contract cannot be taken advantage of by her lessee. (C. P.) Herring *v.* Reade, 522.

In the absence of fraud, an execution may lawfully issue, with the husband's consent, upon a judgment confessed directly to the wife by the husband. Rose *v.* Latshaw, 143.

Collections of the rents of wife's separate estate by the husband, under what circumstances wife can recover them from his estate. (O. C.) Bardsley's Estate, 48. (O. C.) Hart's Estate, 162.

Under the Act of May 4, 1855, simple drunkenness on the part of the husband does not deprive him of his right to his wife's personal property upon her death without issue. Failure on his part to support her must concur with drunkenness. D'Arros's Appeal, 125.

A mere surrender of property contemplated by the insolvent laws, does not entitle a person, in confinement for deserting his wife and children, to his discharge. He must satisfy the conscience of the Court, after an actual confinement of three months, of his inability to comply with the order of the Court. Davis's Appeal, 286.

Right of widow to elect to take against husband's will. See DECEDENTS' ESTATES. Crozier's Appeal, 197.

Widow's claim for exemption. See DECEDENTS' ESTATES.

Rights of widow upon partition. See PARTITION. (C. C.) Benfield's Estate, 575.

Divorce. The Court will not entertain jurisdiction of a proceeding for divorce, where the respondent is a non-resident, unless the marriage of the parties took place, or the acts which are the ground of the divorce were done in Pennsylvania, and the respondent has left the jurisdiction. (C. P.) Ralston *v.* Ralston, 572.

What not evidence of a desertion of a husband by his wife. Ib.

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HUSBAND AND WIFE—*Continued.*

Where a husband seeks a divorce on the ground of the wife's adultery, he must pay alimony and her counsel fees up to the final decree. An order for counsel fees and alimony will be enforced by attachment. (C. P.) Mann *v.* Mann, 507.

Divorce a mensa et thoro. To entitle a wife to a decree of divorce *a mensa et thoro* upon the ground that she was turned out of doors, there must be proof that she was ejected by force, or compelled to leave because of a threat to employ force, with a reasonable apprehension that it would be used against her; or there must be proof of a refusal to receive her upon demand that she should be received into her husband's home as his wife, or proof of facts amounting to a justification on the part of the wife in withdrawing from the home of her husband. Sowers's Appeal, 313.

Abusive or profane language, occasional refusal to speak, or neglect in writing, are not such indignities to the person, or such cruel and barbarous treatment as is contemplated by the Act of Feb. 26, 1817. Ib.

INFANT. A contract by an infant is voidable, not void; hence, if after attaining his majority an infant ratified the making of a promissory note, the holder of the note cannot assert that the note is void. (C. P.) People's Bank *v.* Spering, 435.

The administrator of an infant cannot disaffirm the executed contracts of the infant with stockholders. (C. P.) Anwalter *v.* De Haven, 311.

INSOLVENT DEBTOR. When not entitled to discharge. See Husband and Wife. Davis's Appeal, 286.

INSURANCE. Fire. One who is the owner of the equitable title to real estate, solely, unconditionally and entirely, has such an insurable interest in the property, that a policy issued to him as owner is valid, although the company were not informed that the title of the insured was equitable, not legal. Millville Ins. Co. *v.* Wilgus, 24.

A contract of insurance with a mutual company, whose charter required that the insured should sign the policy and prepay certain premiums, is not made until these conditions are fulfilled; and if the property is destroyed before the insured has fulfilled these conditions, the company is not liable, although the policy has been executed by the company. Shaffer *v.* Mutual Ins. Co., 385.

In the case of a mutual fire insurance company, membership dates only from the consummation of the contract. During negotiations for insurance, a mutual company occupies no other position than one organized on the stock plan. Eilenberger *v.* Protective Mutual Ins. Co., 363.

When an agent of the assurer has cheated the assured into signing the warranty and paying the premium, and the policy is issued upon the false statements of the agent himself, the assured may prove the fact, and hold the principal to the contract as if he had committed the wrong. Ib.

A company cannot relieve itself from the fraud of its agent in procuring an insurance by a stipulation incorporated in the policy that such agent shall be regarded as the agent of the insured. Ib.

Parol evidence is admissible to show that an agent whose duty it was to fill up an application for insurance either intentionally or negligently wrote ambiguous or erroneous answers. Smith *v.* Farmers' Ins. Co., 365.

A mere technical levy upon real estate under judicial process, unaccompanied by change of possession or increase of risk, will not avoid a policy of insurance con-

INSURANCE—*Continued.*

taining a condition that the insurance "should cease from the time the property insured should be levied upon or taken into possession or custody, under any proceeding in law or equity." Ib.

Covenants and conditions against increase of risk construed. Pottsville Mutual Ins. Co. *v.* Horan, 461.

A mutual insurance company is relieved from liability for loss occasioned by fire after a voluntary surrender and acceptance of the policy, and payment of assessments then due. No formal cancellation of the policy, or erasure of the name of the insured from the books of the company, is necessary, although the by-laws provided that the liability of the members should continue until such cancellation and erasure should have been made. Farmers' Ins. Co. *v.* Wenger, 191.

Life insurance. A statement in an application for a policy of life insurance that the assured would not practise any pernicious habit, does not work a forfeiture of the policy, although the assured afterward drank to such excess that he died of delirium tremens, in the absence of any clause in the policy avoiding it in case the assured should practise any pernicious habit, or of any covenant or warranty on his part that he would not do so. Knecht *v.* Mutual Life Insurance Co., 297.

INTEREST on mechanics' claims, up to what time computed on sales under the Act of February 17, 1876. See Assignment for Benefit of Creditors. Carver's Appeal, 169. Tomlinson's Appeal, 171. Herbst's Appeal, 173. See Usury.

INTESTATE LAW. See Decedents' Estates.

ISSUE, the granting of not a matter of right. See Orphans' Court Practice. (O. C.) Gray's Estate, 542.

JUDGMENT. Effect of an entry of "judgment nisi four days" in United States Circuit Court. (U. S. C. C.) Prevost *v.* Healy, 263.

Opening judgment, review of discretion of lower Court in opening confessed judgment. See Errors and Appeals. Earley's Appeal, 515. Hockernell *v.* Flickinger, 515.

Opening of judgment confessed by client to attorney. See Attorney. (C. P.) Haldorn *v.* Hassitt, 162.

A refusal to open a judgment confessed is not the subject of an appeal when the judgment has been revived by agreement. Lamb's Appeal, 189.

A general judgment upon a scire facias to revive a judgment is a lien, though no assessment of damages be filed. Appeal of the Fogelsville Building and Loan Association, 56.

The lien of a judgment upon lands sold by a judgment debtor is not lost by the failure of the judgment creditor to collect the judgment out of a fund in the hands of the sheriff, produced by the sale of other lands of the defendant. Schoonover *v.* Pierce, 93.

Judgment when set off against another judgment. (C. P.) Stout *v.* Moore, 456.

Right of judgment creditors of decedent to share in the distribution of personalty. See Decedents' Estates. Mason's Appeal, 9.

JUDICIAL SALES. Interest upon liens, up to what time computed. See Assignment for Benefit of Creditors. Carver's Appeal, 169. Tomlinson's Appeal, 171. Herbst's Appeal, 173.

See Execution.

JURISDICTION. See Courts.

JUSTICE OF THE PEACE. Appeal from, when allowed nunc pro tunc. (C. P.) Schoneman *v.* Sternberger, 111.

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JUSTICE OF THE PEACE—*Continued.*

When not allowed nunc pro tunc. (C. P.) Fick *v.* Wellendorf, 111.

The prothonotary may issue a fieri facias against personalty upon a transcript from the judgment of a magistrate which shows a return of "nulla bona" to a writ issued by the magistrate. (C. P.) Techner *v.* Karpeles, 258.

Jurisdiction of justice in landlord and tenant cases. See LANDLORD AND TENANT.

LACHES. The failure of the municipal authorities to detach the ferules, when by ordinance they first were entitled to do so, is not such laches as the water tenant, or one claiming under him, can take advantage of. Girard Life Insurance Co. *v.* Philadelphia, 69.

Effect of laches on the part of a receiver in enforcing the individual liability of a stockholder in a national bank. See BANKS AND BANKING. Price *v.* Yates, 51.

LANDLORD AND TENANT. Ground-rent. Contribution between vendees of portions of land sold subject to ground-rent, when enforced. (C. P.) Donagan *v.* McKee, 112.

Personal liability of trustee purchasing land under and subject to a ground-rent. (C. P.) Conrad *v.* Smith, 160.

The vendee to land under and subject to a ground-rent, who took title prior to the Act of June 12, 1878, is not relieved from liability for accruing rent by that Act. (C. P.) Burton *v.* Association, 439. (C. P.) Miller *v.* Kern, 504.

Lease of mining rights, rights to dig clay on, discussed. Scheetz *v.* Allen, 108.

Rights of married woman as a landlord. See HUSBAND AND WIFE.

Use and occupation. In an action for use and occupation, a contract expressed or implied must be proved. Easby *v.* Patterson, 219.

Eviction. When a tenant is evicted under a title paramount to that of his landlord from a portion of the demised premises, but continues to occupy and enjoy the rest of the premises, he remains liable to his landlord in an action for use and occupation for such proportion of the rent as the value of the part retained bears to the whole. Seabrook *v.* Moyer, 139.

Surrender. In an action for rent, a tenant cannot escape from liability by averring in his affidavit of defence his removal from the premises and an entry by the landlord, who made such repairs as could not have been made while the tenant was in possession. There must be a clear and distinct averment of an acceptance of the surrender by the landlord. Breuckmann *v.* Twibill, 188.

Averment in an affidavit of defence of surrender and acceptance, when sufficient. (C. P.) Sharpless *v.* Weigle, 376.

Other matters. Action by landlord against tenant who has paid delinquent taxes, under the Act of April 16, 1879. (C. P.) Eagen *v.* Wilkins, 486.

A lessee cannot recover from his lessor the value of improvements put by him upon the land, even though the latter has used them as a set-off in an action against him by a paramount owner for mesne profits. (C. P.) Lanigan *v.* Kille, 293.

In the absence of fraud on the part of the tenant, or special authority in the lease, a landlord cannot follow goods removed by the tenant before the rent accrued. (C. P.) Conway *v.* Lowry, 64.

In landlord and tenant proceedings, any party in interest, though not a party to the record, may sue out a certiorari. (C. P.) Tyrell Building Association *v.* Daughen, 244.

LANDLORD AND TENANT—*Continued.*

The record of the proceedings before the magistrate must show upon its face the terms of the lease and the amount of rent reserved. Ib.

When a summary proceeding is given by statute, and is in derogation of the common law, the necessary jurisdiction must appear affirmatively on the face of the record. Graver *v.* Fehr, 429.

A justice of the peace has no jurisdiction under the Landlord and Tenant Act, when it does not appear affirmatively that a certain rent was reserved. Ib.

The limitation of twenty days within which a writ of certiorari must be sued out does not apply when it is apparent that the justice has no jurisdiction. Ib.

The twenty-first section of the Act of 1810, known as the One Hundred Dollar Act, does not apply to landlord and tenant proceedings. Ib.

See REPLEVIN.

LEGACY. A bequest of "ten shares of Philadelphia and Germantown Railroad stock," the testator being the owner at the time of his death of eighty-nine shares of that stock, is a general, not a specific, legacy. (O. C.) Eckfeldt's Estate, 19.

A mere direction by a testator that a devisee shall pay a legacy does not create a charge on land. There must be express words, or a necessary implication from the whole will that such was the intention. Cable's Appeal, 549.

Demonstrative legacies, in what order they abate upon deficiencies of assets. See DECEDENTS' ESTATES. Grim's Appeal, 517.

LEGISLATURE. Bribery of member. See CRIMINAL LAW. *In re* Riot Bill, 306.

LEX LOCI CONTRACTUS, how provable. See EVIDENCE. (C. P.) South *v.* Pool, 178.

LIMITATIONS, STATUTE OF. The pendency of an action of trespass to determine the validity of a claim to a right of way prevents the party claiming such right from enjoying such peaceable, quiet, and adverse possession of the same as can be made the basis of title to the easement by prescription. Workman *v.* Curran, 101.

The statute of limitations does not begin to run upon a promissory note until the expiration of the days of grace. (C. P.) Scattergood *v.* Carberry, 213.

Where an attorney neglects to bring a suit until his client's right is barred by the statute, the latter's right of action against the attorney will be barred in six years from the time of such neglect. (C. P.) Moore *v.* Juvenal, 375.

Under what circumstances the pendency of bankruptcy proceedings prevents the running of the statute. (O. C.) Bucknor's Estate, 470.

An indorsement on a joint and several note of a payment of interest, in the handwriting of the holder, proven to have been made within six years of the making of the note, and of action brought, does not toll the running of the statute. Lazarus *v.* Fuller, 217.

Statute of limitations, when not tolled by the issuing of a summons. (C. P.) Bailey *v.* Vehmeier, 195.

Where an executor fails to file an account, the statute of limitations cannot be pleaded to debts contracted by the decedent within six years of his death. (O. C.) Wallington's Estate, 488.

Action by Receiver of National Bank to enforce individual liability of stockholders, when barred by statute of limitations. See BANKS AND BANKING. (U. S. C. C.) Price *v.* Yates, 51.

Limitation as to proceedings in escheat. See ESCHEAT. Commonwealth *v.* Naile, 203.

See USURY. Stephens *v.* Monongahela Bank, 491.

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LIS PENDENS. Effect of, upon a title by prescription to a right of way. See LIMITATIONS, STATUTE OF. Workman v. Curran, 101.

Effect of proceedings in lunacy as constructive notice of mental incapacity. Moore v. Hershey, 478.

LUNATIC, liability of, as indorser of commercial paper. See BILLS AND NOTES. Snyder v. Laubach, 464. Moore v. Hershey, 478.

MANDAMUS. The Constitution of 1874 deprived the Supreme Court of power to issue writs of mandamus to State officers, and as yet no Act of Assembly has conferred that power upon the Courts of Common Pleas. Commonwealth v. Wickersham, 265.

Mandamus, when not appropriate remedy to enforce payment of poor-law charges. Overseers v. Guardians, 222.

A mandamus is a "civil proceeding" within the meaning of the Act of March 30, 1875, relating to changes of venue. City of Williamsport v. Commonwealth, 345.

When appropriate remedy to compel payment of interest on municipal bonds. See MUNICIPAL CORPORATIONS. Commonwealth v. Pittsburgh, 409; Williamsport v. Commonwealth, 345.

Power of the Quarter Sessions to issue mandamus to compel the payment of road damages. See ROADS, HIGHWAYS, AND BRIDGES. *In re* Sedgley Avenue, 1.

MARRIAGE. See HUSBAND AND WIFE.

MARRIED WOMAN. See HUSBAND AND WIFE.

MARSHALLING OF ASSETS. See DECEDENTS' ESTATES. Mason's Appeal, 9.

MASTER AND SERVANT. The Act of April 4, 1868, creates the relation of master and servant between a railroad company and the consignor of goods, who, at the request of a station agent, enters a car to remove his goods. If such consignor is injured while so engaged, through the negligence of the company's servants, he has no greater right of action than he would have if he were a regular servant of the company. Rickard v. North Penna. R. R. Co., 37.

MECHANICS' LIENS. An architect who makes plans and specifications for a building, but who does nothing more, is not within the provisions of the mechanics' lien law, and is not, therefore, entitled to a lien against the building for his labor. Price v. Kirk, 107; Rush v. Able, 199.

A claim filed against the separate estate of a married woman, without joining her husband, will be stricken off. (C. P.) Van Roden v. Sterrett, 196.

Claim filed under the Act of Feb. 17, 1858, against mining improvements, particularity required in. Ely v. Wren, 141.

Extra work and materials done and furnished by a contractor during the performance of his agreement, though outside the contract, are so closely connected with it, that they have always been allowed to be included with those done and furnished under the contract. Rush v. Able, 199.

A claim for extra work should set forth distinctly the kind of extra work. Ib.

A mechanic's claim, filed prior to the passage of the Act of June 11, 1879, permitting amendments in mechanics' claims, cannot be amended by adding the name of an additional contractor as a co-defendant. (C. P.) Sutton v. Clark, 437.

Effect of sheriff's sale of real estate, while in course of alteration, upon right of mechanic to file claim for alterations and repairs. See EXECUTION. (C. P.) Eddridge v. Madden, 226.

Service of scire facias. A sheriff's return to a scire

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facias sur mechanics' claim, "Made known by posting a copy of the writ upon the premises in accordance with the Act of Assembly in such case made and provided," is defective. (C. P.) Bradley v. Forepaugh, 392. (C. P.) Bradley v. Totten, 16.

For the purposes covered by the Act of April 3, 1872, a builder's contract is sufficiently recorded, although specifications accompanying the contract be not recorded. Glading v. Frick, 134.

MERCANTILE AGENCY. Liability of, for negligence of correspondent. See NEGLIGENCE. Duncan v. Dun, 246.

MESNE PROFITS. See EJECTMENT. Carman v. Beam, 453.

MILEAGE. See COSTS.

MINOR. See INFANT.

MOBS. Liability of County for damages by. See COUNTIES. County of Allegheny v. Gibson, 441.

MORTGAGE. An agreement between the parties to a transaction, that one of two mortgages executed at the same time should be prior in lien to the other, will be enforced upon a distribution as between the parties, although the mortgage agreed to be postponed was first recorded. Rigler v. Light, 156.

A widow is not entitled to her exemption under the Act of April 14, 1851, out of the proceeds of the real estate of her deceased husband, in preference to his mortgage thereof. Nerpel's Appeal, 549.

A mortgagor, who at the time that he executes a mortgage delivers to the mortgagee a certificate of no defence, thereby estops himself from setting up, as against a purchaser of the mortgage, that there was fraud in obtaining the mortgage. Gill v. Hutchison, 545. Robertson v. Hay, 546. (See Jeffers v. Gill, 8 W. N. C. 19.)

Failure of mortgagor to pay interest, when not excused by agreement of mortgagee to give notice of the falling due of the same. (C. P.) Gerke v. Jacoby, 438.

A scire facias sur mortgage may issue where the præcipe refers to the record of the mortgage, although there be no averment in the sci. fa. as to the time of the payment of the debt. Rhoads v. Reed, 520.

The satisfaction of a mortgage on the record may be shown to have been entered by mistake, and in that event it is not conclusive as between the parties to the transaction. West's Appeal, 427.

The burden of proving the mistake rests upon the party alleging it, and the mistake must be made out by clear and satisfactory evidence. (O. C.) Gray's Estate, 542.

Satisfaction of a lost mortgage will not be ordered until due advertisement of the application has been made. (C. P.) *In re* Petition of Thomas Banes, 128.

Commissions for collection. Although a reasonable attorney's fee for collection can be provided for in a mortgage and recovered in a judgment on a scire facias, yet the amount fixed is rather in the nature of a penalty than of liquidated damages, and is reducible at the discretion of the Court. Daly v. Maitland, 103.

Upon a mortgage of $14,000 two per cent. is fair compensation. Ib.

Upon a mortgage of $90,000, one and one-half per cent. will be allowed. (C. P.) Waln v. Massey, 312.

Purchase, under and subject. The mere fact that the amount of a mortgage has been retained out of the nominal purchase money of land as recited in the deed is not sufficient to create a personal liability for the mortgage debt on the part of the vendee.

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MORTGAGE—*Continued.*
Davis's Appeal, 237. (See Heritage *v.* Bartlett, 8 W. N. C. 26.)

Evidence is admissible to show that at the time of the conveyance of land under and subject to a mortgage the grantee expressly promised to pay the mortgage. Merriman *v.* Moore, 425.

MUNICIPAL CLAIM. A municipal claim for paving does not lie against the road-bed of a railroad company. Junction R. R. Co. *v.* Philadelphia, 87.

Paving claim, selection of paver by majority of property owners, effect of revocation of such selection prior to the award of contract. City *v.* Phila. & Read. R. R. Co., 466.

A lien filed for paving done under a contract entered into with a person not the choice of the property owners as required by ordinance is invalid, and is not cured by a subsequent ordinance ratifying all contracts under which work has been done under resolution or ordinance authorizing the same. (C. P.) City *v.* Hays, 468.

What not a defence to a claim filed for construction of sewer emptying into a private drain, and having no public outlet. (C. P.) City *v.* McNeely, 573.

Service of scire facias, when sufficient. (C. P.) Kern *v.* Simmons, 359.

Claim, when not stricken off. (C. P.) City *v.* Greaves, 487.

Assessment of claims against rural property. See CONSTITUTIONAL LAW. Craig *v.* Philadelphia, 117.

MUNICIPAL CORPORATIONS. A peremptory mandamus may be issued against a city treasurer to compel him to apply money in his hands already appropriated to other uses by city councils to the payment of overdue interest on city bonds, provided the withdrawing of the amount from the treasury will not embarrass the city government. Williamsport *v.* Commonwealth, 345.

A city cannot require those who present for payment coupons cut from its bonds to give the numbers of the bonds and a history of their title thereto. Ib.

It is no defence on the part of a city treasurer, as against an attachment for not obeying a mandamus, that the amount of coupons presented was largely in excess of the amount in hand, and that, therefore, he cannot discriminate between them. Ib.

The invalidity of the assessments against rural property abutting upon the streets leading out from Pittsburgh does not relieve the city from its obligation to pay the interest upon the bonds known as the street improvement bonds, and a mandamus will be issued to enforce payment. Commonwealth *v.* Pittsburgh, 409.

The title of an ordinance is sufficient if it fairly give notice of its subject matter. Esling's Appeal, 76.

Municipal corporations cannot by ordinance make that negligence which before was prudence. Their ordinances are but police regulations imposing public duties enforceable by penalties recoverable only by action instituted by the municipality or its representative. P. and R. R. R. Co. *v.* Ervin, 73.

The Board of Guardians of the Poor of Philadelphia is but a department of the city; proceedings to collect the expense of maintaining and removing a pauper should be had against the city. Overseers *v.* Guardians, 222.

The right to detach water connections for non-payment of water rents, when not lost. Girard Life Ins. Co. *v.* Philadelphia, 69.

Chief Commissioner of Highways, when enjoined from severing sewer connections. (C. P.) Assay *v.* Baldwin, 160.

Immunity of, for negligence of paid fire department.

MUNICIPAL CORPORATIONS—*Continued.*
See NEGLIGENCE. (C. P.). Freeman *v.* Philadelphia, 45. (C. P.) Rosenberry *v.* Philadelphia, 558.

When not liable for explosion of gas main. See NEGLIGENCE. (C. P.) Strawbridge *v.* Philadelphia, 537.

Payment of road damages by, when enforced by mandamus. See ROADS, HIGHWAYS, AND BRIDGES. *In re* Sedgley Avenue, 1.

NATIONAL BANKS. See BANKS AND BANKING.

NEGLIGENCE. Where there is some evidence of negligence by the defendants, and also evidence of facts from which the jury might infer contributory negligence by the plaintiff, the evidence on both questions must be submitted to the jury. North Penna. R. R. Co. *v.* Kirk, 473.

A row-boat is not within the protection of the "Steering and Sailing Rules" embodied in the navigation laws of the United States. Philadelphia and Reading R. R. Co. *v.* Adams, 329.

A steamer is justified in believing that a row-boat will keep out of the way. Ib.

It is the duty of a railroad company to provide safe and reasonably convenient means of ingress and egress to and from its cars; it is the duty of passengers to use the means thus provided with reasonable circumspection and care. Del., Lack., and West. R. R. Co. *v.* Napheys, 233.

If a passenger while seated in the car is injured by a collision or any defect in the machinery, the burden is upon the company to disprove negligence; but where a passenger in stepping down from the car breaks his knee cap, apparently by the strain in stepping down a long distance, the burden rests upon him of establishing the negligence of the company. Ib.

Failure to comply with the requirements of a municipal ordinance in placing guards around the edge of a wharf is not *per se* such negligence as will entitle one suffering damage from such failure to maintain a common law action based thereupon. Phila. and Reading R. R. Co. *v.* Ervin, 73.

Whether the negligence of the defendants was the proximate or remote cause of the plaintiff's injury, in a case where sparks from a locomotive ignited brush near the track from which the fire extended until it destroyed the plaintiff's buildings, is a question for the jury. Penna. and N. Y. Canal and R. R. Co. *v.* Lacey, 368. Lehigh Valley R. R. Co. *v.* McKeen, 369.

Where borough authorities fail to protect by guards a place of unusual danger on a much-travelled road, the question of their negligence is to be left to the jury. Pittston *v.* Hart, 165.

The City of Philadelphia is not responsible for damages suffered through the reckless driving of employés of the paid fire department. (C. P.) Freeman *v.* Philadelphia, 45. (C. P.) Rosenberry *v.* Philadelphia, 558.

In the absence of negligence the city is not responsible for damages arising from the bursting of a gas main owned by it. (C. P.) Strawbridge *v.* Philadelphia, 537.

A mercantile agency may by contract stipulate against liability to its customers for loss occasioned by the neglect of its agents. (U. S. C. C.) Duncan *v.* Dun, 246.

Alleged contributory negligence of owners of property destroyed by the Pittsburgh mob of 1877, considered. See COUNTIES. Allegheny *v.* Gibson, 441.

Action against attorney-at-law for negligence, when barred by the statute of limitations. See LIMITATIONS. (C. P.) Moore *v.* Juvenal, 375.

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NEGLIGENCE—*Continued.*
Liability of banks as special bailees of securities deposited for safe keeping. See BAILMENT. First Nat. Bank *v.* Rex, 167.
See COMMON CARRIER. DAMAGES. EVIDENCE. MASTER AND SERVANT. MUNICIPAL CORPORATION. RAILROAD COMPANIES.
NON-RESIDENTS, whose property is destroyed by rioters, are entitled to maintain an action against the county under the Act of 1841. Allegheny *v.* Gibson, 441.
NOTARY PUBLIC. The attestation of a notary public is invalid unless his seal be affixed. (C. P.) Horstman *v.* Kaufman, 487.
NOTICE, of lease, to purchaser of land, from possession of land, to what cases extended. Sheetz *v.* Allen, 108.
To agent, when binding upon principal. See PRINCIPAL AND AGENT. Peabody Building Association *v.* Houseman, 193.
When cestui que trust not affected by knowledge of trustee. See TRUSTS AND TRUSTEES. Guillou *v.* Peterson, 268.

OIL LANDS, power of guardian to lease. See GUARDIAN AND WARD. Stoughton's Appeal, 363.
Receiver of oil from flowing well, pending ejectment, when appointed. See EQUITY. Dunlap *v.* Riddell, 466.
ORPHANS' COURT. Order of reference to an examiner, when vacated. (O. C.) Watson's Estate, 424.
When the granting of an issue is within the discretion of the Orphans' Court, it will not be granted in a case where a *prima facie* case be made out on the one side, unless the evidence contra, if believed, would be sufficient to overcome it. (O. C.) Clendaniel's Estate, 260.
The granting of an issue by the Orphans' Court upon questions of fact arising in the distribution of a decedent's estate is not a matter of right, but is within the discretion of the Court. (O. C.) Gray's Estate, 542.
The power of the Orphans' Court to correct or amend its own decrees does not depend entirely upon the Act of October 13, 1840, relating to bills of review; and in a case where injustice would result by permitting a decree to stand, and where no rights have changed in consequence of the decree, the power of correction or amendment will be liberally exercised, notwithstanding the fact that error does not appear on the face of the record, or that new matter is not averred or shown. (O. C.) Bucknor's Appeal, 470.
Where an executor has distributed a fund under a decree of the Court, a bill of review will not be allowed. (O. C.) Cremer's Estate, 544.
Pending the argument upon a petition for a bill of review, a special injunction will be granted restraining the trustees of the distributees from handing over the funds to them. (O. C.) Hattrick's Estate, 261.
The finding of the Orphans' Court upon a question of fact will not be reviewed unless the entire testimony be brought up. D'Arros's Appeal, 125.
When a petitioner sets a cause down for argument upon bill, answer, and replication, without affording an opportunity to take testimony, the effect is the same as if heard upon bill and answer alone. (O. C.) Sterr's Estate, 35.
Where a petition, answer, and replication have been filed, and no testimony taken, the responsive allegations of the answer are presumed to be true. (O. C.) Cremer's Appeal, 544.
An administrator who has converted funds of the

ORPHANS' COURT—*Continued.*
estate to his own use is not entitled to the benefit of the $300 exemption law upon an execution issued upon an order to pay. (O. C.) Wood's Estate, 84.
Liability of surety for guardian. See PRINCIPAL AND SURETY.
Sale under decree of Orphans' Court. See CONVERSION. Wagner's Appeal, 90.
See DECEDENTS' ESTATES. GUARDIAN AND WARD. PARTITION.
OWELTY. See PARTITION.

PARENT AND CHILD. Action against railroad company for causing death of adult son. See NEGLIGENCE. North Pa. R. R. Co. *v.* Kirk, 473.
See ADOPTION. GUARDIAN AND WARD.
PARTITION, in the Orphans' Court. An allotment to heirs by name of parcels of land charged with owelty without being appraised, is improper under the terms of the Act. (O. C.) Benfield's Estate.
In partition, if there be a widow, and the estate cannot be divided between her and the heirs, the inquest has power only to appraise the property. Ib.
PARTNERSHIP. An unincorporated charitable association is not a partnership, but a quasi corporation. (O. C.) Maguire's Estate, 214.
In Pennsylvania one partner may bind his copartner by submission to arbitration by any agreement not under seal. Gay *v.* Waltman, 175.
Upon a question of partnership, the declarations of each of the parties charged are admissible against himself, though not against the others. Filbert *v.* Bickel, 217.
What sufficient evidence of ratification of unauthorized act of partner. Ib.
A partnership to whom a trustee, who was also a copartner, fraudulently loaned the assets of the trust estate, which were lost by the firm in the course of its business, is liable to the trust estate for the value of the securities so lost, if the partners had knowledge that such securities were not the individual property of the trustee so loaning them, *aliter* if the firms had not such knowledge. Guillou *v.* Peterson, 268.
When in an action against a partnership the pleas are "nil debet" and "no partnership," the effect of withdrawing the plea of "no partnership" is to admit the partnership. Gay *v.* Waltman, 175.
In an action upon a firm debt against the executor of a deceased partner, a surviving partner is, on the ground of interest, incompetent as a witness to prove the partnership. Hogeboom *v.* Gibbs, 399.
Receiver of partnership, when one partner will be appointed. (C. P.) Warren *v.* Stagner, 127.
Parol evidence is admissible to show that land is partnership assets. Black *v.* Seipt, 565.
A partnership debt may be set off against an individual debt with the assent of the partners. (C. P.) Stout *v.* Moore, 456.
Limited partnership. Where a limited partnership fails to record, in the manner prescribed by the acts of assembly, an agreement for a renewal of the partnership, the liability of the special partner becomes general. Guillon *v.* Peterson, 268.
PATENT. Note given for a patent right. See BILLS AND NOTES. (C. P.) Martin *v.* Smith, 32.
PAUPER. See POOR LAW.
PENALTY. Attorney's commission clause in mortgage. See MORTGAGE. Daly *v.* Maitland, 103.
PLEADING. In replevin, the plaintiff cannot plead *de injuria sua absque tali causa* to an avowry. (C. P.) Frederick *v.* Royal, 64.

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PLEADING—*Continued.*

A plea in abatement after a plea in bar, not verified by affidavit, will be stricken off on motion. (C. P.) Commonwealth *v.* Wilson, 62.

A special plea will not be stricken off as equivalent to the general issue except in a case where it is plainly frivolous or vexatious, or inappropriate to the action. (C. P.) Bickford *v.* Ice Co., 16.

Special plea, when stricken off as equivalent to the general issue. (C. P.) Boyer *v.* Clairborne, 360.

After the close of the plaintiff's case, an application on the part of the defendant to amend by pleading set-off specially is in reality a motion for leave to then give notice of special matter, and is within the discretion of the Court of Common Pleas and not within the Act of 1806. Scott *v.* Kittanning Coal Co., 289.

Effect of withdrawal of plea of no partnership as an admission of partnership. Gay *v.* Waltman, 175.

What evidence admissible under a count to which the general issue has been pleaded, which is bad upon demurrer. See EVIDENCE. Phila. and Reading R. R. Co. *v.* Ervin, 73.

What evidence is admissible under plea of non assumpsit. See EVIDENCE. Scott *v.* Kittanning Coal Co., 289.

Pleading, in action against husband and wife for necessaries furnished to wife. See HUSBAND AND WIFE. Darlington *v.* Ervin, 456.

POOR LAW. Settlement of pauper, when derivatively acquired through parent. (Q. S.) Overseers of Davidson *v.* Overseers of Moreland, 12.

Prior order of removal, when not conclusive. Ib.

When no appeal is taken from the order of removal of a pauper, jurisdiction in relation to expenses thereof is not given to the Quarter Sessions of the removing district by the Act of April 15, 1867; the remedy for costs of removal in such case must be sought in the courts of the district to which the pauper is removed. Overseers *v.* Board of Guardians, 222.

The Board of Guardians of the Poor of Philadelphia is but a department of the City; proceedings to enforce the expense of maintaining and removing a pauper should be against the City. Ib.

PORT WARDENS. See RIVERS. Simpson *v.* Neill, 85.

POWER OF SALE. See WILL. Peterson's Estate, 300.

PRACTICE. Service of *scire facias* sur municipal claim. See MUNICIPAL CLAIM. (C. P.) Kern *v.* Simmonds, 359.

Service of *scire facias* sur mechanic's claim. See MECHANIC'S CLAIM. (C. P.) Bradley *v.* Totten, 16.

The return of a writ of foreign attachment against real estate must show that it was served upon the tenant of the defendant as garnishee. Bryan *v.* Trout, 402.

Who not an agent of defendant upon whom a service could be made under the Act of 21 April 1868. (C. P.) Wheelan *v.* Stedman, 17.

Where a defendant is decoyed within the jurisdiction of the Court, the service will be set aside. (C. P.) Sloan *v.* Green, 408.

The service of a certified copy of the record containing the names of the arbitrators and the time and place of meeting, required in cases of compulsory arbitration, may, under the provisions of the Act of March 23, 1877, be made upon either the opposite party personally or his agent or attorney; if he have no agent or attorney the service may be in like manner as of a summons in personal actions. Wilcox *v.* Payne, 419.

Amendment of sheriff's return, when permitted. (C. P.) City *v.* Coulston, 196. (C. P.) Haskins *v.* Dill, 258.

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Application to compel filing of warrant of attorney, when made too late. (C. P.) Sheetz *v.* Whitaker, 570.

Affidavit in support of special capias, when insufficient. (C. P.) Flaherty *v.* Lindsay, 79.

Municipal claim, when stricken off. (C. P.) City *v.* Greaves, 487.

When transcript of justice cannot be treated as a declaration or statement. (C. P.) Faries *v.* Weisel, 213. (C. P.) Snyder *v.* Hensel, 280.

The Court of Common Pleas in its discretion may strike off a *non pros.* entered for want of a narr., and the exercise of its discretion will not be reviewed. Singer Manufacturing Co. *v.* Hackett, 45.

An assignee in bankruptcy is entitled to be admitted as plaintiff upon the record in suits instituted by the bankrupt prior to his bankruptcy. (C. P.) Silk Co. *v.* Disston, 63.

An omission to suggest upon the record the death of the plaintiff is cured by the defendant's pleading to a sci. fa. sur judgment issued by the administrator. Finney *v.* Huston, 44.

Security for costs, when not ordered on interpleader. (U. S. C. C.) Goss *v.* Gerhard, 51.

Feigned issue to try validity of will, when executor not permitted to withdraw as party. (C. P.) Sheetz *v.* Whitaker, 570.

A bill of particulars is demandable of matters averred in a special plea, where the plea is really a cross action against the plaintiff. (C. P.) Reed *v.* Church, 79.

It is within the discretion of the Court, whether to allow a discontinuance or not; it will not be allowed where the result would subject the defendant to inconvenience and expense. (C. P.) Payne *v.* Grant, 406.

Removal of causes to the Federal courts. See REMOVAL OF CAUSES. COURTS.

Trial and its incidents. Withdrawal of evidence improperly admitted. See EVIDENCE. Albert *v.* Miller, 477.

A judgment entered for want of an affidavit of defence will not be opened because the defendant's attorney was absent from the city. (C. P.) Armstrong *v.* Shaw, 17.

The question of the remoteness or proximity of the damages is for the Court, not for the jury. Sloan *v.* Chamberlain, 536.

If there is evidence from which the jury can properly find the question for the party on whom the burden of proof rests, it should be submitted; if not, the case should be withdrawn from the jury. Hyatt *v.* Johnson, 561.

When points are submitted which are irrelevant or of which there is not sufficient evidence to justify the submission, the Court may properly decline to answer them. Heiskell *v.* Bank, 249.

Where a point of law is reserved, the proper practice is to enter judgment for the plaintiff, subject to the point reserved. Glading *v.* Frick, 134.

In an ejectment by one of four heirs, a general verdict for the plaintiff will not be set aside upon a writ of error. Hess *v.* Gourley, 157.

In an issue directed by the Register of Wills to test the validity of a will, the nominal parties to the record cannot consent to a verdict so as to bind parties in interest who have not agreed. (C. P.) Sheets *v.* Whitaker, 403.

A new trial will not be granted upon the ground of after-discovered evidence after the lapse of two months. (C. P.) Kensington Bank *v.* Little, 406.

Judgment, when opened on terms. (C. P.) Bradley *v.* Forepaugh, 392.

Assessment of damages, when amended. (C. P.) Samuel *v.* Scott, 438.

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Reference to auditor by the Supreme Court. Stoughton's Appeal, 563.

Order of restitution, when erroneously engrafted upon decree of Supreme Court. Hughes's Appeal, 518.

Venire facias de novo, when not awarded. See ERRORS AND APPEALS. Penna. R. R. Co. *v.* Fries, 433.

See AFFIDAVIT OF DEFENCE LAW. CRIMINAL LAW. FOREIGN ATTACHMENT. EXECUTION. JUDGMENT. PLEADING. REPLEVIN.

PRESCRIPTION. See EASEMENT. Workman *v.* Curran, 101.

PRINCIPAL AND AGENT. Principal, when not bound by act of agent. See BANKS AND BANKING. First Nat. Bank *v.* Hoch, 298.

Principal, when chargeable with fraud of agent. See INSURANCE. Smith *v.* Farmers' Insurance Co., 365. Eilenberger *v.* Ins. Co., 363.

Principal, when relieved by contract from liability for negligence of agent. See MERCANTILE AGENCY. (U. S. C. C.) Duncan *v.* Dun, 246.

PRINCIPAL AND SURETY. Where a check of the principal debtor sufficient to pay the debt is given to the creditor, who fails to present it within a reasonable time, and the check then becomes worthless, the surety is discharged. Fegley *v.* McDonald, 71.

Notice to a creditor by the surety under the Act of May 14, 1874, to proceed against the principal debtor must be in writing. Hockernell *v.* Flickinger, 515. (C. P.) Commonwealth *v.* Wilson, 62.

A surety for the payment of rent is not discharged from liability by a subsequent agreement to reduce the rent. (C. P.) Flanigan *v.* Rossiter, 180.

An accommodation indorser is not a surety. Stephens *v.* Monongahela Bank, 491.

To maintain a suit against a surety on an administration bond, it is not necessary that the administrator should be pursued to insolvency. (C. P.) Commonwealth *v.* Wilson, 62.

The sureties upon a guardian's bond are not liable for the failure of the guardian to pay over the proceeds of the sale of the real estate of his ward made under an order of Court. Blauser *v.* Diehl, 338.

Where a guardian authorized by an order of the Orphans' Court sold part of the property at one time and part at another, the surety, who, after the first sale, entered a bond conditioned "for the faithful execution of the power conferred upon the guardian," is liable by the misappropriation by the guardian of the proceeds of the second sale. Rutherford *v.* Commonwealth, 534.

PRIVILEGE FROM ARREST. See Note at end of Index.

PROVINCE OF COURT AND JURY. See PRACTICE. Sloan *v.* Chamberlain, 536. Hyatt *v.* Johnson, 561.

RAILROAD. The road-bed of, not subject to municipal claim. See MUNICIPAL CLAIM. Junction R. R. Co. *v.* Philadelphia, 87.

Occupation of streets of Philadelphia by Penna. R. R. Co. (C. P.) Duncan *v.* Penna. R. R. Co., 551.

Action against, upon coupons. See AFFIDAVIT OF DEFENCE LAW. (C. P.) Gilmer *v.* P. & R. R. R. Co., 15. Copeland *v.* P. & R. R. R. Co., 15. Parrish *v.* P. & R. R. R. Co., 196.

Action against, by passengers injured while getting out of cars. See NEGLIGENCE. Del., Lack., & West. R. R. Co. *v.* Napheys, 233.

Action against, by one while employed about depot. See MASTER AND SERVANT. Rickard *v.* N. P. R. R. Co., 37.

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Action against, by parents of an adult son. See NEGLIGENCE. North Penna. R. R. *v.* Kirk, 473.

Action against, for fire caused by defective spark arrester. Penna. & N. Y. Canal Co. *v.* Lacey, 368. Lehigh Valley R. R. Co. *v.* McKeen, 369.

Action by, for subscription to stock. See CORPORATION. Boyd *v.* Peach Bottom R. R. Co., 351.

Charter of Penna. R. R. Co. considered. (C. P.) Duncan *v.* Penna. R. R. Co., 551.

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RECEIVER of trust estate, when appointed. See EQUITY. (C. P.) Fidelity Co. *v.* Huber, 278.

Of oil from flowing well, pending ejectment. See EQUITY. (C. P.) Dunlap *v.* Riddell, 466.

See PARTNERSHIP.

RECOGNIZANCE. Where there is a formal forfeiture of a recognizance the liability of the recognizors is absolutely fixed. Relief should be sought by petition to the Court under the Act of 1783. Foulke *v.* Commonwealth, 174.

RECORDER OF DEEDS. The Recorder of Deeds is responsible for a false search issued by his deputy, at the request of a mortgagor who had volunteered to provide the solicitor of the mortgagee with necessary searches. Peabody Building Association *v.* Houseman, 193.

RECORDING ACTS. See DEEDS. MORTGAGES.

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REMOVAL OF CAUSES, from State to Federal Courts. See Article, 133. See COURTS. (C. P.) Middleton's Exrs. *v.* Middleton, 144. Eby *v.* Northern Pacific R. R. Co., 145.

REPLEVIN. A plaintiff in replevin can be nonprossed for failing to file his narr. within twelve months. Singer Manufacturing Co. *v.* Hackett, 45.

A plaintiff cannot plead *de injuria sua absque tali causa* to an avowry. (C. P.) Fredericks *v.* Royal, 64.

Additional security, when ordered. (C. P.) Rowand *v.* Fox, 438.

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RES ADJUDICATA. In an equitable ejectment one verdict and judgment is conclusive. (C. P.) Winpenny *v.* Winpenny, 112.

See ESTOPPEL. Third Reformed Dutch Church Appeal, 26.

See POOR LAW. (Q. S.) Overseers of Davidson *v.* Overseers of Moreland, 12.

RESTITUTION. Order of, when improper. Hughes's Appeal, 518.

RIOTS. Liability of county for damages. See COUNTIES. County of Allegheny *v.* Gibson, 441.

RIVERS. The water of the Delaware at Philadelphia, between low-water mark and the Port Wardens' line, is held merely by license from the Commonwealth and under such laws as the Legislature may see fit to enact. Simpson *v.* Neill, 85.

Parties using the rivers for commercial purposes have no status to appeal from the plans adopted by the Port Wardens in a proceeding to establish wharf lines. The right of appeal only rests in riparian owners. (C. P.) *In re* Port Wardens' line at Point Breeze, 277.

See FISHERY.

ROADS, HIGHWAYS, AND BRIDGES. The Court of Quarter Sessions has no power to vacate streets laid out and dedicated to public use in incorporated boroughs; such power is confined to the municipal authorities. *In re* Osage Street, 400.

Right of Penna. R. R. to occupy streets in Philadelphia. (C. P.) Duncan *v.* Penna. R. R. Co., 551.

A report of road viewers must show either that re-

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ROADS, HIGHWAYS, AND BRIDGES— *Continued.*
leases were obtained from land owners or that the viewers considered the question of damages. (Q. S.) Road in Cogan Township, 257.

Power of Quarter Sessions to issue mandamus to enforce payment of road damages. *In re* Sedgley Avenue, 1.

Liability of borough in case of failure of authorities to provide guards for dangerous places in highway. See NEGLIGENCE. Pittston *v.* Hart, 165.

SALE. Evidence of a false statement by the vendor of the cost of the article sold is not admissible. Scott *v.* Kittanning Coal Co., 287.

Where a purchaser, ignorant of the value of articles, purchased them upon representations of their value made by the vendor, he may rescind the sale if such representations were false, even though the vendor made them in good faith. Bower *v.* Fenn, 431.

What a sufficient averment of a warranty in an affidavit of defence. (C. P.) Schultz *v.* Wilde, 212.

A shipper of goods has no right to stop them after a sale by his vendee, of the bill of lading issued therefor, to a third party. (U. S. D. C.) Schmidt *v.* Steamship Pennsylvania, 98.

See CONTRACT. EVIDENCE.

SCHOOL-HOUSE. See ABANDONMENT.

SCHOOL LAW. The fact of having served as county, city, or borough superintendent of common schools is not, under the Act of April 9, 1867, an absolute test of qualification upon a new election of the same person. Commonwealth *v.* Wickersham, 265.

The Act of April 11, 1862, prescribing that school teachers can be selected only by a vote of the school board, is to be strictly followed, and a contract made by the president and secretary of the board cannot be enforced. School District *v.* Padden, 220.

No contract for the employment of teachers should extend beyond the current school year. Ib.

SEARCHES. Liability for false certificate. See RECORDER OF DEEDS. Peabody Building Association *v.* Houseman, 193.

SET-OFF. A partnership debt may be set off against an individual debt with the consent of the partnership. (C. P.) Stout *v.* Moore, 456.

When one judgment may be set off against another judgment. Ib.

Sufficiency of averment of. See AFFIDAVIT OF DEFENCE LAW. Markley *v.* Stevens, 357.

See PLEADING. Scott *v.* Kittanning Coal Co., 289. See USURY. Stephens *v.* Monongahela Bank, 491.

SHERIFF. Liability of, for insufficient bail. (C. P.) Murtland *v.* Wright, 388.

SHIPS AND SHIPPING. A row-boat is not within the protection of the sailing rules. P. & R. R. R. Co. *v.* Adams, 329.

Collision. See NEGLIGENCE.

Salvage. Costs in. See COSTS. (U. S. C. C.) Lubker *v.* Schooner Quinby, 509.

Advances to master for necessaries for voyage, when a lien upon freight. (U. S. D. C.) The Bark Commissionrath Dientsbach, 100.

Freight, right to, when lost. (U. S. D. C.) The Brig Muriel, 147.

Authority of master to punish seamen. (U. S. D. C.) Bark Geo. Kingman, 50.

The shipping commissioner is not entitled to any additional fees when a seaman, regularly shipped on a vessel, upon its return reships on the same vessel for another voyage. American S. S. Co. *v.* Young, 393. See ADMIRALTY.

SPECIAL LEGISLATION. See CONSTITUTIONAL LAW.

STATUTES. When not retroactive. See CONSTITUTIONAL LAW. Ballard *v.* Ward, 254. Merriman *v.* Moore, 425. Sutton *v.* Clark, 437.

STOCK EXCHANGE. A seat in is not attachable. Thompson *v.* Adams, 281. Pancoast *v.* Gowen, 457.

STOCK GAMBLING. See CONTRACT. North *v.* Phillips, 151. (C. P.) Thomas *v.* Smith, 390.

STOPPAGE IN TRANSITU. See SALE.

SUBROGATION. See EQUITY.

TAVERN LICENSE. The refusal to grant is not the subject of a writ of error. Toole's Appeal, 206.

TAXES AND TAXATION. An appeal from the assessment of real estate made by the Board of Revision will not be entertained when the appellant has been guilty of laches. (C. P.) City *v.* Michener, 558.

When a tract of land lies in two townships it should be assessed in the township where the mansion house is located. Bennethum *v.* Eckert, 373. (C. P.) Nippenose Township *v.* Bastress Township, 245.

Priority of taxes in distribution of proceeds of sheriff's sale of realty. Dungan's Appeal, 252.

Collectors of taxes, when not indictable for illegal collection of taxes. Buck *v.* Commonwealth, 241.

Corporations, taxation of. When a part of the capital of a national bank is invested in a building used for banking purposes, and the bank pays into the State treasury the tax of one per cent. prescribed by Act of Assembly upon the par value of all its shares, the building cannot be taxed for county purposes, although the cashier occupies the part of the building not used for banking as a residence. (C. P.) County of Lancaster *v.* Lancaster National Bank, 29.

A company flowing petroleum through pipes from place to place is a transportation company within the meaning of the Act of April 24, 1874, and the Act of March 30, 1877, and as such is liable to the tax imposed by the said Acts. Columbia Conduit Co. *v.* Commonwealth, 489.

Contributions made by stockholders after the payment of dividends to supply losses incurred by the company cannot, in computing the tax, be deducted from the actual amount of taxable dividend received and divided among the stockholders. Ib.

Exemption from. See CONSTITUTIONAL LAW. (C. P.) Y. M. C. A. *v.* Donohugh, 208.

Collateral inheritance tax. See DECEDENTS' ESTATES.

TENDER. See EJECTMENT. COSTS.

TRADE-MARK. Congressional legislation as to, unconstitutional. See CONSTITUTIONAL LAW. (U. S. S. C.) United States *v.* Steffen, 524.

Injunction to restrain infringement of. See EQUITY. (C. P.) Sheppard *v.* Stuart, 498.

TRAMPS. Who is not a tramp. (C. P.) Commonwealth *v.* Gill, 557.

TRIAL AND ITS INCIDENTS. See PRACTICE.

TRUSTS AND TRUSTEES. The Common Pleas still has jurisdiction over testamentary trusts when executors are trustees *nominatim* and not *virtute officii*. Anderson *v.* Henzey, 39.

The income of a faithless trustee, who is also an annuitant under the instrument creating a spendthrift son trust in his favor, will not be sequestered. Overman's Appeal, 380.

Under what circumstances the executors of a surviving non-resident trustee are entitled to transfer corporate stock. Lehigh Coal and Nav. Co.'s Appeal, 106.

Though one who voluntarily assumes to do some-

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TRUSTS AND TRUSTEES—*Continued.*
thing without consideration be not liable for non-feasance, yet, if he does anything, he is bound to do it rightly according to his agreement. Fairlamb *v.* Hempshire, 93.

Trustees, who have acted under the advice of counsel and in good faith, are not responsible for an error of judgment, or a mistake of law. Bradley's Appeal, 181.

Trustees, when not responsible for depreciation of securities unconverted. (O. C.) Williamson's Estate, 83.

A claimant at distribution in the Orphans' Court, who is neither creditor, legatee, nor next of kin of the decedent, cannot waive the tort of a trustee and sue the estate for moneys of the claimant fraudulently placed by the trustee among the assets of the estate. Braman's Appeal, 305.

Where an administrator at the sale of his decedents' real estate discouraged bidders with the view of procuring the property himself at a low price, and he purchased it through a third party, though not at a gross undervalue, the sale is fraudulent and void without regard to the price the property actually brought, and the cestui que trust is entitled to recover in ejectment without a tender of the purchase money. Mayer *v.* Senyard, 224.

Cestuis que trustent are not bound by acts done or knowledge possessed by a trustee when acting beyond the scope of his authority, much less when his acts are fraudulent and criminal. Guillou *v.* Peterson, 268.

Receiver of trust funds, when appointed. See EQUITY. (C. P.) Fidelity Co. *v.* Huber, 278.

See ESCHEAT. Commonwealth *v.* Naile, 203.

Trusts, when active or passive. See WILLS.

"UNDER AND SUBJECT," liability of purchaser. See LANDLORD AND TENANT. MORTGAGE.

UNINCORPORATED SOCIETY. Where a suit is brought against an unincorporated society by its association name, leave will be given to amend the record, and issue an alias summons against the individual members. (C. P.) Schweinberg *v.* Paul Lodge, 48.

USE AND OCCUPATION. See LANDLORD AND TENANT.

USURY. In the distribution of the proceeds of a sale of mortgaged premises under a first mortgage, a second mortgagee is entitled to dispute the lien of the first and the amount due on the ground of usury. (C. P.) Lennig *v.* Meyer, 325.

Subsequent judgment creditors have no standing to attack a judgment on the ground of usury without proof of an intent to defraud them thereby. Wheelock *v.* Wood, 319.

The statute of limitations applies to the right of set-off for usurious interest paid, and to the remedy for its recovery. Stephens *v.* Monongahela Bank, 491.

The State and Federal Courts have concurrent jurisdiction in actions by and against national banks. Ib.

Where there has been a series of renewal notes given to a national bank for the continuation of the same original loan, the taint of usury in the first transaction follows down the descent through the whole line, and when the bank sues to recover its debt on the last of the series of renewal notes, the borrower is entitled to credit for all the interest he has paid from the beginning of the loan, and not merely to the excess over the lawful rate. Ib.

The rule that the vicious element in a usurious contract survives in all its transmutations is confined to

USURY—*Continued.*
cases in which the obligor or promisor remains the same. Macungie Savings Bank *v.* Hottenstein, 320.

A national bank, by charging usurious interest on overdrafts upon it, loses the right to recover any interest at all. Third National Bank *v.* Miller.

The sureties of a debtor are entitled to take advantage of usury included in a debt. Ib.

Contract by bank to pay usurious interest to school board, when authorized by statute. McQuisten *v.* School Board, 123.

The payment of usurious interest after the maturity of a debt, is not a valid consideration for an agreement to give time. Shaffer *v.* Clark, 459.

VACANCY, in county office, what constitutes. See COUNTIES. Walsh *v.* Commonwealth, 21.

VENDOR AND VENDEE. Gas fixtures and heaters, though appurtenant to the house, are personal property. Heysham *v.* Dettre, 207.

Parol evidence is admissible to show a collateral agreement between the vendor and purchaser of a house that the gas fixtures and heaters should pass with the house to the purchaser of the latter under a written agreement. Ib.

The question whether a chattel affixed to the freehold becomes part of the realty, depends upon circumstances; as between heir and executor, and vendor and vendee, the rule with regard to what shall be considered a part of the realty, is much more strict than that which exists between landlord and tenant. (C. P.) Wilson *v.* Freeman, 33.

What covenants implied from the use of the words "grant, bargain, and sell." (C. P.) Trotter *v.* Page, 469.

Right of married woman to sue for breach of contract relating to real estate. See HUSBAND AND WIFE. (C. P.) Freeman *v.* Walsh, 296.

Liability of purchaser, under and subject to a mortgage. See LANDLORD AND TENANT. MORTGAGE. SALE.

VENUE, Change of. See MANDAMUS. City of Williamsport *v.* Commonwealth, 345.

WAGERS. Stock-gambling contracts. See CONTRACTS.

WASTE. Injunction to stay, when granted. See EQUITY.

WATER-RENTS, non-payment of, power of city authorities to cut off water. See MUNICIPAL CORPORATIONS. Girard Life Ins. Co. *v.* City, 69.

WAY, right of, when established by prescription. See EASEMENT. Workman *v.* Curran, 101.

WHARVES AND DOCKS. Dockage, contract to pay, when not implied from use and occupation of dock. Easby *v.* Patterson, 219.

Jurisdiction of port-wardens over wharfage controversies. See RIVERS. Simpson *v.* Neill, 85.

Jurisdiction of port-warden over wharf lines. See RIVERS. *In re* Port Wardens' Line, 277.

WILL. What not a testamentary writing. (O. C.) Dewald's Estate, 422.

Testamentary capacity. Want of memory, vacillation of purpose, credulity, vagueness of thought may coexist with testamentary capacity. (O. C.) Hopple's Estate, 523.

Deference on the part of a testator to the opinion of the wife, in the management of his estate and in the daily conduct of his life, does not indicate any undue influence on her part which will render invalid a will made in her favor. Ib.

Issue devisavit vel non. Verdict by agreement,

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WILL—*Continued.*
when set aside. See PRACTICE. (C. P.) Sheetz *v.* Whitaker. 403.

Party plaintiff, when not permitted to withdraw from issue. See PRACTICE. (C. P.) Sheetz *v.* Whitaker, 403.

In the case of a bequest to a widow of the testator *durante viduitate* with a limitation over, the limitation over will be sustained. (O. C.) Hough's Estate, 559.

Conversion. Unless a will contains an imperative direction to sell irrespective of contingencies, and independent of discretion, conversion of real estate devised to trustees, with power of sale, will not take place until the sale is actually made. Peterson's Estate, 300.

Power of sale, whether mandatory or discretionary; Orphans' Court will not compel exercise of power. (O. C.) Peterson's Estate, 508.

Election of widow to take against a will creating a trust. (O. C.) Calahan's Estate, 130.

Trusts, active or passive. A trust in favor of minors, and upon the youngest reaching the age of twenty-one years then to be conveyed in such way and manner that each share shall be for the sole and separate use of the beneficiary, free from the debts of her then present or any future husband, will be sustained. In such case the status of the daughters at the time fixed for the division of the estate, fixes the nature of their interest. (O. C.) Hughes's Estate, 539.

Remainder. A devise of the income of real estate in trust for a wife during life or widowhood, and upon death or marriage the real estate to be sold and proceeds divided among children "then living," creates

WILL—*Continued.*
a contingent remainder. (O. C.) Calahan's Estate, 130.

A devise to trustees to pay and divide income among testator's children in equal shares, and upon the death of each child to pay the principal represented by his share of the income to his children if of full age, and if minors, to pay the income during minority, and the principal upon their attaining twenty-one, creates a vested interest in the grandchildren. Peterson's Estate, 300.

In a will, the words "when" or "upon" in a gift to a person at a certain period, if preceded by a limitation of the estate, do not import a contingency, but the estate vests from the death of the testator. Crawford *v.* Ford, 532.

Construction. Where distribution is to be made among two or more without anything to indicate the proportions in which they are to take, the presumption is that the shares are to be equal. Lewis's Appeal, 353.

Where the meaning of a devise is uncertain, the law will adhere as closely as possible to the general rules of inheritance; and whoever claims against the laws of descent, must show a satisfactory written title. Grim's Appeal, 517.

A mere direction by a testator that a devisee shall pay a legacy, does not create a charge on land. There must be express words or a necessary implication from the whole will that such was the intention. Cable's Appeal, 549.

Annuity created by will, when apportionable. See ANNUITY. Stewart *v.* Swaim, 407.

WITNESS FEES. See COSTS.

NOTE.—The following was omitted from the Index of Vol. IV.

PRIVILEGE FROM ARREST. The exemption from arrest of members of the State legislature during their attendance upon, and in going to and returning from the sessions of the legislature, under Art. II., sec. 15, of the Constitution of Pennsylvania, applies only to arrest on civil process, and not where crime or misdemeanor is charged. (Q. S. of Delaware Co.) Commonwealth *ex rel.* Bullard *v.* Keeper of the Jail, 4 W. N. C. 540.

END OF VOLUME VII.

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